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COMMENTARY ON
THE CODE OF CRIMINAL PROCEDURE, 1898
(ACT NO. V OF 1898)

IN
TWO VOLUMES

DINESH CHANDRA ROY

Advocate, High Court, Calcutta

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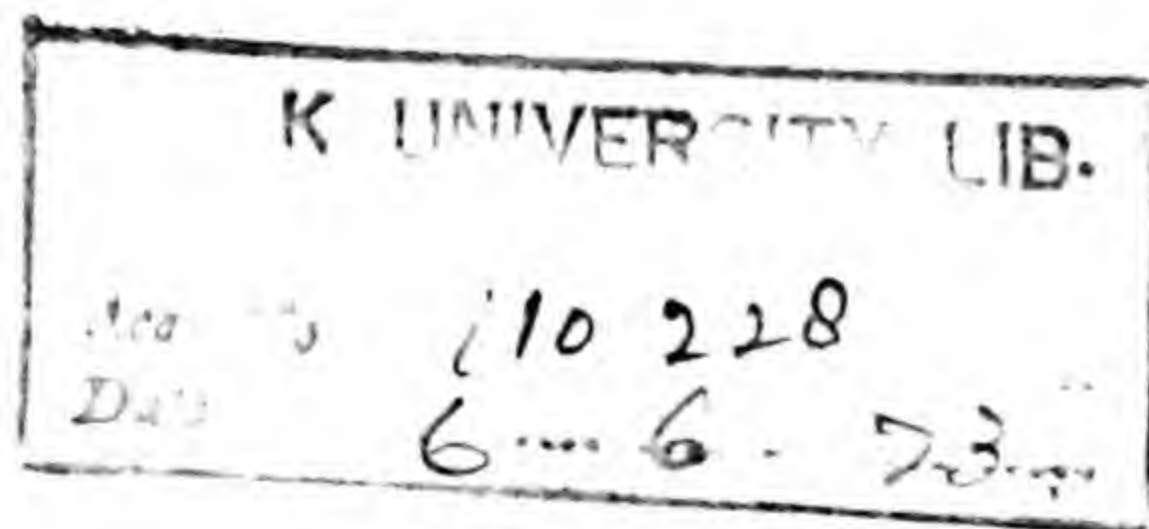
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Addenda and Corrigenda (1)

Addenda 1 and 2 contain decisions that were printed while the book was in the Press, cases published up to June, 1963 have been included in the book, cases published up to April, 1964 have been included in Addenda No. 2.

<i>Section</i>	<i>Page</i>	<i>Line</i>	
	XXI under statement of Repeals and Amendments.	Line 30 from top.	Section 93A for "Substituted, Act I of 1951, Section 9" read "omitted by Act 26 of 1958".
		Line 7 from end.	Section 105A for "Inserted, Act XVIII of 1923, Section 14" read "Inserted, Act 26 of 1958.
1	4	Add after line 6 from the top.	Extent. —The Criminal Procedure Code shall come into force on 1-10-1963 throughout the Goa Union Territory in virtue of Goa, Daman and Diu (Laws) Regulation, 1962 (Reg. 12 of 1962), Goa Gaz. 22-8-1962. Series 1, No. 33, p. 259.
			Extent. —The Code of Cr. Procedure (Behar Amendment) Act, 1948 as extended to Ajmer (Raj Act 31 of 1948) repealed by Rajasthan Laws Repealing and Amending Act—Raj Gaz. 15-12-1962, Pt. 4 (ka) Ext. P. 22)—P. 487—S. 161 was amended in its application to Kerala State by Act 27 of 1962 <i>vide</i> Kerala Gaz. 31-12-1962.
			Andhra Pradesh The Criminal Procedure Code by virtue of S. 172 (3) of Andhra Pradesh Panchayat Act, 1964 (A. P. Act 2 of 1964) and save as otherwise provided in that Act or the Rules made thereunder, is not to apply to the proceedings of a Nayaya Panchayat established under that Act—A. P. Gazette, Extraordinary, Pt. IV—B, dated 18-1-1964, p. 1.
			Pondichery The Criminal Procedure Code extended to and shall come into force from

Section

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Line

in the said Territory on 1-10-1963 subject to modification in First Schedule in virtue of Pondichery (Laws) Regulation, 1963 (Reg. 7 of 1963)—Gaz. of India, 18-7-1963 Part II, S. 1, Ext., p. 259.

Union Territories (Goa, Daman and Diu)

- Code of Criminal Procedure, 1898, S. 68—Notified that all the present officials *de Deligencies* shall be the proper officers of respective Courts under which they are at present working to serve the summons on the persons against whom they are issued by such Courts—Goa Govt. Gaz. 28-11-1963, Series 1, No. 47, p. 411.
- Exercise of powers under—Powers under Ss. 19, 29-B, proviso to 88-6 (c), 106, 170, 186, 190, 206, 249, 260, 349, 380, 435, 437, 438, 488, 528, 561, 562 and 565 of the said Code shall not be exercised by Executive Magistrates, in virtue of Cl. 7 of Goa, Daman and Diu (Seperation of Judicial and Executive Functions) Order, 1963—Goa Govt. Gaz. 28-12-1963, Series No. 1, No. 47, p. 411.
- Exercise of powers under—Powers under Ss. 107 to 110, 133, 143 to 147 and 524 shall be exercised only by Executive Magistrates in virtue of Cl. 8 of Goa, Daman and Diu (Separation of Judicial and Executive Functions) Order, 1963—Goa Govt. Gaz. 26-12-1963, Series 1, No. 4.
- Goa, Daman and Diu (Administration) Removal of Difficulties Order, 1962—Clauses 2 and 3—Directed that persons appointed as Magistrates of First Class and Public Prosecutors respectively by the Order published in Goa Govt. Gaz. 1-11-1963 Supp. Series II, No. 44, shall exercise the same jurisdiction and functions as they were exercising before 1-11-1963, the day on

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			which Indian Penal Code, 1860 and Criminal Procedure Code, 1898 came into force within the Union Territory in respect of criminal offences committed before the said date—Goa Govt. Gaz. 28-11-1963, Series 1, No. 47, p. 411.
4 5 (2)	17 36	Footnote 18. Line 11 from end.	Read 18 CWN 1021 for 18 WN 102. There is no bar to the Criminal Court to entertain complaint against employer for an alleged contravention of S. 72 of Employees State Insurance Act ^{35a} — <i>N. G. Mills v. E. S. I. Corporation</i> , A 1961 A. P. 338.
12 (2)	50	Line 8 from end.	Where proceedings under S. 145 were drawn up in respect of lands situated in another sub-division of the same District <i>held</i> , jurisdiction is not limited under S. 12 (2) ^{61a} — <i>Peri Charan Singh v. Hemar Singh</i> , A 1961 P. 94 ; <i>Chenappa</i> , A 1960 Mys. 248.
32	82	Line 9 from the end.	It is highly undesirable that where the longest term of imprisonment is awarded to an accused person, the punishment shall be supplemented by a sentence of fine ^{70a} — <i>Babulal</i> , A 1960 A 223 ; See <i>Banshi Singh</i> , A 1960 N P. 105.
40	95	Footnote 69.	Read <i>Bakshi Ram</i> “A 1938 A 102” for “A 1938 102”.
87	153	Line 5 from the end.	Note 97 Add—the words ‘The onus to show that he had no’ before the words “purpose of avoiding executions”....lies on the accused ⁹⁷ — <i>Jagadeothan</i> , A 1948 L 151.
144 (4)	365	Line 9 from the end.	An Additional District Magistrate is competent to grant permission under S. 3 of the U. P. Temporary Control of Rent and Eviction Act (3 of 1947) without special authority of the District Magistrate— <i>Central Talkies Ltd., Cawnpur v. Duloka Prasad</i> , A 1961 S. C. 606. S. 144 (4) allows an <i>ad interim</i> stay of the Order although no appeal is provided for ^{52a} — <i>Babulal Perata v. State of Maharashtra</i> , A 1961 S. C. 884.

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144 (6)	367	Line 10 from the top.	A Magistrate has no jurisdiction to promulgate an order under this section exceeding two months ^{83a} — <i>Sri Ram Gaur v. The City Magistrate</i> , A 1960 A 397 ; (1960) Cr. L. J. 865 (2).
145	417	Line 10 from the end.	Date of preliminary order does not relate back to the date of publication ^{85a} — <i>K. Venkata Ramiah v. C. Sitaramiah</i> , A 1961 A P 208 (F B).
146	434	L. 4 from the top.	In case of an <i>ex parte</i> order by the Civil Court, Order 9, Rule 13, Civil P. C. applies, Criminal Court must await the finding on such application ^{51a} — <i>Narain Ganjhee v. Panchu Gangham</i> , A 1960 P. 519 ; <i>Shivagaminton v. Nataraja</i> , A 1961 M 384.
146	435	Footnote 64.	Read “A 1957 Mys 43” for A 1857 Mys 43.”
147	447	L. 14 from the end.	Where the entire proceeding under S. 145 was in respect of temple land including income of offerings made to a deity and reference was made to the Civil Court under S. 146, <i>held</i> that it was not open to the party after the earlier order was passed to initiate another proceeding under S. 147 ^{59a} — <i>Ambika Panday v. Gokul Panday</i> , A 1960 P 189.
147	452	L. 3 from the top.	The procedure applicable to a proceeding under S. 145 whereby parties are to be asked to produce affidavits of witnesses is not applicable to a proceeding under S. 147 where a Magistrate must receive all such evidence as may be produced by the parties ^{96a} — <i>Sharda Prasad v. Satya Narain</i> , A 1961 P 410.
155	476	Line 11 from the end.	Where the case involved cognizable and non-cognizable offences, S. 155 (2) is not attracted, the procedure under S. 207A is inappropriate ^{86a} — <i>Vedlamddi</i> , A 1961 A. P. 448.
155	476	Footnote 86	Read <i>Shyamlal Sarma</i> , A 1949 A 483 F. B. for A 1949 A 227 ; <i>Mahindar Singh</i> , A 1963 Raj 48.

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156	479	Footnote 2.	Read <i>Mainaben</i> , A 1962 B 202 for “60A 1962 B 202”.
162	499	Line 10 from the top.	Where the statement to the Investigating officer was signed by the person making the statement, such statement is not inadmissible ^{31a} — <i>Chinna</i> , ILR 1960, 10 Raj 921 ; A 1961 Raj 35.
162	502	Footnote 77.	Add to footnote 77, followed in <i>Samuel</i> , A 1961 Ker 99 F. B.
162	506	Footnote 18.	Read A 1954 C 305(326) for A 1954 C 303(306) before 62 CWN 717.
	507	Footnote 27.	A Judicial Magistrate and not an Executive Magistrate.
164	515	Line 13 from the top.	A statement recorded in derogation of S. 164 is not admissible under S. 9, Evidence Act and the object of S. 164 shall be defeated ^{94a} — <i>Deep Chand v. State of Rajasthan</i> , A 1961 S. C. 152.
164	516	Line 13 from end.	A Judicial Magistrate and not an Executive Magistrate can record the confession ^{8a} — <i>Abdul Samad</i> , A 1959 Ker 46.
164	522	Foot-note 55.	Read <i>Bela Majhi</i> —before A 1951 Or 73.
167	542	L. 5 from end.	Read “Detention” for “Description” before the words “by police”.
181 (2)	581	L. 6. from the top.	Where the Trustee who had head office in Bombay sent money to the accused managing temple in Rajasthan and embezzled money in Rajasthan, <i>held</i> , the Bombay Court had no jurisdiction to proceed with the complaint— <i>Gulab Chand</i> , A 1962 B 78 where <i>Jivanand Savchand</i> A 1930 B 490 and <i>Gonanda Dhone v. Santi Prakash Nandy</i> , A 1925 C 613 referred to.
196A (2)	654	L. 22 from end.	Read S. 196A (2) for S. 195 (2). The Supreme Court in the State of <i>Andhra Pradesh v. Subhiah</i> ^{33a} A 1961 S. C. 1241 did not consider whether in a case of conspiracy to cheat Government sanction was necessary for offences under Ss. 466 and 467, I. P.

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			C. as the case went back and it was time for the Government to consider whether it would accord sanction.
198	671	Line 2 from the top.	Add to footnote 77 ; <i>Abdul Rahman v. Haji Ahmad</i> , A 1961 S. C. 82 where held that the provisions of S. 198 are mandatory, order of acquittal is bad as the Presidency Magistrate wrongly framed the charge under S. 500, I. P. C. in violation of S. 198.
198B 3(A)	674	Foot-note 82.	Add. <i>In re E. v. Sampath</i> , A 1961 M 318.
199	679	L. 13 from end.	Note no. 16 Read "Coercing wife" for "Convicting wife".
202	701	Foot-note 53.	Read A 1924 p. 138 for A 1924/138.
209	738	L. 16 from end.	Read "reasonable degree" for "reasonable decree".
239	849	L. 10 from end.	In note no. 19 omit "Sedition" before the words "A deposition in one Transaction. . proper case" ⁶¹ .
247	873	L. 6 from the top.	The Magistrate cannot wait indefinitely till the closing hours of the Court before an order can be passed ^{67a} — <i>Gurdial Singh</i> , A 1961 Punj 77 ; (1961) Cr. L. J. 305.
247	874	L. 8 from the top.	Where the complaint is filed by the Assistant Commercial Officer, <i>held</i> , it was he who was the complainant and the whole Railway Administration could not be treated as the complainant ^{78a} — <i>S. G. Dubey</i> , A 1961 A 447.
250	890	L. 15 from the top.	A finding that the accusation was false or frivolous is necessary ^{88a} — <i>Ram-sagar Singh v. Chandrika Singh</i> , A 1961 p. 364.
251A (9)	904	L. 7 from the top.	Add to footnote 93, <i>C. M. Armugam</i> , A 1961 Mys 198 where held that the accused has the right to apply at the stage for process for compelling production of documents under Section 94. He need not wait till he enters upon his defence under S. 251A (9).

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256	923	L. 4 from end.	“Any remaining witnesses” do not mean fresh witnesses named in the list filed under S. 252 (2). Witnesses given up by the complainant cannot be summoned under S. 256 ^{61a} — <i>Mst. Sulghi v. Mohan Lal</i> , A 1961 M. P. 47.
258	929	Footnote 98.	Read <i>Nathuram v. Pannalal</i> A 1961 Ass 97 for A 1960 Ass 97.
269	951	Add to 1st line.	City Sessions Court Act 20 of 1953 amended by W. B. Criminal Law Amendment Act, 1956.
271	955	L. 14 from the top.	Committing Magistrate has no power to record the plea of the accused. Conviction cannot be based on such plea— <i>In re Gulappa</i> , A 1961 Mys 71.
271	955	Footnote 25.	Add after 7 WR (Cr) 39; <i>Hambajan Chayavina</i> , 1957 Cr. L. J. 144.
		Footnote 25.	Add: <i>In re Pachimathu Pandithan</i> , A 1958 M 325; <i>Ramswamy</i> , 1955—1 M L J 63.
274	959	L. 14 from the end.	Read “Sessions Judge” for “District Magistrate”.
278 (8)	967	Footnote 88.	Add <i>Michnel</i> , A 1960 M. P. 118 where held.
287	976	L. 3 from end.	Where statement of the accused before the Committing Court was not brought on record before the Sessions Judge, the statement could not be used against him ^{40a} — <i>In re Gulappa</i> , A 1961 Mys 71.
293	991	Footnote 68.	Read <i>Abdul Gafur</i> before A 1952 B 335.
294	993	L. 16 from the top.	A person who is a signatory to inquest report is a biased and partial member of the jury and is disqualified from attending as a juror ^{77a} —(1961), <i>Sankar Kumar Dutt</i> , 67 CWN 22 where retrial was directed.
297	1000	L. 4 from the top.	Reference to only part of hand note of the Supreme Court without referring to the context amounts to misdirection ^{32a} . <i>Wasu Pillai</i> ,—A 1961 A 114.
297	1005	L. 16 from the end.	The evidence of the approver has to be corroborated in material parti-

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			cular with regard to the participation of the accused concerned. ^{98a} — <i>In re Chinna Sami</i> , A 1960 M 462.
297	1016	Footnote 20.	Read <i>Senivaratne</i> , 41 CWN 65 P. C. for 41 CWN 68 P. C.
297	1018	L. 18 from the top.	Omission to explain to the jury S. 84 Penal Code amounted to a grave misdirection ^{44a} — <i>L. R. v. Fatik Narayan</i> , A 1961 C. 436.
297	1021	L. 7 from the top.	Read S. 167, Evidence Act for S. 147, Evidence Act in 75 <i>Mushtak</i> , 1957 S. C. R. 809.
306	1035	L. 4 from the end.	Read in Note 5—The words “unless he proceeds in accordance with the provisions of S. 562” for “The words in Italics are new”.
307	1042	Footnote 44.	Read “ <i>Ananda</i> , 21 CWN 435” for 121 CWN 435.
307	1044	L. 22 from the top.	Read “as” for “is”.
337	1068	L. 9 from the end.	A pardon can only be ordered under sub-section (1) with respect to the three categories of offences mentioned therein ^{45a} — <i>Hiralal Girdharilal Kothari</i> , (1960) S. C. J. 349.
339	1077	L. 15 from the end.	Read “Certificate of” for “Certificate to” before the Public Prosecutor.
339	1077	Footnote 9.	Read <i>Sashi Rajbanshi</i> , 42 C 856 for 42 L 856.
340	1082	Footnote 52.	Read “Legal Remembrancer Manual, State of West Bengal, Chapter XI, p. 108 rule No. 1” for circular No.
342	1091	Footnote 25.	Add : <i>Maniappan</i> , A 1961 S. C. 175 where held that even if there was any defect in the examination of the accused under S. 342 the defence amounted merely to an irregularity and did not call for interference especially when no complaint on this ground was raised before the High Court— <i>Maniappan v. State of Madras</i> , A 1961 S. C. 175.
342	1091	Footnote 27.	Add : <i>Kaki Bejonji v. State of Bombay</i> , A 1961 S. C. 967 where held that the failure of the Magistrate to put

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			to the accused any specific questions under S. 342 to explain various articles found in the premises occupied by him cannot be said to have caused any prejudice to him.
342	1092	L. 4 from the end.	The Madras High Court in a later case has held that S. 342 applies to a summons case but the mandatory part is not applicable. ^{46a} — <i>Kaliappan</i> , ILR (1960) M 424 : A 1961 M. 354.
342	1096	L. 10 from the end.	Opportunity to explain only incriminating evidence should be given to the accused ^{96a} — <i>Kanchera Sada</i> , A 1961 Guj 20.
345	1121	L. 7 from the top.	Composition of offences under S. 337, I. P. C. does not involve an acquittal of the accused under S. 279, I.P.C. ^{71b} — <i>Kamal Kar v. Javarkar</i> , A 1960 B 269.
350	1134	Foot note 61.	Add to footnote 61 ; <i>In re Ganesha Pillai</i> , A 1961 M 342 where held, the right of getting witnesses examined <i>de novo</i> which was originally granted by S. 350 has been taken away by the amendment in 1953. The discretion of examination of witnesses is now vested in the Magistrate to whom the case is transferred.
350	1135	Footnote 75.	Add <i>K. v. Sethuram</i> , before A 1960 A P 151.
		Footnote 74.	Add A 1947 p. 428 followed in <i>Sorrat Singh</i> , A 1960 A P 302.
350	1137	L. 5 from the top.	Add "After amendment of the Code in 1955 accused persons cannot claim a <i>de novo</i> trial."
354	1143	Footnote 48.	Read " <i>Abdul Gaffur v. Govind Prasad</i> " before A 1928 R 284.
354	1154	L. 10 from the end.	S. 362(2-A) is a special provision which overrides the general provisions contained in S. 364(1) — <i>Madan Lal</i> , A 1961 C 240.
366	1164	L. 5 from the top.	A judgment written by a Magistrate can be pronounced by his successor ^{79a} — <i>Pasusram v. Laxminraya</i> , A 1961 M P 8.

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367	1167	L. 3 from the end.	Read "Court of Revision" for "Court of Rivision".
367	1168	L. 23 from the top.	Trial Court is to keep a record of questions put to it by witnesses ^{6a} — <i>Govind Nather</i> , A 1961 Guj 11.
367	1170	L. 10 from the end.	It is not open to Courts of Law to assume that certain facts exist which were not spoken to or relied on either by the prosecution or by the defence— <i>Viswanathan</i> , A 1960 p. 96.
367	1172	Footnote 56.	Read ' <i>In re Nigappa</i> ' before A 1960 Mys 294.
367	1173	Footnote 57.	Add after 23 CWN 833 ; See <i>Raju</i> , A 1961 Mys 74.
367	1173	Footnote 58.	Read <i>Etwa Oraon</i> before A 1961 p. 355.
367	1173	Footnote 63.	Add ; <i>Kedarnath Bannerji v. State of West Bengal</i> , A 1954 S. C. 660.
367 (5)	1175	L. 8 from the top.	Recording of reasons is not required— <i>Majiya Ratna</i> , A 1961 M. P. 10.
367	1175	L. 11 from the top.	Omit the word "Proviso".
371	1181	L. 9 from the end.	Read S. 370 (i) for 370 (l) under the caption "Revision".
374	1183	L. 7 from the end.	Read "guilt" for "fact" before the words "or innocence".
374	1186	L. 25 from the top.	Where the High Court does not confirm the death sentence the Supreme Court can confirm it ^{52a} — <i>Deoman Upadhyaya</i> , A 1960 S. C. 1125 : (1960) A. L. J. 733.
386	1199	Footnote 12.	Read A (1923) P. 57 for A 1923 p. 57.
399	1207	L. 21 from the end.	In note 1 add after "proviso of S. 317" the words "of the Code of 1872."
401	1211	Add after line 20 from the top.	(3) Orissa .—Rules for release of prisoners on parole—Amendment—In the said rules, in Schedule A, From II added—Orissa gazette, dated 20-12-1963, Pt. III, p. 2155.
401	1212	L. 9 from the end.	Transportation of life means the whole of the remaining period of accused's natural life, hence remission under

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			Prison Act rules is of no help to him, of course the appropriate Government under S. 401, Cr. P. C. can remit the sentence ^{59a} — <i>Gopal Vinayak Godse v. the State of Maharashtra</i> , A 1961 S. C. 600 : 63 Bom. L. R. S. C. 517.
403	1222	Foot-note 19.	Read <i>Gokul Chandra Dwaraka Das</i> , 52 CWN 325 : A 1948 P. C. 82 for 52 CWN.
403	1229	Foot-note 85.	Add : <i>R. N. Ghosh</i> , A 1956 C. 247.
404	1230	Add after last line.	Article 132—To the High Court for a Certificate of fitness to appeal to the Supreme Court under Cl. (1) of article 132, article 133 or sub-clause (c) of clause (1) of article 134 of the Constitution. —Sixty days—The date of the decree, order or sentence. Article 133—To the Supreme Court for Special Leave to appeal. (a) in a case involving death sentence —Sixty days—The date of the judgment, final order or sentence. (b) in a case where leave to appeal was refused by the High Court. —Sixty days—The date of the order of refusal. (c) in any other case. —Ninety days—The date of the judgment or order.
404	1231	Add after note 6, L. 11 from the end.	Article 114—of Limitation Act 36 of 1963—Appeal from an order of acquittal. (a) under sub-section (1) or sub-section (2) of S. 417. —Ninety days—The date of the order appealed from. (b) under sub-section (3) of Section 417 of that Code. —Thirty days—The date of the grant of Special leave. Article 115—under the Code of Cr. P. Code.

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			(a) from a sentence of death passed by a Court of Sessions or by a High Court in the exercise of its original jurisdiction.
			—Thirty days—The date of the sentence.
			(b) from any other sentence or any order not being an order of acquittal—
			(i) to the High Court—sixty days—The date of the sentence or order.
			(ii) to any other Court—Thirty days—The date of the sentence or order.
411A	1243	L. 16-19 from the end.	Omit Bombay Amendment.
413	1248	L. 2 from the top.	Where a Magistrate of the first class imposed a sentence of fine less than Rs. 50.00 under S. 480, appeal lies to the Court of Sessions ^{70a} — <i>Tripal Sharma</i> , 1956 ALJ 725 ; A 1960 A 210.
413	1248	L. 2 from the top.	S. 413 does not envisage a recurring fine of Rs. 2-50 nP per day in addition to a fine of Rs. 25.00 ^{70b} .
417(3) (4) Limitation	1256	Add after L.15 from the top.	So far as appeal by the State Government against acquittal is concerned, the law of limitation is the general law laid down in the Limitation Act (Art. 157 now Article 114 of the amended Limitation Act 36 of 1963) to which S. 5 would apply by its own force. But in so far as appeal by a private prosecutor is concerned, the legislature was astute to specifically lay down in S. 471 itself that the foundation for such an appeal should be laid within 60 days from the date of acquittal. In that sense, this rule of 60 days bar is a special law, S. 5 of the Limitation Act is wholly out of the way, in view of S. 29 (2) (b) of the Limitation Act— <i>Kaushalya Rani v. Gopal Singh</i> , A 1964 S. C. 260 where <i>Anjanabai v. Yeshawantrao Daulptras</i> , ILR (1961) B 135 ; A 1961 B 154 F. B. approved and <i>Rajjan Lal</i> , A 1961 A 139 F. B. which overruled <i>Mohamed Ibrahim v. Gopilal</i> , A 1958 A 691 ; <i>Venkata</i>

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Subbareddi v. D. Papireddi, A 1957 A. P. 406 : 1957 Cr. L. J. 923 and *In re Parchari*, A 1958 A. P. 280 : 1958 Cr. L. J. 475 overruled.

Although the amended Limitation Act 36 of 1963 which came into force from 1st January, 1964 by Article 114 provides that the limitation for appeals by the State against an order of acquittal under S. 417 (1) or (2) is ninety days from the date of order appealed from and that under S. 417 (3), thirty days from the date of the grant of Special leave by the High Court which means that the special limitation of sixty days provided in S. 417 (4) governs appeals under S. 417 (3) and the thirty days are the period prescribed for filing appeal to the Supreme Court.

The Supreme Court decision reported in A 1964 S. C. 260 being based upon the Limitation Act prior to the amended Limitation Act 36 of 1963 it is submitted that S. 5 of the Limitation Act does apply Sec. and S. 29 as amended to cases instituted on complaint after 1st January, 1964.

417	1255	L. 24 from the top.
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High Court will not interfere with an order of acquittal where accused was harassed in a petty case^{23a}—*Revachand*, A 1961 A 352.

418	1258	L. 15 from the end.
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The particular errors of law should be set out in the petition of appeal^{47a}—*Kapil Deo v. State of Uttar Pradesh*, A 1958 S. C. 121.

420	1261	Footnote 74.
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Read *Pratap Singh*, A 1961 S. C. 586, before *Putta Rangan Kalu, In re*, 1958 An. W. R. 456.

422	1264
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State Amendment—Maharashtra—District Magistrate, appointed to be the officer to whom notice of appeal shall be given under the said section—Govt. Notification, Judl. Dept. No. 1321 D/23-2-1883 Superseded—Maha. Gaz. 2-1-1963, Pt. IV—A, p. 1.

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422	1265	Footnote 21.	Add after 32 Cr. L. J. 1017; <i>R. C. Jadav v. State of Bon bay</i> , A 1960 S.C. 718 where held, that if appeal has been admitted on the ground of sentence the appellant can insist that the appeal should be heard on the merits.
422	1265	L. 22 from the top.	Before an appeal against acquittal can be heard against a respondent he must be served with notice under S. 422— <i>State v. Viswanath</i> , A 1945 N. 231.
423	1269	L. 25 from the top.	Read 90 days limitation for appeal against acquittal referred by the Government for six months and by a private complaint 60 days under S. 417 (3) and 60 days for appeal from conviction before the High Court and 30 days before the Sessions Judge— —Number of articles of Limitation Act 36 of 1963 being different, <i>vide</i> Article 115 (b) and (c).
423	1269	Footnote 38b.	<i>Alamgir v. State of Behar</i> , before A 1959 S. C. 436; <i>Biswanath Chakravorty v. Haripada Dhar</i> , A 1959 C 443; 1959 Cr. L. J. 831.
423	1270	L. 4 from the top.	Appeal admitted cannot be allowed to be withdrawn ^{41c} — <i>Biswanath Chakravorty v. Haripada Dhar</i> , A 1959 C 443; 1959 Cr. L. J. 831. <i>Ghulam Muhammad</i> , A 1942 L. 296 (F. B.).
423	1280	L. 12 from the end.	Add S. 407 having been omitted by Act 26 of 1955 the Legislature should have omitted in S. 106 (3) reference to S. 407.
423	1283	L. 16 from the top.	Where offence was committed about 5 years ago and the appeal came to the High Court Twenty-seven months after trial Judge's judgment, sentence should not be enhanced ^{62b} — <i>Nadir Ali</i> , A 1960 A 103.
428	1294	L. 2 from the top.	Additional evidence at the stage of appeal can be admitted subject to caution ^{38a} — <i>Majiya Ratna</i> , A 1961 M. P. 10.

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431	1298	Footnote 78.	<i>Sailendra</i> ,—60 CWN 239 ; A 1957 C 24 overruled in <i>Pranab K. Mitter v. State of West Bengal</i> , A 1959 S. C. 144.
432	1299	Footnote 82.	Add <i>Biswamber Nath</i> before A 1953 Punj 77.
432	1300	Footnote 88.	See <i>Abdul Rahman v. Mohamed Haji Ahmed</i> , A 1960 S. C. 83.
435	1304	L. 8 from the top.	A Presidency Magistrate is an inferior Criminal Court. High Court may revise the order of discharge passed by him under Ss. 435 and 439 ^{3a} — <i>Ramgopal Ganpatram v. State of Bombay</i> , A 1958 S. C. 97 ; <i>Dalmia Airways Ltd.</i> , A 1951 C 193 (S. B.).
435	1302	L. 31 from the top.	Add the words “in sub-section (4)” before the words “an Executive Magistrate.”
435	1304	Footnote 6.	Add : <i>In re Nalla Baligudu</i> , A 1953 M 801 (F. B.).
435	1305	Footnote 13.	Read <i>Sukhbir Singh</i> , A 1957 Punj 77 for <i>Hari Kishan Das</i> , A 1957.
435	1308	Footnote 50.	Read 1957 Cr. L. J. 218 (A. P.) for (All).
436	1320	Footnote 48.	Read “32 N 220 (F. B.)” for 32 N 220.
436	1321	L. 3 from the end.	Where no reasons are required in the order of discharge revision lies ^{66a} — <i>L. Narayanaraju v. P. Challen Veddy</i> , A 1961 A. P. 117.
437	1325	L. 21 from the end.	The words “improperly discharged” have been used in S. 437 in relation to or in the context of the words “case” and “matter” and not in connection with or in relation to the word “offence” ^{90a} — <i>Aphabin</i> , A 1962 Guj 218 following <i>Nahar Singh</i> , A 1952 A 251 and dissenting from <i>Sambhu Charan Mondal</i> , 60 CWN 708. See <i>In re Nalla Baligudu</i> , A 1953 M 801 (F. B.) ; <i>M. Subbra Yudu</i> , A 1955 A P 87 (F. B.) ; <i>Ram Chandra Babaji Gore</i> , A 1935 B 137—High Court can revise commitment on facts and law.
438	1329	Footnote 20.	Read “A 1933 p. 697” for 1933 p. 697.
		Footnote 21.	Read “A 1948 p. 180” for A 1948 p. 180.

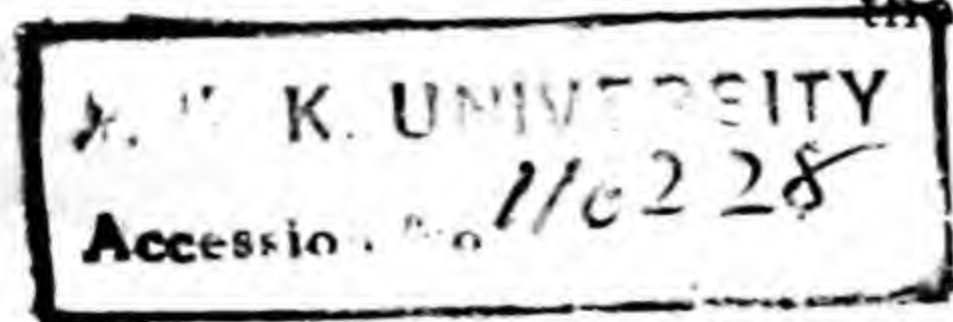
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439	1336	L. 7 from the top.	Calcutta High Court does not insist on this practice of moving the Sessions Judge before moving the High Court under S. 439 ^{53a} — <i>Bholanath</i> , 1953 Cr. L. J. 67(Cal); <i>Narayan Swami v. Egappa</i> , A 1962 M. 443; Contra— <i>Municipal Board v. Bhim Singh</i> , A 1962 A 451, <i>Sami Rampa</i> , A 1960 A 636; see <i>Murlidhar Onkar</i> , A 1961 B 213; 62 Bom L. R. 849.
439	1337	L. 7 from the top.	Ss. 435 and 439 give the High Court ample powers to interfere with any order of discharge or of commitment under S. 207A, S. 215 cannot affect its revisional powers ^{68a} — <i>Harbans Singh v. Chohan</i> , A 1960 C 722 following <i>Panchanan Balav</i> , 63 CWN 195; A 1959 C 207.
439	1339	L. 14 from the top.	Under Article 131 of the amended Limitation Act 36 of 1963, 90 days limitation has been prescribed for Criminal revision. As Limitation Act applies, petition praying for extension of time under S. 5, Limitation Act has to be moved.
439	1339	L. 16 from the bottom.	Read “not” before “tied” in case No. 98.
439	1339	L. 3 from the end.	Read “State” for “Crown”
439	1340	L. 9 from the top.	Copies, no affidavit is necessary ^{13a} — <i>Rajbalav</i> , 40 CWN 1408 followed in <i>Sher Ali</i> , 62 CWN 873.
			Where the complainant filed revision against the order of acquittal and the accused had not objected that revision was barred under S. 439(5) as complainant had the right of appeal under S. 417(3), objection cannot be allowed to be raised for the first time in an appeal before the Supreme Court under Art. 136 of the Constitution— <i>Malamraj v. Jalanchand Lodha</i> , A 1960 S. C. 744.
439	1340	L. 11 from the top.	A point of law can be raised for the first time before the High Court ^{4a} — <i>In re Dewseri Veraju</i> , A 1959 A P 29 following <i>Sellamathu Padayachi</i> , A 1954 N 313.

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439	1340	Footnote 9.	Add after 2 B. 564 (570) Contra <i>Narani Ammal</i> , 1962 MWN S.C. 398; <i>Pranab K. Mitter</i> , 1959 (1) S. C. R. 63 : A 1959 S. C. 144.
439	1341	Footnote 11.	Add after 3 I. C. 393 : See <i>Shankar Mikhan</i> , A 1960 Punj 565.
439	1341	Footnote 12.	Add after 13 Cr. L. J. 710 Contra <i>Murlidhar Onkar</i> , A 1961 B 213.
439	1344	Footnote ^{36a} .	Add after 1954 Cr. L. J. 1808 ; <i>Soni Bachu Lokman</i> , A 1960 Guj 37 ; <i>Chimappa Rangayya v. Guntapalli Ramayya</i> , A 1960 A. P. 233.
439	1345	Footnote 46.	Add after <i>Ram Frasad</i> , 17 CWN 379 ; <i>Kochan Velagudhan</i> , A 1961 Ker 8 (F. B.) ; <i>Alakhal Senappa</i> , A 1960 Mys 24.
439	1345	Footnote 49.	Add after 4 Bom L. R. 686 ; <i>Issa Yakub</i> , A 1961 Mys. 7.
439	1346	L. 2 from the end.	This view is no longer tenable. The High Court can revise such orders under S. 439 ^{51a} — <i>Ramgopal Ganpatram v. State of Bombay</i> , A 1958 S. C. 97 ; <i>Satya Kinkar Roy v. Nikhil Chandra</i> , A 1951 C 101 (F. B.).
439	1347	L. 20 from the top.	Revision lies against an order under the Probation of Offenders Act ^{58a} — <i>Rajeswari Prasad</i> , A 1961 P 19.
439	1347	L. 19 from the end.	Failure to apply under S. 144 (4) is no bar to an application under S. 439 ^{58b} — <i>Premchandra Tiwari v. Sangat Ali</i> , (1960) Cr. L. J. 1445.
439	1348	L. 15 from the top.	Add “and Government of India Act, 1935”.
439	1348	L. 13 from the end.	A third party can move the High Court in revision ^{66a} — <i>Ramendra Nath Roy on behalf of Subhash Chandra Bose</i> , 35 CWN 716 ; <i>Narain Prasad Nigam</i> , A 1923 A 85 ; <i>Sailabala Devi</i> ^{56a} A 1933 A 678 ; <i>Ambika</i> , A 1933 C. 361 ; <i>High Court Bar Association, Lahore</i> , A 1941 L. 324 ; <i>G. V. Raman</i> , A 1929 C. 319.
439	1349	Footnote 69.	Add : <i>Chanbidya</i> , A 1935 P. C. 5 ; See <i>Ramesh Chandra</i> , A 1960 S. C. 154.
439	1349	L. 13 from the top.	Add to caption 42 ; “May in its discretion”. See the following cases ^{70b}

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			— <i>Pranab K. Mitra</i> , A 1959 S. C. 144 ; <i>Bolton</i> , 60 C 676 ; <i>Arumugha</i> , A 1943 M 169 ; <i>Mali Jese Bhoj</i> , A 1961 Guj 49.
439	1350	Footnote 76.	Add after 46 I. C. 157 ; <i>Ambakiran v. Venubai Limbo</i> , A 1961 B 261 : 1961 (1) Cr. L. J. 639 ; <i>Public Prosecutor v. Deviveddi</i> , A 1962 A P 479 (F. B.) where <i>held</i> that when the order is to the prejudice of an accused it is obligatory upon the Court under S. 439 (2) to give an opportunity to the accused of being heard.
439	1351	L. 4 from the top.	Read “Private prosecutor” for “private prosecution”.
439	1352	Footnote 98.	Add after 1958 Cr. L. J. 496(2) ; <i>Bal Krishna</i> , A 1961 Ker 25.
439	1354	L. 21 from the top.	The High Court can enhance the sentence beyond the powers of the Magistrate ^{20a} — <i>Sarojag Ram v. State of Bihar</i> , (1958) S. C. R. 768.
439	1354	L. 21 from the top.	The jurisdiction to enhance the sentence can be properly exercised only if the High Court is satisfied that the sentence is unduly lenient or that in passing the sentence the Lower Court had manifestly failed to consider the relevant facts. In enhancing the sentence the High Court should restore the sentence passed by the Trial judge ^{20b} — <i>Alamgir</i> , A 1959 S. C. 436 : 1959 Cr. L. J. 527.
439	1354	L. 20 from the end.	Powers of enhancement of sentence should be sparingly exercised ^{21a} — <i>Balkrishna</i> , A 1961 Ker 25 ; See <i>Jangir Singh</i> , A 1962 Punj 348 ; <i>Alamgir</i> , A 1959 S. C. 436.
439	1355	Footnote 29.	Read A 1958 P 88 for A 1958 p. 88 ; A 1952 P 242 for A 1952 p. 242.
439	1356	L. 12 from the end.	In a case of acquittal under S. 302/34, I. P. C. and conviction under S. 304, the accused filed an appeal, the State did not move but the complainant filed a petition for enhancement of sentence, <i>held</i> , High Court cannot alter the finding ^{37a} — <i>Jangir Singh</i> , A 1962 Punj 348 ; see <i>Contra City Board v. Srikishen Lal</i> , A 1959 A 413.

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439	1358	L. 5 from the end.	Where the appeal was filed before the Sessions Judge but the High Court not being aware of the filing of appeal called for the record and issued a show cause notice to the appellant for enhancement of sentence and ordered transfer of appeal to itself, <i>held</i> , there is no illegality in passing the order ^{62a} — <i>Ramesh Chandra</i> , A 1960 S. C. 154.
439	1359	L. 14 from the top.	Limitation Act applies to criminal Revision—ninety days from the date of the order or sentence to be reversed, <i>see</i> amended Limitation Act 36 of 1963, Article 131.
439	1359	L. 3 from the top.	In a proper case the High Court can exercise the powers of revision of an order made against the accused person after his death ^{67a} — <i>S. P. Dubey v. Nar Singh Bahadur</i> , A 1961 A 447.
440	1360	L. 11 from the top.	Add <i>see Ambu Khan Vaditki's case</i> ^{73a} —1961 (1) Cr. L. J. 639 (Bom); <i>Basirhat Municipality</i> , Cr. Rev. 1364-60 (Cal. High Court).
441	1361	L. 5 from the top.	A Presidency Magistrate unlike another Magistrate is permitted to supplement the record by a statement setting forth the grounds of his decision or order ^{81a} — <i>Ramgopal Ganpat Rai</i> , A 1958 S. C. 97 ; 1958 Cr. L. J. 244.
465	1365	L. 8 from the top.	By reason of unsoundness of mind and the consequent inability on his part to instruct his lawyer in the conduct of his appeal and in dealing with the Reference the Court is bound to afford the accused the same protection to which he would have been entitled, had he been of unsound mind at the time of the trial in the Court of first instance ^{98a} — <i>Sundaram</i> 64 CWN 1015.
476	1375	L. 21 from the top.	Read "Time" for "Trial".
476	1375	L. 24 from the top.	Read "Proceedings" for "Preceedings".
476	1383	Footnote 4.	Add <i>Chimappa Rangayya v. Guntapalli</i> , A 1960 A P 233 (234) where <i>held</i>

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			that in considering the question of expediency of a prosecution no doubt the time-factor is a relevant consideration but the revisional bar would not interfere with the concurrent findings of the Courts below as to the expediency of laying a complaint.
476	1386	L. 12 from the end.	“Read “Sanctioning” for “Sentencing” before prosecution.
476	1387	L. 19 from the top.	Where a suit is filed by the petitioner in the name of his father by forging his signature on plaint and Vakalatnama, the petitioner does not claim to come within the purview of S. 476 as he is not a party to the suit ^{46a} — <i>Akloo Prasad</i> , A 1960 P. 310 ; (1960) Cr. L. J. 977 following <i>Mathur v. Pitambar</i> , A 1945 P 362.
476	1391	L. 14 from the top.	A temporary Sessions Judge who takes over the file of another temporary Sessions Judge in the same Sessions Division can make a complaint under this section in respect of the offences falling under S. 195 that were committed in the Court of his predecessor ^{87a} — <i>Ayub Syed Hussain</i> , A 1962 A 132 : 1962 (1) Cr. L. J. 229 ; <i>Adari Gangunaidu</i> , A 1958 A P 351.
476	1391	Footnote 88.	Add <i>Rathi Ram Agarwalla</i> , A 1960 P 206 ; <i>Ramzani</i> , A 1960 A 350.
476B	1398	Footnote 52.	Add <i>Surendra Nath Maity</i> , A 1931 C 604 ; <i>Jonardhan</i> , A 1946 A 245, <i>Deonandan</i> , A 1948 P 225 (F. B.) ; <i>Dhupnarain Singh</i> , A 1954 P 76 (F. B.), <i>Bishambar Das</i> , A 1943 N 241.
479A	1404	Footnote 64.	Read <i>Virudan</i> (1962) MWN 290 and delete A 1962 M.
479A	1404	Footnote 64.	Read <i>Dhan Singh</i> , A 1961 M. P. 303 and delete A 1958 A 364.
479A	1404	L. 1 from the end.	The express language in S. 479A specifies a witness alleged to have given false evidence at any stage of judicial proceeding ^{70a} — <i>Dude Kala Dastigammal</i> , A 1961 P 130 ; 1961 (1) Cr. L. J. 388.



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479A	1405	L. 8 from the top.	In fact the object in enacting S. 479A is to obviate the delay inherent in launching prosecutions under S. 476 ^{74a} — <i>Bijli Pathak</i> , 39 P 203 ; A 1961 P 387 following <i>Puroshottam Lal Madanlal</i> , A 1959 Punj 145.
479A	1405	L. 14 from the end.	A person making affidavit in a writ proceeding is not a person applying as a witness ^{78a} — <i>Ugan Singh</i> , A 1961 Raj 268.
488	1425	L. 6 from the top.	Read “aggrieved person” for “accused”.
488	1425	L. 10 from the top.	In heading (e) read “reviewed” for “rescinded”.
492	1458	Line 12 from the end.	Add : 4 (a). State Amendments—Rajasthan.
492	1459	Line 20 from the end.	Add : 4 (a). State Amendment <i>Rajasthan</i> —Authority to conduct prosecutions—All Labour Inspectors (Central) posted in the State of Rajasthan are authorised to conduct prosecutions under specified Acts before all Courts of Magistrates in that State— <i>Rajasthan Gazette</i> , dated 5-12-1963, Pt. I (Ka), p. 144.
529	1584	Footnote 78.	Read A 1962 Raj 94 for A 19 2 Raj 94.

[illegible]

Addenda (2)

Cases Published upto April, 1964

- S. 10 (2), (p. 46)**—An Additional District Magistrate has power to sanction prosecution under the Arms Act as the District Magistrate in S. 29 of the Arms Act as understood under the Criminal Procedure Code—*B. C. Koer*, A 1962 B 188=1962 (2) Cr. L. J. 176.
- S. 14, (p. 54)**—(as amended by Bombay Act 23 of 1951). A law vesting discretion is an authority to appoint a Special Magistrate under S. 14 of the Code to try cases under the normal procedure and is not hit by Art. 14 of the Constitution. A Presidency Magistrate being a Judicial Magistrate under S. 6A as added by the Bombay Legislature, powers conferrable on a Presidency Magistrate may lawfully be conferred upon a Judicial Magistrate—*Jagannath v. State of Maharashtra*, A 1963 S. C. 728=1963 (1) Cr. L. J. 639.
- S. 32, (p. 83)**—In case of inordinate delay the Court can substitute a sentence of life imprisonment in lieu of death sentence—*Anant Kumar*, A 1962 C 428=1962 (2) Cr. L. J. 179.
- S. 32, (p. 83)**—Facts are to be taken into consideration in awarding sentence under the Prevention of Cow Slaughter Act—*Ayub*, A 1962 A 141=1962 (1) Cr. L. J. 237.
- S. 35, (p. 90)**—Offences under Ss. 457 and 380 do not fall under S. 71 I. P. C. Conviction under both the sections is not illegal—*Udai Bhan v. State of U. P.*, A 1962 S. C. 116 [1962 (2) Cr. L. J. 251] where *In re Natesa Mudaliar*, A 1945 M 33 referred to.
- S. 44, (p. 98)**—mentions the offences of which every person is bound to give an information to the nearest Magistrate or police officer and his failure to do so is punishable under S. 202—*Ram Balak Singh*, A 1964 P 62.
- S. 52, (p. 109)**—According to law no woman can be searched except by another woman and having regard to the emphasis on decency under Ss. 52 and 103 the search can not be done in the presence of men—*Kamala Bai v. State of Maharashtra*, A 1962 S. C. 1189 following *Malak Khan*, 72 I. A. 305.
- S. 84, (p. 142)**—A police officer to whom warrant is directed for execution outside the local limits of the jurisdiction of the Court must execute it in accordance with the provisions of S. 84. He cannot endorse it to any other police officer outside the limits of the Court issuing the same. If the Court issuing a warrant desires that the procedure

laid down under S. 79 be adopted, it should send the warrant by post or otherwise to one of the authority indicated in S. 83—*Devi Singh*, A 1964 Raj 36.

S. 87, (p. 144)—In a proceeding for contempt of Court the contemnor did not appear before the Court, hence the Chief Court of Oudh issued a proclamation under S. 87 and attached certain property *held*, Ss. 87 and 88 are not applicable to contempt proceedings—*Mrs. V. Peterson v. O. V. Forbes*, A 1963 S. C. 692=1963 (1) Cr. L. J. 633.

S. 94, (p. 158)—To issue a summons to an accused person to produce a document in his possession is not warranted in a trial. In such cases the proper sections to be utilised are Ss. 96 and 95—*Shyamlal*, A 1963 Guj 178.

S. 94, (p. 158)—S. 94 being a general provision can be invoked by a Court where the accused applies for production of a document—*In re Ragathum*, A 1963 A. P. 362.

Ss. 96, 98, (p. 169)—Where goods or documents are seized by the Customs Authorities in execution of warrant issued in the form prescribed by the Criminal Procedure Code by the Magistrate under S. 172 of the Sea Customs Act, the Customs Authorities are not entitled to the custody of the Records. The ultimate disposal should be made by the Magistrate—*Md. Serajuddin*, A 1962 S. C. 759.

S. 99A, (p. 171)—**Scope.**—Where an order of the West Bengal Government under S. 99A dated 6-11-61 was published by Government of Bihar in Bihar Gaz. Pt. III of 3-1-1962 for information *held*, order of Government of Bihar was not an order of forfeiture under S. 99A, hence it could not be set aside—*Golam Sarwar*, A 1963 P 284.

Ss. 103, 165, (p. 183)—It may be that where the provisions of Ss. 103 and 165 are concerned the search can be resisted by the person whose premises are sought to be searched. It may also be that because of illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure, the seizure of the article is not vitiated—*Radha Kishan v. State of Uttar Pradesh*, A 1963 S. C. 822=1963 (1) Cr. L. J. 809.

S. 112, (p. 259)—Provisions of S. 112 are mandatory—Disregard of S. 112 cannot be treated as an irregularity—*Zahir Ahmed v. Ganga Prasad*, A 1963 A 4=1963 (1) Cr. L. J. 20.

S. 117 (3), (p. 270)—A Magistrate cannot be sued for damages for detaining a person proceeded against under S. 107 who fails to produce sureties acceptable to the Magistrate—*Lakshmi Narayan Singhal*, A 1962 A 137=1962 (1) Cr. L. J. 224.

Ss. 132, 127, 128, (p. 301)—Where any Police Officer acts in exercise of powers under Ss. 127, 128, *held*, sanction under Ss. 132 and

197 is necessary—*Krishna Pillai v. Sadasiv Pillai*, A 1963 Ker 7 following *Amrik Singh*, A 1955 S. C. 309 = 1955 Cr. L. J. 865 = 1955 (1) S. C. R. 1302.

The occasion for the Court to consider whether the complaint could be filed without the sanction of the Government would be when at any later stage of the proceedings it appears to the Court that the action of the Police Officer complained of appears to come within the provisions of Ss. 127 and 128 of the Code.

The get the benefit of S. 132 the accused has to show (i) that there was an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace, (ii) that such an assembly was commanded to disperse, (iii) that either the assembly did not disperse on such command or, if no command had been given, its conduct had shown a determination not to disperse and (iv) that in the circumstances he had used force against the members of such assembly—*Nagaraj v. State of Mysore*, A 1964 S. C. 269.

Ss. 137 and 138, (p. 327)—There is no provision in the Code authorising the Magistrate either to amend the preliminary order or to pass any order except in accordance with the preliminary order—*State v. Mahadevappa*, A 1964 Mys 52 relying on *D'Silva v. D'Silva*, A 1943 M 335, *Secy., Rate Payees' Committee, North Burrackpore Municipality v. Dweep Narain Singh*, A 1952 C 127, *Sadananda Tewari*, A 1958 A 174 = 1958 Cr. L. J. 314.

S. 145, (p. 380)—The Legislature has armed the Magistrate with powers to proceed when there is an apprehension of a breach of peace about the possession of a certain immovable property between private parties. The provision is not meant for territorial jurisdiction between two rival bodies—*Gram Panchayat v. Meenka Thana*, A 1963 Raj 42 = 1963 (1) Cr. L. J. 226.

S. 145 (1) and (3) (p. 404)—Where a preliminary order under S. 145 (1) is not at all passed, the subsequent proceedings culminating in the final order are vitiated, but if there is a preliminary order, however defective it may be, the defect would not be fatal unless it has resulted in prejudice—*Kondappa v. Rama Rao*, A 1964 A. P. 168 (170) where *Pakhmaraju Naicker v. Chidambara Nadar*, A 1955 M 229 relied upon.

S. 145, (p. 405)—Where there are several disputes in respect of distinct parcels of land, joint inquiry is prejudicial, separate proceedings should be started—*Radhashyam Patra*, A 1962 Or 161 = 1962 (2) Cr. L. J. 391.

S. 145, (p. 409)—S. 145 has no application to the case of property jointly possessed—*Ghulam Shah v. Meerajuddin*, A 1964 J. & K. 1 following *Gopinath Singh*, A 1948 Oudh 130, *Nahar Singh*, A 1951 Raj 156.

- S. 145, (p. 416)**—It is the discretion of the Magistrate to accept additional affidavits and documents after the expiry of time-limit fixed by the Magistrate—*M. Tripartia*, A 1963 A. P. 401.
- S. 146, (p. 434)**—The reference to a Civil Court of competent jurisdiction under sub-section (1) of S. 146 has no reference to pecuniary jurisdiction—*Ram Dulan Shambhunath*, A 1963 P 252 (F. B.) where *Bodi Narayan Prasad v. Deo Narain*, A 1958 P 308 approved.
- S. 146, (p. 435)**—Civil Court does not include a Revenue Court—*Asa Ram*, A 1963 A 17=1963 (1) Cr. L. J. 28.
- S. 146, (p. 436)**—Finding of Civil Court can be interfered with under S. 439 after the finding is adopted by the Magistrate's final order passed under S. 146 (1-B). S. 146 (1-D) has not the effect of taking away powers of the High Court under Art. 227 of the Constitution—*Raj Singh*, A 1963 Pat 243 (F. B.)=1963 (2) Cr. L. J. 25 overruling *Shreedhar Thakur v. Kishore Rao*, A 1962 P 468 ; *Sudama Wati Kuer v. Ram Chandra Singh*, A 1963 P 321 ; *Inder Singh*, A 1964 Raj 81.
- S. 154, (p. 470)**—First Information Report is not substantive evidence. It can only corroborate or contradict its maker—*Sagal Chandra*, A 1962 C 85 ; 65 C. W. N. 808 ; *A. W. Khan*, A 1962 C 641, following *Nisar Ali*, A 1957 S. C. 366 =1957 S. C. R. 657=1957 Cr. L. J. 550 ; *Shiva Singh*, A 1962 Raj 3.
- S. 154, (p. 472)**—A report of accident to police station is not a First Information Report, but the report of the accused under S. 89 of the Motor Vehicles Act that accused was driving the motor vehicle at the time of the accident is an admission under S. 21, Evidence Act—*Jawan Singh*, A 1963 Guj 111.
- S. 155 (2), (p. 476)**—Objection cannot be taken that the District Police Officer is not empowered to make investigation outside the local area of the Police station—*Pukhia*, A 1963 Raj 48.
- S. 156 (3), S. 190, (p. 479)**—Where a Magistrate to whom a complaint was made, forwarded it to the police for investigation and report under S. 156 (3) on the ground that some of the offences mentioned in the complaint were cognizable offences, the action of the Magistrate cannot be said to be illegal. By ordering investigation under S. 156 (3) and not for the purpose of proceeding under various sections of Chapter XVI of the Code the Magistrate cannot be said to have taken cognizance of the offence—*In re Arumugha Gounder*, 1962 (2) Cr. L. J. 764=A 1962 M 495 following *Gopaldas Sindhi v. State of Assam*, A 1961 S. C. 986=1961 (2) Cr. L. J. 391 ; *R. R. Chari*, A 1951 S. C. 207.

S. 157, (p. 482)—Though ordinarily investigation is undertaken on information received by a Police Officer, the receipt of information is not a condition precedent for investigation. S. 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise—*State of Uttar Pradesh v. Bhagwant Kishore*, A 1964 S. C. 221—case under Prevention of Corruption Act.

S. 162, (p. 495)—“Save as hereinafter provided” is not restricted in its operation to S. 162 alone but applies to the body of the Code, to hold otherwise would be to introduce a patent inconsistency between S. 27A and S. 162 for by the former section in committed proceedings the statements recorded under S. 162 are to be regarded as evidence—*Usha Kolhe v. State of Maharashtra*, A 1963 S. C. 1531=1963 (2) Cr. L. J. 418.

S. 162, (p. 504)—Where copy of statement of approver recorded during investigation was not supplied to the accused, held it is a fatal defect. High Court will not consider approver's evidence in appeal, case held unfit for remand after a prolonged trial—*Sharaf Shah Khan*, A 1963 A. P. 314.

S. 162, (p. 506)—After the amendment of S. 162 in 1955 it has been the practice for public prosecutors to examine the prosecution witnesses themselves with reference to the earlier statements to the police even in cases where the witness does not at all seem to have turned hostile. If the memory of the witness plays a trick he cannot be cross-examined—*In re Kalu Singh v. Moti Singh*, A 1964 M. P. 30.

S. 162, (p. 507)—Omissions to statements of prosecution witnesses to police cannot be regarded as contradictions but serious and glaring omissions can be relied on as a relevant circumstance—*Md. Misir Ali*, A 1963 Ass 151.

S. 163, (p. 511)—It cannot be said that the provisions of S. 161 of the Code authorises the Police Officer examining a person to beat him or to confine him for the purpose of inducing him to make a particular statement. The provisions of S. 163 emphasise this fact—*State of Andhra Pradesh v. Venugopal*, A 1964 S. C. 33.

S. 164, (p. 523)—Where a second Class Magistrate not specifically empowered to record a confession under S. 164 has purported to record a confession of the accused under S. 164, his oral evidence will be inadmissible, S. 533 would not justify the admissibility of such oral evidence—*State of Uttar Pradesh v. Singhrara Singh*, A 1964 S. C. 358=1964 (1) Cr. L. J. 263 where *In re Natesan*, A 1960 M 443 doubted.

Ss. 164 (3) and 364 (3), (p. 525)—Where the appellants were tried for the offence of murder and concealing dead body and the

evidence against them was the retracted confession and the recovery of the dead body at the instance of the appellant, *held* that the confessions were not voluntary and cannot be used against the appellants, in recording the confession the Magistrate had adopted a somewhat casual attitude by disregarding the provisions of S. 164(3) and S. 364(5)—*Babu Singh v. State of Punjab*, (1963) 3 S. C. R. 749 where *Nazir Ahmed*, 63 I A 372 referred to.

- S. 164, (p. 532).—Retracted confession**—Where the prosecution by reliable evidence which is independent of the confession and is also not tainted evidence like the evidence of co-accused establishes the truth of certain parts of the account given in the confession and these parts are integrally connected with other parts of the confession a prudent judge would think that what he stated in the confession is true—*Nand Kumar v. State of Rajasthan*, (1963) 2 S. C. 890 = 1963(2) Cr. L. J. 702.
- S. 165, (p. 537)**—Illegality in the search by Excise Officers by itself will not render the conviction illegal—*United Oil Mills v. Collector of Customs*, A 1963 Ker 241.
- S. 173 (4), (p. 562)**—There is nothing in S. 173(4) which prevents the prosecution from putting in such documents at the trial which at the time of the report were not available to them or even if available their copies were not supplied to the accused —*Raghunath*, A 1963 Raj 85.
- Ss. 173 (4), 207A(3), Ss. 162 and 537**—See *Noor Khan v. State of Rajasthan*, A 1964 S. C. 286 printed in commentary on S. 537 where *held* that the object of Ss. 162, 173(4) and 207A (3) is to enable the accused to obtain a clear picture of the case against him before the commencement of the inquiry. Copies of statements of witnesses must be supplied, but failure to supply the copies is curable under S. 537 and must be considered in the light of prejudice caused by such breach.
- S. 173, (p. 562)**—S. 162 applies to cases investigated by Excise Officers, S. 173 (4) does not apply—*Sushil Kumar Dutt*, A 1963 C 430 = 1963(2) Cr. L. J. 129.
- S. 179, (p. 574)**—A Court trying an accused for offence of conspiracy is competent to try him for all offences committed in pursuance of the conspiracy—*Banwarilal v. Union of India*, A 1963 S. C. 1620 = 1963(2) Cr. L. J. 529 following *L. N. Mukherjee*, A 1961 S. C. 1601 = 1961(2) Cr. L. J. 736 and *Puroshattam Das Dalmia*, A 1961 S. C. 1589 = 1961(2) Cr. L. J. 728.
- S. 179, (p. 574)**—applies to those offences which by their very definition consist of an act and its consequence—*Dhulaji Bayaji*, A 1963 Guj 234 ; *Lalchand*, A 1961 P 260.
- S. 180, (p. 579)**—The offence of Criminal Conspiracy is similar to the offence of abetment and illustrations to S. 180 show that the

Court which has jurisdiction to try the further offence committed in pursuance of the conspiracy can also try the charge of conspiracy—*Dhulaji Bayaji*, A 1963 Guj 234 following *Banwarilal*, A 1959 Ker 111 and not following *L. N. Mukherji*, A 1961 M 126 see *R. K. Dalmia*, A 1962 S. C. 1821 printed in footnote 33 at p. 579 ; see *Govindarajalu*, A 1962 Mys 275.

S. 180, (p. 579)—Conspiracies included in S. 120B I. P. C. and acts done in pursuance of those conspiracies can not be brought within the scope of S. 180. The more appropriate section is S. 182—*Govindarajalu*, A 1962 Mys 275.

Ss. 190, 156 (2), (p. 600)—Special Judge is a creature of the Statute. Cognizance is not vitiated merely because there was illegality in investigation conducted by a Police Officer in violation of S. 5A Prevention of Corruption Act—*Parsanath*, A 1962 B 205 ; 64 Bom L. R. 188 following *H. N. Risbud*, A 1955 S. C. 196=1955 S. C. A 258=1955 Cr. L. J. 526 ; *Din Dayal Sarma v. State of U. P.*, A 1959 S. C. 831=1959 Cr. L. J. 1120 ; *Rousthan Arde-shir Banaji*, A 1948 B 163=49 Cr. L. J. 196=I. L. R. 1948 B 66.

S. 190, (p. 605)—Where cognizance of an offence has been taken by a Magistrate on a police report submitted on investigation by an unauthorised Police Officer, the Magistrate should merely stay the case at that stage without discharging the accused and direct further investigation by an authorised Police Officer—*L. R. V. Khitish Chandra*, A 1962 C 189=(1962) 1 Cr. L. J. 405.

S. 190 (1) (b), (p. 605)—A statement of facts constituting an offence contained in an application to Police Officer cannot be treated as a complaint as defined in S. 4 (1) (h) but a police report of which cognizance is taken under S. 190 (1) (b)—*Chittaranajan Das*, A 1963 C 191=1963 (1) Cr. L. J. 424=*State v. Ramaswami*, A 1963 M 160.

S. 193, (p. 610)—The word “Case” in S. 193 (2) may cover a petition filed under S. 528 before the Sessions Judge. It undoubtedly differs from the word “appeal” or “revision”—*V. P. Seth*, A 1964 A P 59.

S. 195, (p. 631)—In a suit for partition the Receiver took possession of a property including a shop but there was no order of the Court directing him to take possession of the shop and there was no charge under S. 183 I. P. C. but the accused persons were charged under Ss. 448 and 454 I. P. C., *held*, the proceeding was not vitiated for want of a complaint under S. 195—*Fazlul Huq*, 1963 A. L. J. 501=A 1964 A 103.

S. 195, (p. 631)—Where the report to Tahsildar with a view to take action is found to be false, the offence under S. 182 I. P. C. is completed even if no action is taken on the report.

Prosecution under S. 182 I. P. C. must be on complaint in writing by the Tahsildar—*Daulat Ram v. State of Punjab*, A 1962 S. C. 1206=1962 (2) Cr. L. J. 286.

S. 195, (p. 643)—Income-tax Officer who holds proceedings under S. 21 of the Income-tax Act is a Revenue Court—*Mulji Manilal*, A 1963 B 70=1963 (1) Cr. L. J. 569 following *Hossain Kassem Dada*, A 1953 S. C. 221=1953 S. C. R. 987.

S. 195, (p. 643)—Election Tribunal constituted under S. 22 U. P. Municipalities Act is a Court—*Shiv Kumar*, A 1963 A 395.

S. 196A, (p. 649)—A letter from the under Secretary to the Government in its Home Department addressed to the District Magistrate informing that the Governor has been pleased to grant sanction for prosecution of certain person named therein has in fact been accorded and that the official act was regularly performed. Such a document would meet the requirements of S. 196A—*Tulsi Ram v. State of Uttar Pradesh*, A 1963 S. C. 666=1963 (1) Cr. L. J. 623.

S. 196B, (p. 655)—In appropriate cases the Investigating Officer may arrest an accused in course of investigation under authority of warrants—*Shanker Lal*, 39 P 490=A 1962 P 2.

S. 196B, (p. 655)—In Mysore dismissal of Inspectors of Police of all grades vests in the Government. The Inspector General of Police can dismiss a sub-inspector who is a Police Officer below the grade of Assistant Superintendent. No sanction is necessary even if the Sup-Inspector of Police had committed an offence while acting or purporting to act in the discharge of his official duty—*Nagraj v. State of Mysore*, A 1964 S. C. 269.

S. 197, (p. 661)—Chief Executive Officer of Transport is a public servant—*In re Chief Executive Officer*, A 1963 A. P. 491.

S. 197, (p. 662)—Misconduct by public servant need not be in connection with his own official duty—*Dhandaswar v. Delhi Administration*, A 1962 S. C. 195. Case under S. 5 (1) (d) Prevention of Corruption Act where *State of Ajmer v. Shivji Lal* explained.

S. 197, (p. 663)—Where a Police Officer acted in exercise of powers under Ss. 127 and 128, *held*, sanction under Ss. 132 and 197 was necessary for prosecuting him—*Krishana Pillai*, A 1963 Ker 7=1963 (1) Cr. L. J. 53 following *Amrik Singh v. State of Pepsu*, A 1955 S. C. 309=1955 Cr. L. J. 865.

S. 198, (p. 671)—Proceedings can be continued even after the death of the aggrieved person—*Nathu*, A 1963 M. P. 47=1963 (1) Cr. L. J. 184.

- S. 198B (3)**—The proper time to raise objection to the admission in evidence of sanction under S. 198 (3) (b) on the ground that it had not been formally proved was when the sanction was actually tendered and objection cannot be entertained at the appellate stage—*M. B. Kanwar*, A 1963 Punj 201=1963 (1) Cr. L. J. 609.
- S. 198B, (3) (a), (p. 674)**—Public Prosecutor cannot lodge a complaint under S. 500 or 501 I. P. C. without the previous sanction of the Government under Clause (3a)—*Gour Chandra v. Public Prosecutor Cuttak*, A 1963 S. C. 1198=1963 (2) Cr. L. J. 194.
- S. 200, (p. 686)**—Joint complaint of two persons is not contemplated. Provisions in S. 247 or 259 indicate that the complaint shall be filed by one person—*Narayanswami v. Egappa*, A 1962 M 443.
- Ss. 200 and 417, (p. 686)**—‘Complainant’ has not been defined in the Code but that commonly means the person who has been examined under S. 200 and after his death, the appeal filed by him before his death under S. 417 (3) abates. In such a case the right to present an appeal from the order of acquittal shall be of the State under S. 417 (1)—*Namilal Samanta*, A 1964 C 64=1964 (1) Cr.L.J. 186.
- S. 202, (p. 695)—Scope and object**—for determination of the question whether any process is to be issued is not what the Magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. The object of the inquiry under S. 202 (1) is to ascertain the truth and falsehood of the complaint—*Chandra Deo v. Prakash Chandra*, A 1963 S. C. 1430=1963 (2) Cr. L. J. 397, following *Vedilal Pachanand v. Dattaraja*, 1961-1—S. C. R. 1=A 1960 S. C. 1113=1960 Cr. L. J. 1499.
- S. 202, (p. 701)**—Non-compliance with proviso to S. 202 (1) by the Magistrate renders the order for enquiry and all further proceedings liable to be set aside—*Surendra Bahadur*, A 1962 A 450.
- S. 203, (p. 709)**—Reason for dismissal of complaint under S. 203 goes to the root of the matter and absence of the reason would make the order a nullity. Even assuming, however, that the rule laid down in *William Slame* 1955-25—2 S. C. R. 1140 applies to such a case prejudice is writ large on the face of the order—*Chandra Deo v. Prakash Chandra*, A 1963 S. C. 1430=1963 (2) Cr. L. J. 397.
- S. 207A (4), (p. 726)**—In a committal proceeding the prosecution is not bound to examine all the persons who have been witnesses to the crime but in cases where the number of witnesses is not much and the evidence of some witnesses is open to criticism such witnesses should be examined—*Noor Khan v. State of Rajasthan*, A 1964 S. C. 286.

- S. 207A (4)**—Under S. 207A the Magistrate is bound to take evidence of only such eye-witnesses as are actually produced by the prosecution in Court. The Magistrate if he is of opinion that it is in the interest of justice to take evidence whether of eye-witnesses not produced by the prosecution or other, has a duty to do so—*State v. Gundicha Bhoi*, A 1962 Or 172=1962 (2) Cr. L. J. 392; *Bayappa*, A 1964 Mys 61 following *Shiv Ram v. State of Maharashtra*, A 1961 S. C. 674.
- S. 207A (4), (p. 726)**—The prosecution is not bound to examine any of the eye-witnesses before the Committing Court. It is therefore erroneous to discard the identification evidence of eye-witnesses in Sessions Court on the ground that these eye-witnesses have not been examined in the Committing Court—*Maheswar*, A 1964 Or 37=I. L. R. (1963) Cut 762 following *Sriram*, A 1961 S. C. 674=1961 (1) Cr. L. J. 760; *Jawla Mahton*, A 1963 A 161 (F. B.)=1963 (1) Cr. L. J. 404, which overruled *Kanikoo*, A 1961 A 612 and *Ram Bilas*, A 1961 A 614.
- S. 207A (6), (p. 728)**—Under S. 207A (6) it is not open to a Committing Magistrate to appreciate the evidence. The question of appreciation is left to the Sessions Court. The whole object of S. 207A is to give a secondary importance to committal proceedings—*State v. Gundicha Bhoi*, A 1962 Or 172=1962 (2) Cr. L. J. 392.
- S. 207A (6) and (7), (p. 728)**—There is some distinction between the procedure to be adopted at the preliminary inquiry under Ss. 208 and 209 on a private complaint and in proceeding instituted on Police report. The expression “disclose no grounds for committing” in S. 207A (6) is different from the words “there are not sufficient grounds for committing” in S. 209—*Apavuvalar v. Musgan*, (1964) 1 M. L. J. 101.
- S. 207A, (p. 725)**—Under S. 207A (6) it is not open to a Committing Magistrate to appreciate the evidence. The question of appreciation of evidence is left to the Sessions Court. The whole object of S. 207A is to give a secondary importance to committal proceedings. Distinction between a discharge under S. 207A (6) and under S. 209 is also decided in the instant case—*Bavabhai Nagjibhan*, A 1963 Guj 162.
- S. 207A (6), (p. 728)**—Even if it is not the strict requirement of the law it is always proper and expedient in the interests of justice that statements of an accused person should be taken under S. 342 at the stage of commitment—*Chhota Singh*, I. L. R. (1963) 2 Punj 129=A 1964 Punj 120.
- S. 207A, (p. 729)**—The Magistrate is under an obligation to give a hearing to the accused so that the accused may be able to satisfy him that no sufficient grounds exist for committing him—*Velaudhan Pillay*, A 1963 Ker 85=1963 (1)

Cr. L. J. 290 following *Ram Dayaram*, A 1960 B 124 ; 1960 Cr. L. J. 32.

S. 207A (11), (p. 729)—does not contemplate an order of acquittal based on the non-production of prosecution witnesses. It only applies to such cases where after consideration of all evidence produced by the prosecution the court comes to the conclusion that the accused is not guilty of the offence charged—*State v. Shib Charan Singh*, A 1962 Or 159 ; 1962 (2) Cr. L. J. 200.

S. 221, (p. 767)—The requirement of S. 222 (1) is that the accused person must have a reasonably sufficient notice as to the case against him—*Chittaranjan Das v. State of West Bengal*, A 1963 S. C. 1696.

S. 221, (p. 770)—Where it is the prosecution case that the act of the accused in inflicting the injuries on the person of the deceased caused the death of the deceased obviously the charge shall be under S. 302 and not under S. 304, I. P. C. unless special circumstances are present—*Krishna Ram*, A 1964 Ass 53.

S. 221, (p. 771)—Where the charge against the accused is under that part of S. 161, I. P. C. which refers to accepting of gratification for rendering any service or disservice to any person with any public servant, the charge should specify the other public servant who is to be approached for rendering service or disservice. At the same time even if the other public servant is not specified in the charge the trial would not be bad. Such a defect is curable under S. 537 unless such error or omission or irregularity or misdirection has in fact occasioned a failure of justice—*State of Maharashtra v. Jagat Singh*, A 1964 S. C. 492.

S. 222 (2), (p. 780)—Where an accused person is charged with criminal breach of trust or dishonest misappropriation of money, then sub-section (2) provides *inter alia* that it is sufficient to specify the dates between which the offence is alleged to have been committed. It is permissible in a charge in which S. 222 (1) applies to state that the particular offence was committed in or about the particular date—*Chittaranjan Das v. State of West Bengal*, A 1963 S. C. 1696.

S. 225, (p. 795)—Charge for conspiracy in addition to charges for offences committed in pursuance of the conspiracy can be framed. In the absence of any objection by the accused at the proper time and in the absence of any material from which prejudice to the accused person could be inferred, the accused was precluded from complaining about it after their conviction by the Trial Court—*State of Andhra Pradesh v. Gandeswara Rao*, A 1963 S. C. 1850.

- S. 232, (p. 797)**—Where accused was charged under Ss. 332-34, Penal Code but was convicted under S. 332 without a charge, *held* accused is prejudiced by the absence of charge and he cannot be convicted under S. 332, I. P. C. *Mossa*, A 1963 Ker 48.
- S. 233, (p. 802)**—The expression 'every distinct offence' in S. 233 must have a different context from the expression 'every offence' or 'each offence'. A separate charge is required for every distinct offence and not necessarily for each separate offence—*Banwarilal v. Union of India*, A 1963 S. C. 1620=1963 (2) Cr. L. J. 529.
- S. 234, (p. 812)**—Where the offences charged were more than three and not of the same kind as contemplated by S. 234 as the case was brought under S. 235 and no prejudice was caused to the accused *held* trial was not vitiated—*Dinkar Roy Raghunath*, A 1963 Guj 15; 1963 (1) Cr. L. J. 162; *Kishan Singh*, A 1961 B 124 following *Chandi Prasad v. State of Uttar Pradesh*, A 1956 S. C. 149=1956 Cr. L. J. 322; *William Slaney*, A 1956 S. C. 116=1956 Cr. L. J. 291.
- Ss. 236 and 237, (p. 828)**—Ingredients of offences under Ss. 409 and 477A, Penal Code are different. There is no scope for doubt. Case is covered by S. 403 (2)—*Shrinath*, A 1963 Raj 14.
- S. 237, (p. 833)**—Where a single charge under S. 400, I. P. C. was framed against accused persons involved in several dacoities prosecution case about conspiracy having failed, legality of joint trial for different dacoities was not affected—*Sharaf Shah Khan*, A 1963 A. P. 314.
- S. 239, (p. 843)**—Scope on a plain construction of the provisions of S. 239, it is open to the Court to avail itself cumulatively to the provisions of the different clauses of S. 239 for the purpose of framing charges and charges so framed by it will not be in violation of the law, the provisions of Ss. 233, 234, 235 notwithstanding. The words 'same transaction' in S. 239 has the same meaning as in S. 235 (1)—*State of Andhra Pradesh v. Gandeswara Rao*, 1963 S. C. 1850.
- S. 239, (p. 844)**—The mere fact that the special Judge thought it necessary in a case under Prevention of Corruption Act (1947) to separate the trial of accused with respect to certain items for which there was sanction would not mean that these new cases had no sanction behind it. The sanction of the original four cases would cover these cases also—*State of Andhra Pradesh v. Venugopal*, A 1964 S. C. 35.
- S. 239, Cl. (d), (p. 853)**—Trial of driver for offences under Ss. 279 and 304A, I. P. C. in one trial is bad—*Gyan Singh*, A 1963 Guj 275.

- S. 243, (p. 852)**—Where a co-accused pleaded guilty on behalf of the accused and no authority was proved, *held*, conviction on the basis of such a plea under S. 243 was not proper—*Sarashibala*, A 1962 P 244 (248)=1962 (1) Cr. L. J. 743.
- S. 247, (p. 870)**—The report of a police officer in a non-cognizable case is not a complaint, S. 247 does not apply. Accused can not be acquitted for absence of police officer—*State v. Abdul Rashid*, A 1963 M. P. 71=1963 (1) Cr. L. J. 197.
- S. 247, (p. 870)**—An offence under S. 112, Motor Vehicles Act is a non-cognizable offence, charge-sheet lodged by police cannot be treated as a complaint attracting operation of S. 247—*State of Madhya Pradesh v. Abdul Kadir*, A 1963 M. P. 125=1963 (1) Cr. L. J. 442 following *Babulal*, A 1936 N 86 and *Hatim Ali*, A 1950 N 38.
- S. 247, (p. 871)**—Where proceedings taken in absence of complainant without dispensing with his personal attendance and no order of acquittal was passed and no prejudice shown, *held*, the trial is not vitiated—*Prem Kumar*, A 1963 Raj 77=1963 (1) Cr. L. J. 321.
- S. 247, (p. 872)**—A Court can resort to S. 247 and acquit an accused only if the complainant does not appear on the adjourned date. Where the case was adjourned to a specific date for issue of summons to the accused and the Court cannot act under S. 247 on an earlier date on the ground that the complainant was absent—*S. P. Rangaswamy Gounder*, (1964) 1 M. L. J. 998; *Dagadu v. Goppal Singh*, A 1962 M. P. 383 following *Laxmi Prasad*, A 1940 N 357.
- S. 247, (p. 874)**—A Magistrate cannot wait indefinitely till the closing hours of the Court before an order under this section can be passed—*Chinnan v. Chandramma*, A 1963 Or 90=1963 (1) Cr. L. J. 602.
- S. 248, (p. 876)**—Where there was a case of a private complaint in respect of two acts of house trespass and the Magistrate passed an order of acquittal with respect to the earlier trespass with liberty to file a fresh complaint, *held* that the order was without jurisdiction and the legal affect of that order was one of discharge, hence, the prosecution was not barred under S. 403—*Verathaiah v. Ramaswamy*, A 1964 Mys 11.
- S. 249, (p. 878)**—There is no provision in the Code which enables a complainant in a warrant case to withdraw his complaint at any stage of the trial. S. 249 is restricted to summons cases under Chapter XX—*Verathiar v. Ramswamy*, A 1964 Mys 11.
- S. 251(1), S. 436, (p. 900)**—The word 'Trial' has been used in S. 250A (1) in the sense of a proceeding in the nature of an

“enquiry” commencing from the appearance of the accused. Thus the proceeding preceding an order of discharge under S. 251A (2) is not a trial in the strict sense but is only in the nature of an inquiry. The District Magistrate has jurisdiction under S. 436 to set aside the order of discharge—*Sellamal v. Periammal*, A 1962 M 142 ; 1962 (1) Cr. L. J. 439.

- S. 251A (2) and (3), (p. 901)**—In the context the word ‘ground’ in sub-sections (2) and (3) must be taken to have been used in its ordinary dictionary sense, meaning basis, foundation or valid reason—*Manjoor Khan*, A 1962 Mys 106 ; 1962 (1) Cr. L. J. 730.
- S. 251A, (3,) (p. 901)**—There is no illegality if a Magistrate relies on the submissions made by the prosecution during hearing at the stage of S. 251A (3) that identification basis of which is to be found in the First Information Report will be supported by other evidence at the trial—For that purpose looking into the Police Diary should not be resorted to—Even if the Magistrate looks into the police diary that only approved an aid to the Court—*Joti Jiban*, A 1964 C 59 following *A. K. Roy*, 66 C. W. N. 697 (F. B.) ; 1962 (1) Cr. L. J. 285 and *Noor Mohammad*, A 1959 C 276=62 C. W. N. 717=1959 Cr. L. J. 586 explained.
- S. 251A, (p. 902)**—Under S. 251A (7) the Magistrate is bound to take all such evidence as may be produced by the prosecution. Sub-section (4) of S. 173 does not control sub-section (7) of S. 251A—*Sardar Khan*, A 1963 M. P. 337 following *Premchand Kheltry*, A 1958 C 293=1958 Cr. L. J. 622=62 C. W. N. 198 and *In re Padai Goundan*, A 1957 M 292 overruling *Laxminarayan Khemchand*, A 1961 M. P. 13=1961 (1) Cr. L. J. 92.
- Ss. 257, 251A (2), (p. 925)**—The consideration for the exercise of the powers under S. 257 or 251A (2) and those prescribed therein and if those considerations are not existing, the Court cannot refuse the application of the accused—*In re Raghatam*, A 1963 A. P. 362.
- S. 259, (p. 930)—Scope**—The interpretation of S. 259 is that the power conferred by it may be exercised by it with reference to all compoundable and all non-cognizable offences—*Shankar Das v. Mahu Ram*, A 1963 H. P. 82.
- S. 263, (p. 944)**—Where a summary trial resulted in acquittal, recording of judgment is not necessary but a brief statement of reasons should be recorded—*State of Mysore v. Mohabala Shetty*, A 1963 Mys 77=1963 (1) Cr. L. J. 306 following *A. Joseph*, A 1959 Ker 10=1959 Cr. L. J. 45.
- S. 264, (p. 945)**—In cases of summary trial where no appeal lies under S. 414, compliance with provisions of S. 264 is not necessary. Recording of substance of evidence and judgment is necessary where appeal lies—*Municipal*

Committee, Sirsa v. Kripa Ram, A 1962 Punj 203=1962 (1) Cr. L. J. 621.

- S. 265, (p. 947)**—The words “shall be written by the presiding officer” in S. 265 (1) should not be interpreted as to exclude the typing of judgment by the Magistrate or the Judge himself. At the most it would be an irregularity curable under S. 537—*Veerathiah v. Ramaswamy*, A 1964 M 11 following *Abdul Aziz*, A 1956 A 637 and not following *Nagappa Seth v. Holalkar Municipal Council*, A 1955 Mys 109.
- S. 269 (4), (p. 953)**—has no application to a trial before the City Sessions Court by virtue of the amendment introduced in the (W. B.) City Sessions Court Act, 1953 by the West Bengal Criminal Law Amendment Act, 1956—*Haridas Mundra*, A 1964 C 30=1964 (1) Cr. L. J. 30.
- S. 278, (p. 967)**—Where in a trial by jury on a murder charge, a juror who was a witness to the inquest Report acted as a juror and no objection was taken before the trial Court, *held*, the accused was precluded from taking objection in the appeal—*Shankar Kumar*, A 1962 C 449=1962 (2) Cr. L. J. 336 following *Kishori Khanna*, A 1943 C 515 (518)=44 Cr. L. J. 483; *Kapil Deo Shukla*, A 1958 S. C. 121 (124)=1958 Cr. L. J. 262.
- S. 288, (p. 981)**—The words “produced and examined” in this section clearly indicate that the section comes into play only after the evidence of a witness concerned is concluded—*Abdul Ahad Lone*, A 1964 J & K 13.
- S. 297, (p. 1004)**—Where the judge instructed the jury that the statement made by a witness before the committing Magistrate can be treated as substantive evidence although the statement was not admitted under S. 288, *held* the instruction so given is a misdirection which vitiated the jury’s verdict—*Nidhan Misra*, A 1962 C 173; 1962 (1) Cr. L. J. 315.
- S. 337, (2), (p. 1071)**—itself shows that the motivating factor to turn what is known in England as “King’s Efficence” is the hope of pardon. While it must be short that the approver is a witness of truth, for judging the credibility of the approver the evidence led to corroborate him in material particulars would be relevant for consideration—*State of Andhra Pradesh v. Gandeswar Rao*, A 1963 S. C. 1850.
- S. 337, (p. 1074)**—Approver’s evidence—There should be corroboration in material particulars and *qua* each accused—*Bhiva v. State of Orissa*, A 1963 S. C. 599 following *Bhubani Sahu*, 76 I. A. 147; A 1949 P. C. 257; *Baskerrilla*, 1916—2 K. B. 638, *Babu Singh v. State of Punjab*, (1963) 3 S. C. R. 749, *Chinna Gowda v. State of Mysore*, (1963) 2 S. C. R. 517.

- S. 340, (p. 1082)**—Right conferred by this section does not extend to a right in the accused to be provided with a lawyer by State—*Dukhia De*, A 1963 Or 144.
- S. 340, (p. 1082)**—A note of warning is to be struck against the practice of some of the Sessions Judges appointing raw and inexperienced jurors to defend accused in capital cases—*Kunnummal Mohammad*, A 1963 Ker 54=1963 (1) Cr. L. J. 175.
- S. 340, (p. 1084)**—Trial of criminal cases would be held during Court hours so that the accused persons may have opportunity to avail of legal assistance—*Afzal Hussain*, A 1962 Raj 216 ; 1962 (2) Cr. L. J. 496.
- S. 342, (p. 1096)**—Add to footnote 93 ; *Sarashibala*, A 1962 P 244=1962 (1) Cr. L. J. 743.
- S. 342, (p. 1097)**—Where prosecution evidence discarded, conviction on statement of accused partly exculpatory and partly inculpatory. It must be used as a whole—*Narain Singh v. State of Punjab*, (1963) S. C. R. 678.
- S. 344, (p. 1105)**—Where simultaneous departmental and criminal proceedings go on, *held*, there is no provision for stay of criminal proceedings. Article 20 (3) of the Constitution has no application—*Premal*, A 1962 A 232.
- S. 344, (p. 1108)**—Stay order by higher court does not have the effect of ousting the jurisdiction already passed by the Subordinate Court. Any proceedings taken in the Subordinate Court in ignorance of the order cannot be regarded as a nullity—*Ram Raj*, A 1963 A 588 following *Puroshotam Saran*, A 1927 A 401 (F. B.) ; *Jagdish Pratap Sahi*, I. L. R. (1960) 2 A 812.
- S. 344 (1-A), (p. 1108)**—Where a case is adjourned for absence of the accused the Magistrate cannot order payment of adjournment cost to the complainant—*Monoranjan Roy v. Gadeshu Mondal*, 65 C. W. N. 909 ; A 1962 C 98=1962 (1) Cr. L. J. 139.
- S. 349, (p. 1130)**—The important words in S. 29 are “Subject to the other provisions of this Code.” If the Court other than the one mentioned in the Special law tried an offender, the proceedings shall be void under S. 530—*Sabir Ali*, A 1962 A 405=1962 (2) Cr. L. J. 305.
- S. 367, (p. 1168)**—Where the judgment does not contain a discussion of the pros and cons of a point for determination framed, the judgment is not in accordance with law—*Dhulaji Bayaji*, A 1963 Guj 234 following *Banwarilal*, A 1959 Ker 111.
- S. 367, (p. 1171)**—Comparison that some of the prosecution witnesses might have given a further description of how things happened would not justify the conclusion that omission to examine this was an oblique motive and go to the

benefit of the accused—*R. K. Dalmia v. Delhi Administration*, A 1962 S. C. 1821=1962 (2) Cr. L. J. 805.

- S. 367, (p. 1171)**—The mere fact of non-examination of witnesses mentioned in F. I. R. and that they were examined by the police not on the day of occurrence but on the day following does not affect the credibility of such witnesses—*In re Ratna Reddi*, A 1963 A. P. 252.
- S. 367, (p. 1173)**—Circumstantial evidence—Add to footnote 65a, *Raghav Prapanna Tripathi*, (1963) 2 S. C. R. 239.
- S. 367, (2)**—Detention as an under trial prisoner is not punishment. Refusal to punish on account of long detention as an under trial accused is illegal—*Govind Singh*, A 1962 M. P. 36.
- S. 369, (p. 1179)**—Add to footnote 7, A 1959 A 315 (F. B.) followed in—*In re Bigamma*, A 1963 Mys 326.
- S. 376, (p. 1189)**—Add to footnote 70; *Ramshankar Singh v. State of West Bengal*, A 1962 S. C. 1239 where held; *Bhawani Prasad Bhattacharjee*, A 1935 C 386.
- S. 386 (1) (b) proviso and (3), (p. 1200)**—Where a person sentenced to undergo imprisonment and payment of fine and in default of payment a further term of imprisonment as well as imprisonment in default of fine, a warrant issued under S. 386 (1) (b) for recovery of the fine cannot be executed as a decree under sub-s. (3) unless special reasons are shown for its execution—*Vaman Shenoy v. Collector of South Canara*, A 1964 Mys 64 following *Jadavendra Nath Panja*, A 1938 C 149.
- S. 397 (2), (p. 1206)**—After amendment by Act 26 of 1955 two sentences of transportation for life in two different cases should be ordered to run concurrently in view of S. 397 (2)—*Uttam Singh*, A 1963 Punj 193.
- Ss. 402, 402A, (p. 1214)**—In case of an order of Governor commuting death sentence confirmed by the High Court, High Court cannot under Article 226 of the Constitution direct a *mandamus* on the State against executing death sentence—*Pokaso*, A 1962 A 151; 1962 (1) Cr. L. J. 241.
- S. 403, (p. 1220)**—Where there was a case of private complaint in respect of two acts of house trespass and the Magistrate passed an order of acquittal with respect to an earlier trespass with liberty to file a fresh complaint, *held* that the order was without jurisdiction and the legal effect of that order was one of discharge, hence the prosecution was not barred under S. 403—*Veerathiah v. Ramaswamy*, A 1964 Mys 11.
- S. 417, (p. 1255)**—An appeal from acquittal need not be treated differently from an appeal from conviction and if the High Court finds that the acquittal is not justified by the evidence

on record, it can set aside the acquittal without coming to the conclusion that there are compelling reasons for doing so—*Radhakishan v. State of Uttar Pradesh*, A 1963 S. C. 822 ; *State of Madhya Pradesh v. Ahmedullah*, A 1961 S. C. 998.

S. 417, (p. 1255)—High Court can interfere with a finding of fact based on an erroneous rejection of the evidence—*Dhulaji Bavaji*, A 1963 Guj 234.

Ss. 417, and 423, (p. 1253)—Where after an acquittal of all the accused persons on a charge under S. 414, I. P. C. the State Government preferred an appeal under S. 417 only against an accused against whom there was better evidence for establishing that he was in possession of stolen property, *held* the State could challenge the correctness of the finding of the Sessions Judge about the property being stolen property and consequently the High Court could record its own findings on that question—*Ajemdra Nath v. State of M. P.*, A 1964 S. C. 170.

Ss. 417, 423 (1) (a), (p. 1254)—Where conviction of the accused under S. 304, Penal Code, on an appeal by the accused was confirmed by the High Court, then State filed an appeal against his acquittal on the charge under S. 302, I. P. C. *held*, the accused could not be convicted under S. 302, I. P. C.—*Dewanji Gardharji*, A 1963 Guj 21.

Ss. 417 and 423, (p. 1255)—Appellate Court interferes with an order of acquittal only when it is satisfied on an examination of all questions of law and fact that the view taken by the acquitting Judge is clearly unreasonable—*Sheonandan*, A 1964 A 139 following *Harbans Singh v. State of Punjab*, A 1962 S. C. 439 ; 1962 (1) Cr. L. J. 479 ; See *Dharamdas*, A 1960 S. C. 734.

S. 419, (p. 1259)—Complaint under S. 476 is to be granted as an order for purpose of S. 419—*Ramchandra*, A 1963 A 352.

S. 423, (p. 1268)—Where pleas of fact were not taken at the trial, *held*, High Court was justified in not allowing appellant to take these pleas for the first time at appellate stage—*Afzalullah v. State of Uttar Pradesh*, A 1964 S. C. 264.

S. 423, (p. 1268)—Appellate Court cannot allow questions like a Police Officer carrying on search of residence of the accused if he had no authority to conduct the search to be raised for the first time in appeal—*Puroshottam Mahadeo*, A 1963 B 74.

S. 423, (p. 1268)—Joint appeal.—Where several persons are convicted at a single trial by a Sessions Judge or an Additional Sessions Judge, all persons or some of the accused persons can file a joint appeal—*Lalu Jela*, A 1962

Guj 125 (F. B.) where *Rabari Ghela, Jadab v. State of Bombay*, A 1961 S. C. 748 distinguished.

S. 423, (p. 1275)—Where proceedings under S. 19 (f), Arms Act were instituted without the previous sanction of the authority required under S. 29 of the Act, the entire subsequent proceedings would be illegal and void—*Ramchand*, A 1963 Punj 8.

Ss. 423 and 428, (p. 1276)—An order for retrial is made in exceptional cases and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it, or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no fair trial. If the Appellate Court thinks that the additional evidence is necessary in the interests of justice and for a just and proper decision of the case the Appellate Court should instead of directing a retrial exercise its powers under S. 428 (1)—*Ukhakhola v. State of Maharashtra*, A 1963 S. C. 1531.

S. 423, (1) (b), (p. 1276)—is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged in dealing with an appeal preferred by him against an order of conviction in respect of another offence charged and found proved Appellate Court cannot order retrial on charges on which the accused was acquitted but can do so only in exceptional circumstances—*State of Andhra Pradesh v. T. Narayan*, A 1962 S. C. 240.

S. 423, (p. 1283)—Murder case—Where deceased developed illicit intimacy with the daughter of the accused which had put the latter to great ignominy, held life sentence was sufficient—*Raghunath Sarma*, A 1963 p. 268.

S. 424, (p. 1287)—Contents of appellate judgment—An order of confirmation without considering defence plea of *alibi* and evidence in support of it is improper and cannot be accepted—*In re Ay Yana*, A 1963 A. P. 334.

S. 424, (p. 1287)—Where in a murder trial the High Court rejected the plea of self defence set up by the accused on the ground that it was inconsistent with the portion of a document filed in the case but which had been excluded from the evidence in the case and the High Court failed to consider the evidence of injuries sustained by the parties, held that the judgment of the High Court suffered from a serious infirmity and therefore the conclusions of the High Court could not be accepted—*Gurucharan Singh*, A 1963 S. C. 340.

- S. 431, (p. 1298)**—Where a substantive sentence of imprisonment and fine were imposed on an accused person who died during the pendency of the appeal *held*, appeal so far as it relates to substantive sentence abates but survives as regards the sentence of fine—*Govinda Rajalu*, A 1962 Mys 275.
- S. 437, (p. 1325)**—Where two views are possible on the evidence it is the duty of the Magistrate to commit the accused for trial. Where that was not done the accused must be deemed to have been improperly discharged in regard to the offence triable exclusively by the Court of Sessions—*In re Ranadhir*, A 1962 M. P. 239.
- S. 439, (p. 1345)**—Where a Court directed production of a document subject to objection that might have been taken, *held* that the Judge had exercised his discretion under S. 94, Cr. P. C. read with S. 162, Evidence Act calling for the document from the D. I. G., Kashmir and it could not be said that the discretion was exercised arbitrarily so as to warrant interference by the High Court in revision—*State v. M. A. Beg*, A 1963 J. & K. 20.
- S. 439, (p. 1352)**—Unless there are exceptional circumstances a sentence of imprisonment which has been completely undergone should not be enhanced in revision—*Babaji Gulaji*, A 1963 Guj 222.
- S. 439, (p. 1358)**—Where second class Bench of Magistrates one of whom was invested with first class powers under S. 15 (2) tried a case and accused was sentenced to pay fine not exceeding rupees two hundred, *held* the remedy was by way of appeal which not having been filed, revision under S. 439 was not maintainable—*J. D. Katavil v. C. Municipality*, A 1963 Ker 200.
- S. 439, (p. 1359)**—**Death**—In a proper case the High Court can exercise the powers of revision of an order made against the accused person after his death—*Niranjan Amma Kamalu*, 1962 M. W. N. 398 (S. C.) following *Pranab Kumar Mitter v. State of West Bengal*, 1959 (1) S. C. R. 631 ; A 1959 S. C. 144.
- S. 464, (p. 1363)**—The Magistrate is concerned with the condition of the mind of the accused at the time of the inquiry only and not at the time of the alleged commission of the offence—*State v. Seetharam*, A 1964 Mys 50.
- S. 465, (p. 1363)**—In order to claim the benefit of S. 84, I. P. C. The crucial point of time at which the unsoundness of mind has to be established is the time of the actual act of offence and the burden of proving that the accused is entitled to the benefit of the exception is upon the accused—*Subramanian*, (1964) M. L. J. 156 ; *State of Madhya Pradesh v. Ahmedullah*, A 1961 S. C. 998.
- S. 476, (p. 1396)**—Appeal under S. 476B is against making a complaint and not recording a finding. Starting date of limitation is

the date on which the complaint is signed and not forwarded to the nearest Magistrate—*Ramchandra*, A 1963 A 352.

S. 517, (p. 1527)—empowers the Criminal Courts to deliver the property to any person claiming to be entitled to possession. The Court is therefore to decide the question of possession—*Issac Samuel*, A 1964 Ker 124.

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Addenda

Amendments

Section 118, (p. 273).—The bracket and figure “1” shall be omitted *vide* Act 52 of 1964 (Repealing and Amending) Act, 1964, 2nd Schedule, published in *Gazette* of India, Ext. 30-12-64.

Section 198, (p. 667).—The 2nd proviso added by Act 28 of 1943 Section 2 which was substituted by the Criminal Procedure Amendment Act 56 of 1960 published in *G. I. Ext.* Part II, Schedule 1 No. 44, dated 27th Dec., 1960 as follows :—

“Provided further that where the person aggrieved by an offence under Section 494 of the said Code :—

(a) is the wife, any relative of the wife may make a complaint on her behalf.

(b) is the husband, and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (1) of Section 199-B may, with the leave of the Court, make a complaint on his behalf.

Explanation.—For the purposes of clause (a) of the Second proviso “relative” means any lineal descendant or ascendant of the wife, her brother or sister, or her father’s or mother’s brother or sister.”

The Criminal Procedure (Amendment) Act 56 of 1960 has been repealed by Act 52 of 1964 Repealing and Amendment Act, published in *G. I. Ext.*, dated 30-12-64. now.

Section 198, (p. 667).—Read by deleting clause (a) in 2nd proviso and the Explanation and by omitting the bracket (b). The 2nd proviso added by Act 28 of 1943 Section 2 is restored.

Section 198-B, (p. 671).—(1) in Section 198-B,—

(a) in sub-section (1), the brackets and words “(other than the offence of defamation by spoken words)” shall be omitted.

(b) after sub-section (5), the following sub-section shall be inserted, namely :—

“(5-A) Every trial under this section shall be held in camera if either the party thereto so desires or if the Court of Sessions so thinks fit to do.”

(c) after sub-section (13), the following sub-section shall be inserted, namely :—

“(14) Where a case is instituted under this section for the trial of an offence, nothing in sub-section (13) shall be construed as requiring a complaint to be made also by the person aggrieved by such offence.” [*Vide* Anti-Corruption Laws (Amendment) Act, 1964, *Gazette* of India, Ext., Part II, dated, 19-12-64].

Section 222(2), (p. 775).—In sub-section (2) for the words “dishonest misappropriation of money, it shall be sufficient to specify the gross sum,” the words “dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or as the case may be, describe the movable property” shall be substituted. [*vide*, Anti-Corruption Laws (Amendment) Act 40 of 1964, *G. I. Ext.* Part II, Schedule I No. 43, 19-12-64.]

Section 492, (p. 1458).—In sub-section (1) of Section 492 for the words * “the State Government” the words “The Central Government or the State Government” shall be substituted. (*vide* Act 40 of 1964).

Section 495. (p. 1467).—In sub-section (1) of Section 495, for the words “generally or specially empowered by the State Government”, the words “Generally or specially empowered by the Central Government or the State Government” shall be substituted. [*vide* Anti-Corruption laws (Amendment) Act 40 of 1964.]

Sections 251-A, 344, 435 and 540-A.—While amending the Prevention of Corruption Act, Act 1 of 1947 by insertion of Section 7-A of the said Act, Section 251-A(8), Section 344 (1-A), Section 435 and Section 540-A Cr. P. Code for the purposes of trial of offences punishable under Section 161, Section 165 or Section 165-A I. P. C. or under Section 5 of the said Act, the provisions of the Code of Criminal Procedure shall in their application to such proceeding have effect as if.

Section 251-A, (p. 898).—(a) in sub-section (8) of Section 251-A for the words “The accused shall then be called upon”, the words “The accused shall then be required to give in writing at once or within such time as the Magistrate may allow a list of persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon” had been substituted.

Section 344, (p. 1103).—(b) in sub-section (1-A) of Section 344 after the Second proviso the following proviso had been inserted, namely :—

“Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under Section 435 has been made by a party to the proceeding.”

Section 435, (p. 1301).—(c) in sub-section of Section 435 before the Explanation the following proviso has been inserted, namely—

“Provided that where the powers under this sub-section are exercised by a Court on an application made by a party to such proceedings the Court shall not ordinarily call for the record of the proceeding :—

(a) without giving the other party an opportunity of showing cause why the record should not be called for, or

(b) if it is satisfied that an examination of the record of the proceeding may be made for the certified copies thereof ;

and in any case, the proceedings, before the inferior Court shall not be stayed except for reasons to be recorded in writing.”

Section 540-A, (p. 1620).—(d) after sub-section (2) of Section 540-A, Cr. Code, the following sub-section had been inserted, namely :—

“Notwithstanding anything contained in sub-section (1) or sub-section (2) the Judge or Magistrate may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witnesses for cross examination.” [*vide*, Anti Corruption Laws (Amendments) Act 40 of 1964.]

State Amendments

Section 4(f), (p. 16)—Union Territories (Goa, Daman and Diu).—“Cognizable Offence” Notwithstanding anything contained in Cr. P. Code, 1898 (5 of 1898) an offence under Goa, Daman and Diu Entertainment Tax Act, 1964 (Goa Act 2 of 1964) shall be cognizable in virtue of Section 15 of that Act. (Goa Government Gazette, 9-4-1964, serial No. 1 No. 15 Supp. p. 117).

Section 4(f)—Andhra Pradesh.—Cognizance of Offences under Andhra Pradesh Co-operative Societies Act, 1964 shall be cognizable as specified in Section 85 of that Act. (A. P. Gazette, 25-2 1964, Part IV Ext.)

Section 13—Assam.—The Code of Criminal Procedure, 1898 (5 of 1898) Section 13 is amended by Code of Criminal Procedure (Assam Amendment) Ordinance, 1964 (Assam Ordinance 2 of 1964) Section 13 of the said Code substituted. (Assam *Gazette*, dated 10-2-1964, Ext. p. 140.)

Section 14(2)—Gujarat.—Police Officers appointed in Column of the Schedule to this notification appointed as special Magistrates for the areas within their respective jurisdiction and power specified in Column 2 of the schedule conferred upon them. Bombay Home Department Notification No. 3261-7D, dated 21-2-1955 Suspended. (Gujarat Government *Gazette*, 21-5-1964, Part IV-A, p. 65.)

Sections 29-B and 399, (p. 75)—Mysore.—The said sections cease to apply to the State of Mysore by Section 6(1) of Mysore Children Act 1964 (Mysore Act 19 of 1964). (Mysore *Gazette*, dated 9-4-1964, Part IV, Section 2-B, p. 373.)

Section 32—Union Territories—Andaman and Nicobar Islands.—A Magistrate of first class can lawfully pass a sentence of fine exceeding two thousand rupees for an offence punishable under Andamans and Nicobar Islands Rent Control Regulation, 1964 (Regulation 7 of 1964). (*Gazette of India* Ext. 18-5-1964, Part II, Section 1 p. 241.)

Sections 102-103, (p. 177)—Andhra Pradesh.—The provisions of the said sections relating to search and seizure apply, so far as may be, to searches and seizures under Clause 11 of Andhra Pradesh Food Grains Dealers' Licensing Order, 1964. A. P. *Gazette* Ext., 26-1-1964, Pt II, p. 1 ; apply to searches and seizures under Clause 4 of A. P. Rice Procurement (Levy) Order, 1964, (A. P. *Gazette*, of A. P. 4-3-1964, Ext. Pt II p 1.)

Gujarat.—The said sections relating to search and seizures shall apply, so far as may be, to searches and seizures under Clause 11 of Gujarat Food Grains Dealers' Licensing Order, 1964. (Gujarat Government *Gazette*, 12-3-1964, Pt IV-A p 234.)

Kerala.—Reporting to search and seizure apply, so far as may be, to searches and seizures under Clause 11 of Kerala Food Grains Dealers' Licensing Order, 1964. (Kerala *Gazette*, 24-3-1964, Suppl Pt. 1 G. 936.)

Madras.—The said sections relating to search and seizure, so far as may be, apply to searches and seizures under Section 13(2) of Madras Food Grains Dealers' Licensing Order, 1964. (Ft. St. George *Gazette*, 11-3-1964, Pt V, p. 240.)

Mysore.—Provisions of Sections 102-103 relating to search and seizure apply, so far as may be, to searches and seizure under Clause 11 of Mysore Food Grains Dealers' Licensing Order, 1964. (Mysore *Gazette*, 20-5-1964, Pt IV, S. 2, p. 188.)

West Bengal.—Provisions of Sections 102-103 relating to search and seizure so far as may be, apply to searches and seizures under paragraph 8 of West Bengal Rules and Paddy Control Order, 1964. (*Calcutta Gazette*, 19-2-1964, Ext. Pt. I, p. 477) ; apply to searches and seizure under paragraph 6 of West Bengal Rice and Paddy Purchase (Levy) Order, 1964. (*Calcutta Gazette*, 21-2-1964, Ext. Pt I, p. 519.)

Maharashtra.—Provisions of Sections 102-103 relating to search and seizure so far as may be, shall apply to searches and seizures under Maharashtra and Gujarat Rice (Export Control) Order, 1964. *Gazette of India*, 16-4-1964, Pt. II, S. 3(i), Ext., p. 433.

Punjab.—Provisions of Sections 102-103 relating to search and seizure shall apply, so far as may be, to searches and seizures under Clause 11 of Punjab Rice Dealers' Licensing Order, 1964. (*Punjab Government Gazette*, 10-4-1964, Ext. Pt. III, p. 525.)

Section 492(1), (p. 1460)—Mysore.—Assistant Controller of Weights and Measures working in the State appointed as Public Prosecutors for conducting prosecutions under Mysore Weights and Measures (Enforcement) Act, 1958 (Mys Act 2 of 1959). (*Mysore Gazette*, 2-4-1964, Pt. IV of S. 2-C(ii), p. 876.)

Chapter XLII, (p. 1509)—Mysore.—The provisions of Chapter XLII Cr. P. Code, so far as may be, shall apply to bonds taken under Mysore Children Act, 1964 (Mys Act 19 of 1964) by virtue of Section 97 of the said Act. (*Mysore Gazette*, 9-4-1964, Pt. IV, S. 2-B, p. 373.)

Section 544, (p. 1625)—Gujarat.—Rules under Section 544, Cr. P. Code were published under Government of Bombay Notification, Home Department No. PALO 2534, dated 2-5-1956. The said rules in their application to the State of Gujarat have been superseded by Gujarat Payment of Expenses to Witnesses (Officers of other Governments) Rules, 1963. (*Gujarat Government Gazette*, 13-2-1964, Pt. IV-A, p. 111—5 Rules and a Schedule.)

Cases Published up to August, 1965

Section 1 (p. 8) Statement of Objects and Reasons.—It is common place that a Court cannot construe a provision of the Constitution on the basis of the Statement of Objects and Reasons and the Supreme Court cannot depart from the statutory rule of construction. *Vajravalu v. Sp. Dy. Commissioner*, A 1965 S C 1017 (1021).

Section 1 (2), Section 4 (1) (m), Section 5 (12) (p. 10).—The Kerala General Sales Tax Act does not contain any special forum of procedure for the Trial of offences under the Act, the Criminal Procedure Code will be appli-

cable. The procedure relating to offences against other laws given in Schedule II of the Code are applicable under 'judicial proceeding' as defined in Section 4 (m). The endorsement by the Chief Presidency Magistrate, Madras of the warrant for execution of arrears of Sales Tax recoverable as a fine under Section 387 Cr. P. C. is a judicial order and is revisable under Section 439. *Subramaniam v. Commissioner of Police*, A 1964 M 185: 1964 (1) Cr L J 519.

Section 4 (1) (m), (p. 31).—In order to be judicial, a proceeding must relate in same way to the administration of justice. *Dhani Ram v. Sub-divisional Judge Theog*, A 1965 H P 25.

Section 4 (1) (n), (p. 32).—Offence under the Rajasthan Food Grains Dealers' Licensing Order, 1958, breach of which is liable to be punished under Section 3 (2) (i) of the Essential Commodities Act is a non-cognizable offence and must be treated as a summons case. *Gyasiram*, A 1964 Raj 237 : 1964 (2) Cr L J 606.

Section 5 (p. 37).—Where a special law [Section 130 (19) of the Motor Vehicles Act] is applicable, resort to the provisions of Section 242 is illegal. *Doomgershi*, A 1965 C 215.

Section 10 (2), Section 192 (1), (p. 46).—Under Section 10 (2) the Additional District Magistrate has all the powers of a District Magistrate and although an additional District Magistrate for the purposes of Section 192 (1) is deemed to be subordinate to the District Magistrate, he has power to transfer cases. In re, *Kanhaiyalal Daulatramji*, A 1965 M P 53 : (1965) 1 Cr L J 298.

Section 12 (2), Section 177, (p. 50).—Where a person is appointed a Magistrate for a district and there is no notification by the State Government limiting his jurisdiction, the powers and jurisdiction of the Magistrate extend throughout the district under the provisions of Section 12 (2). In re, *Kanhaiyalal Daulatramji*, A 1965 M P 53 : (1965) 1 Cr L J 298.

Sections 14, 39 (1), (p. 55).—The expression 'local area' in Section 14 is not limited to an area within the district but is wide enough to include the entire State. *P. M. Deshpande v. Ferro Alloys Corporation*, A 1964 A P 471.

Section 29, (p. 73).—The jurisdiction of the Court-martial or of the Magistrate depends upon whether the person is or is not charged under Section 71 of Air Force Act. The Magistrate has to follow the procedure laid down by Section 125 of that Act and the rules framed thereunder. *S. R. Tripathi*, A 1964 A 371.

Section 32, (p. 82).—Offence under Sections 7 and 12 of the Essential Commodities Act is triable by a Magistrate, 1st Class. Where the accused imported food grains after application for but before receipt of licence, held, conduct of the accused was not *bona fide*, fine of Rs. 2,000/- should be awarded. *Jogilal*, A 1965 M P 27 : 1965 (1) Cr L J 43.

In a case of an offence with a Criminal complex, deterrent punishment should be inflicted. *Kalu*, A 1964 M P 182 : 1964 (2) Cr L J 185.

Section 35, (p. 89).—Offences defined by Sections 279, 280, 336, 337 and 338 I. P. C. can be viewed as minor offences included within Section 304-A I. P. C. Accused once convicted under Section 304-A cannot be convicted under Section 279 I. P. C. *Shiva Ram*, 1965 A 196.

Section 46, (p. 107).—Police custody commences from the time movements of the accused are restricted or he is kept in police surveillance. *Paramhansa*, 1964 or 144 : 1964 (1) Cr L J 680.

Sections 51, 54 (1) (iv), Sections 523 and 550 (p. 109) Gold and Silver suspected to be stolen—search and seizure—disposal of property seizure—proper procedure.—Where a person is arrested under Section 54 (1) (iv) on suspicion that he was carrying stolen property and on a search of such person under Section 51 Gold and Silver is seized under Section 550, Section 523 provides for the procedure in that behalf. *Kasturilal v. State of U. P.*, A 1965 S C 1039.

Section 83, (p. 143).—A warrant issued under Section 183 directing the arrest of the proprietor of a firm without mentioning either the name or the description of the person to be arrested is not a valid warrant. *Velepan*, A 1965 Ker 72 following *Sagarmal Khemraj*, A 1940 B 397.

Section 94, (p. 159).—If the document is such as is not the statement of the accused conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document, but if the order relates to a document which contains any statement of the accused based on his personal knowledge, the order for its production will attract the constitutional bar against testimonial compulsion under Article 20 (3) of the Constitution. *Prabhu Singh*, A 1964 Punj 325 : 1964 (2) Cr L J 199 following *State of Bombay v. Kuthi Kula*, A 1961 S C 1808 : 1961 (2) Cr L J 856.

Section 96, (p. 166).—The provisions of Cr. P. Code relating to search apply to search warrants issued under Sections 96, 98 and Form 8 of the Schedule V does not operate in connection with searches under Section 19 (3) Foreign Exchange Act. *Nilratan Sarkar v. Lakshmi Narain*, A 1965 S C 1.

Section 19-A of the Foreign Exchange Act does not take away the general powers vested in the Court contained in Cr. P. Code in respect of property seized under a search warrant. *Eastern Machinery Trading Co.*, A 1964 B 127 : I L R (1963) B 778 following *A. K. Srivastava*, A 1956 C 609, *Ganpatram v. Collector of Land Customs*, A 1960 C 572.

Section 99-B, (p. 173).—Add to footnote 15 : *Nawal Kishore*, A 1964 Punj, 269 (F B) : 1964 Cr L J 696 (F B).

Section 103, (p. 183).—Non compliance with provisions of Section 103 is a mere irregularity. *State v. Satyanarayan*, A 1965 or 136 following *Sunder Singh v. State of U. P.*, A 1956 S C 411 : 1956 Cr L J 801.

Non recording of reasons for search under Section 163 makes the search illegal. The illegality of the search however does not make the evidence of seizure inadmissible. *State v. Satyanarayan*, A 1965 or 136 following *Cochan Velayudhan*, A 1961 Ker 8 (F B) 1961 (1) Cr L J 70, *Radha Kishan v. State of U. P.*, A 1963 S C 822 ; 1963 (1) Cr L J 809 and distinguishing *State of Rajasthan v. Rajman*, A 1960 S C 210 : 1960 Cr L J 286.

Section 107, (p. 197).—Person proceeded under Section 107 can not be granted bail. The procedure to be followed is provided under Section 117 (3). *Chandra Kishore v. Jogendra*, A 1965 Tripura 20.

Section 107, 117 (3), Section 145, (p. 202).—Where there is a *bona fide* dispute between the parties, a proceeding under Section 145 should be started against them but the Magistrate if he so desires has discretion to direct proceeding under Section 107 against both the parties. If such a proceeding is drawn up against only one party, that party will be placed in a disadvantageous position against the other party, similar principle applies in the case of an interim order under Section 117 (3). *Sathuhan Jha*, A 1964 P 445 : 1964 (2) Cr L J 438.

Sections 107, 112, (p. 204).—Initiation of the proceedings under Section 107 depends upon the subjective satisfaction of the Magistrate. Proceedings may be dropped at any stage even after passing an order under Section 112. *Asghar Khan*, A 1964 A 391 following *Chatta Ittaman*, A 1953 Tr Cr 24, *Shankaran v. Dulla*, A 1958 Raj 150 : 1958 Cr L J 970.

Section 133 (p. 307).—Action can only be taken in cases of long standing unlawful obstruction in case of emergency where the public shall be put to great inconvenience and shall suffer an irreparable injury. Action can always be had where unlawful obstruction or nuisance is recent. *Asharfi Lal*, A 1965 A 215 : (1964) All L J 629.

Section 133, (p. 308).—Rights of the riparian owners, however numerous they may be and the private personal rights of each individual owners are not the rights of the public and in directing the petitioner to remove the dam in question on the ground that it interfered with the rights of irrigation of the lower riparian owner the Magistrate acted without jurisdiction. *M. Vellapan v. Narayan Nair*, A 1964 Ker 252.

Section 144, (p. 369).—Add to footnote 81, distinguished in *Khushi Mahion*, A 1964 P 526 where A and B were restrained by an order under Section 144 from going over land with standing crops and A by disobeying the order took away the crops although a riot did not take place due to B's non-resistance. *Held*, conviction under Section 188 I. P. C. was justified.

Section 145, (p. 382) Prior Decree of Civil Court about possession.—The starting of a proceeding under Section 145 between parties who had already fought out litigation in Civil Court would, to quote the words of Khaja Mohammad Noor J. in *Rajendra v. Chintamani*, A 1939 P 151 (152) "Encourage defiance of the decree of Civil Courts and paralyse the administration of Justice". *Banamali Mahapagra*, A 1964 Or 204 : I L R (1964) Cut 182.

Section 145, (p. 387).—If the Magistrate decides to hold local inspection under Section 539 B, he is to inspect the local area in presence of the lawyers and parties concerned. *Appayya Naika*, A 1964 Mys 177 : 1964 (2) Cr L J 313 following *Kistappa v. Serappa*, A 1955 Mys 131.

Section 145 (4), (p. 415).—A magistrate cannot decide question of title. It is for the Magistrate to decide on affidavits as to which party was in possession at the date of the preliminary order and in case he cannot do so he ought to refer the matter to the Civil Court. *Shamsher Bahadur*, 1964 A 394.

Section 145 (4), (p. 420).—A bare order of attachment under Section 145 without any prohibitory order directing one of the parties not to do any acts in respect of the land does not attract the provisions of Section 188, I. P. C. *Kalu Muchi*, A 1965 Ass 29.

Section 145 (4), (9), (p. 426).—The Magistrate can summon any witness under Section 145 (9) to give evidence or produce documents, though he may not have filed affidavit. *Chullamathu v. Rajaval*, 1964 (1) Cr L J 674 : A 1964 M 263 where *Bahore v. Ghore*, A 1960 Raj 15, *Kanhaiyalal v. Devi Singh*, A 1961 M P 302 : 1961 (2) Cr L J 642 *Mirza Md. Aziz*, A 1962 A 68 : 1962 (1) Cr L J 116 relied on ; *Ghutu Akonda v. Shamser Ali*, A 1964 Ass 105 : 1964 (2) Cr L J 272 (1) ; *Shial Kumar v. Tribhuban*, A 1965 P 725.

Section 145 (4), Proviso (2) (p. 419).—Is discretionary and the Magistrate may refuse to take notice of dispossession if he is of opinion that the rightful owner has dispossessed the trespasser within two months of his preliminary order. *Balram Singh v. Budha Devi*, A 1965 P 261 following. *Ganga Bux Singh v. Sukhdin*, A 1959 A 141 (F B) : 1959 Cr L J 261 ; *Janama Bhoi v. Dramupadi Bholam*, A 1952 Or 26 ; 1952 Cr L J 148 ; *Syed Md. Naim v. Dwaraka Singh*, A 1939 Oudh 31.

Section 145 (4), Proviso 3 (p. 420).—Sub-divisional Magistrate while passing an order of attachment should clearly indicate how in the interest of maintenance of peace an *ex parte* order is necessary. *Bhagwandas v. Suggan*, A 1965 Raj 143.

Section 145 (9), (p. 426).—There is no bar to a Magistrate to examine a Court witness under Section 540 even in proceeding under Section 145. *Ghutu Akonda v. Shamsher Ali*, A 1964 Ass 105 ; *Raj Kishore v. Niranjana*, A 1964 Or 226 ; 1964 (2) Cr L J 563.

Section 146, (p. 434).—Add to footnote 52 ; *Hanumappa v. Kandappa*, A 1964 Mys 195 where held that after the Civil Court on a reference under Section 146 (1) found that the Parties are in joint possession, the Magistrate can not make a declaration under Section 145 (6) and has to drop the proceedings.

Section 146 (1-A), (p. 436).—Civil Court is bound to record a finding in favour of one of rival parties, a finding that it was unable to decide which party was in possession is erroneous under Section 146 (1) (D). Revisional Court can not go into the propriety of the final order based on the finding of the Civil Court. *Badrinath*, A 1965 A 127 : 1965(1) Cr L J 271 following *Muthu Sethuvyer v. Landaswami Odayar*, A 1959 M 111 : 1959 Cr L J 355 and not following *Raja Sing v. Mohendra Singh*, A 1962 P 243 (F B) : 1963 (2) Cr L J 25.

Section 147 (2), (p. 453).—A Magistrate dealing with a proceeding under Section 147 can not pass an order for removal of an obstruction over and above passing an order prohibiting interference with the exercise of a right found by him. *Ram Ishwar Singh*, A 1965 P 1-7 following *Jamadar Mia*, A 1961 P 374.

Section 148, (p. 461).—Add to footnote 65 ; *Chandrama Rai v. Harbans*, A 1965 P 21 where held that the successor of the Magistrate who passed final orders under Section 145 can pass order for costs.

Section 151, (p. 462).—Add to footnote 76 ; *Md. Ali v. Ramsarup*, A 1965 A 161.

Section 154, (p. 468).—An information not about the occurrence of a cognizable offence but only a cryptic message in the form

of an appeal for immediate help cannot be treated as First Information Report. *Nanai Adak*, A 1965 C 89 ; 1965 (1) Cr L J 160 ; *Saroop Singh*, A 1964 Punj 508 : 1964 (2) Cr L J 718.

Section 154, (p. 471).—Add to footnote 31 ; *A. W. Khan*, A 1962 C 641 ; *State v. Hirralal*, I L R (1964) Guj 276 : A 1964 Guj 261.

Section 154, (p. 472).—The Supreme Court in *Feddi v. State of Madhya Pradesh*, A 1964 S C 1850 distinguished *Nisar Ali's case*, A 1957 S C 366 and held that F. I. R. is admissible to prove against him, his admissions which are admissible under Section 21 Evidence Act.

Section 154, (p. 472).—A narrative disclosing strained relation between the accused and the deceased several days before the occurrence in the First Information Report given by the accused being a statement disclosing motive for the crime is inadmissible under Section 25 Evidence Act. *Ram Sajiwan*, A 1964 A 447 where *Pakala Narayanswami*, A 1939 P C 47 followed, *Harnam Kisha*, A 1935 B 26 approved and *Lalit Mohan*, A 1921 C 111 distinguished.

Section 154, (p. 468).—Statement recorded by Police after starting of investigation is hit by Section 162. *State v. Ramoyudhya*, A 1965 C 348.

Sections 156 and 169, (p. 480).—Complainant's officer is to be examined at the trial as a principal witness conversant with the facts of the case. *Gopal Krishna*, A 1964 A, 481 : (1964) (2) Cr L J 497.

Section 162, (p. 497).—A 'statement' during period of investigation is not necessarily during course of investigation. The statement must be ascribable to enquiry conducted by the investigating officer and not one which is de hors the enquiry. *Baleshwar Rai v. State of Bihar*, (1963) 2 S C R 433 : 1964 (1) Cr L J 564 (S C).

Section 162, (p. 497).—A confession made by a person accused of an offence under the Bihar and Orissa Excise Act and recorded by an Excise Inspector who is empowered to investigate any offence under the Act is inadmissible by reason of the provisions of Section 25, Evidence Act. *Raja Ram v. State of Bihar*, A 1964 S C 828 : 1964 (1) Cr L J 705 where *Nanoo Sk. Ahmed*, A 1927 B 4 (F B) ; *Ibrahim Ahmed*, A 1931 C 350 ; *Amin Sharif*, A 1934 C 580 (F B) ; *Haribole Chunder*, I L R 1 C 207 ; *Public Prosecutor v. Paramasivam*, A 1953 M 917 ; *Ibrahim*, A 1944 L 57 approved ; *Ah Foong Chinaman*, A 1919 C 527 overruled.

Section 162, (p. 498).—Tape recording of a conversation between the accused and the complainant where a trap was laid in a case of prosecution under Section 165-A Indian

Penal Code did not attract the applicability of Section 162 and was admissible. *Yusuf Ali*, A 1965 B 3 : (1965) 1 Cr L J 12.

Section 162, (p. 502).—Use of statements made to Police under Section 161 for corroborating other prosecution witnesses is not permissible. *Raghu Gope*, 42 P 454.

Section 162, (p. 504).—In a case of a trial on the basis of a subsequent petition of complaint after the police had submitted final report, Section 162 applies, accused can get copies of statements made to the police by prosecution witnesses for contradicting them. *Daitari Das*, A 1965 Or 21 ; 1965 (1) Cr L J 191.

Section 162, (p. 504).—Where there are three different versions of the occurrence, statement of a person who had given F. I. R. which is not hit by Section 162 should be produced in order to enable the Court to arrive at the real truth in the case. *Mansur Ali*, A 1964 Tripura 45.

Section 162, (p. 507).—Where statements made by witnesses in deposition in Court are inconsistent with earlier statements before the police, *held*, there were contradictions within the meaning of Section 162 and no reliance could be placed on the evidence of the witnesses. *Dayabhai v. State of Gujarat*, A 1964 S C 1563 : 1964 (2) Cr L J 472.

Every omission in a statement under Section 162 is not contradiction. *Dukhi Devi*, A 1965 Or 33 following *Tahsildar Singh*, A 1959 S C 1012 : 1959 Cr L J 1231.

Section 164, (p. 516).—Statements recorded under Section 164 are not substantive evidence and can not be made use of except to corroborate or contradict the witness. *Koushalya Devi*, A 1964 Or 38.

Section 164, (p. 522).—Add to footnote 55, *Bala Majhi*, A 1951 Or 75 (F B) followed in *Param Chandra*, A 1964 Or 144 : 1964 (1) Cr L J 680 where *held* that evidence of the Magistrate is admissible under Section 533 to show voluntary nature of the confession.

Section 164, (p. 526).—Add to foot note 1 ; *Raja Ram v. State of Bihar*, A 1964 S C 828 which has overruled *Renugopal*, A 1948 M 39.

Section 164, (p. 527).—Add to foot note 12 ; *Dewan Chand*, A 1965 Or 66.

Sections 164 and 364, (p. 527).—Where the accused was charged under Section 302 Indian Penal Code for burying alive a newly born illegitimate child and an inquest was held in the presence of a Magistrate and in the “examination notes” the Magistrate besides what he had noticed at the spot, also incorporated the confessional statement alleged to have been made

by the accused before the investigating officer, *held* that the illegal recording of the confession and its admission into evidence had prejudiced the accused who was entitled to an acquittal. *Bhagray Amma*, A 1964 Ker 241 : 1964 (2) Cr L J 414.

Section 164(2), 364(3) and 533(1), (p. 529).—Where the memorandum as required by Section 364(3) was not made by a Magistrate and facts showed that only one hour was given for reflection, *held*, Section 364 was not complied with and as the Magistrate was not fully conversant with urdu and the Reader who wrote down the confession was not examined, the confession could not safely be treated as voluntary. *Bala Singh*, 1963 (2) S C J 209 : 1964 (1) Cr L J 566 (S C).

Section 164, (p. 534).—Confession of a co-accused is not evidence within Section 3 of the Evidence Act. It can be considered under Section 30, Evidence Act only after the other evidence has been considered and found satisfactory. *Mohan Singh*, A 1965 Punj 291 where *Ram Prokash v. State of Punjab*, A 1959 S C 11 1959 Cr L J 90 distinguished.

Section 165(5), (p. 539).—Where a police officer fails to comply with the provisions of Section 165 in the matter of making a record and sending a copy of it to the Magistrate as required by sub-section (5), the accused can not be held guilty under Section 353 I. P. C., *Thakur Tanti*, A 1964 P 493 : 1964(2) Cr L J 571 following *State of Rajasthan v. Rahman*, A 1960 S C 210 : 1960 Cr L J 286.

Section 167, (p. 542).—Routine remands deprecated in cases of arrest on suspicion under Section 54. *Sahadat Khan*, A 1965 Tripura 27.

Section 167, (p. 543).—Unless a police officer considers that he cannot complete the investigation within a period of 24 hours fixed by Section 61, it is his duty to produce the accused forthwith before the Magistrate. *Nara Chandra*, A 1964 Manipur 39.

Section 173, (p. 558).—It is the duty of the police to carry out prompt investigation cases of persons arrested on suspicion under Section 54. *Sahadat Khan*, A 1965 Tripura 27.

Section 173, (p. 561).—The question as to whether an order directing submission of a Charge sheet is a judicial order or an administrative order is not free from difficulty and it has been left open in *State v. Awora Bewa*, 27, Cut L T 416 ; *RatnakarDas v. Abadhitaswami*, A 1965 Or 135.

Section 173, (p. 562).—Accused is entitled to copies of documents on which the prosecution relies whether the case is instituted

on complaint or on police report. *Kanhaiyalal Daulatramanji*, A 1965 M P 53 : 1965(1) Cr L J 298 ; *Noor Khan v. State of Rajasthan*, A 1964 S C 286.

Section 176, (p. 578).—Statements recorded by a Magistrate in an enquiry by the Magistrate under Section 176 can be treated as former statements of witnesses or as confessions or admissions of accused persons. *Public Prosecutor Shaikh Ibrahim*, A 1964 A P 548 where *A Rajangam*, A 1959 M 294 dissented from.

Section 182, (p. 583).—The offence committed by a Pakistani in violation of Rule 3 of the Pass-Port Rules by travelling to India is a continuing one within the meaning of Section 182. *Abdul Samad*, A 1965 All 158.

Section 183, (p. 586).—Section 183 does not control Section 180 M (6) and Section 181(2). The object of Section 183 is to provide against the difficulties that might be frequently experienced in limiting the exact place of the commission of an offence committed in course of a journey. *Munnalal*, A 1964 Raj 118.

Section 188, (p. 583).—**Goa, Daman and Diu (Laws) Regulation 12 of 1963.**—The Indian Penal Code and Criminal Procedure Code came to be extended to Goa, Daman Diu on 1-10-1963, although the offence was committed in 1953 when the offender was an Indian citizen and the offence fell within the perview of Sections 3 and 4 I. P. C., accused whether appearing voluntarily or on process being issued on him by the Bombay Court must be said to be 'found' within the meaning of Section 188. Obtaining of certificate after filing of the complaint is not fatal. *Pheroze Jahangir Daster*, A 1964 B 264 : 1964(2) Cr L J 533.

Section 190, (p. 598).—The Medical Officer of health of the Nagar Mahapalika of Kanpur is a person duly authorised by the State Government to make complaints as contemplated by Section 20 of the Ford Administration Act. *Nagar Mahapalika, Kanpur v. Sri Ram*, A 1964 A 270 : 1964(1) Cr L J 705.

Section 190, (p. 599).—**Meaning of taking cognizance.**—Add to footnote 45, *Jamuna Singh v. Bhadai Shah*, A 1964 S C 1541 where held that where the Magistrate applies his mind not for proceeding under the various provisions of Chapter XIV but for purposes of ordering investigation under Section 156(3) or issues a secret warrant, he cannot be said to have taken cognizance of any offence when the Magistrate after examining the complainant orders the Police to institute a case and report and a charge sheet so submitted by the police, held cognizance is taken on a complaint and the police report should be treated as a report under Section 202.

Taking cognizance is a mental act, ordinarily the examination of the complainant enquiry under Section 202 or enquiry under Section 156(3) are all held with a view to find out whether cognizance should be taken or not. *Shivangowda v. Veerappa*, A 1964 Mys 129 following *Gopal Das v. State of Assam*, A 1961 S C 986 : 1961 (2) Cr L J 39 ; *Jamuna Singh v. Bhadai Shah*, A 1964 S C 1541. See *Kanhayalal Daulatramji*, A 1965 M P 53 : 1965 (1) Cr L J 298.

Taking cognizance.—A Magistrate when he applies his mind for proceeding under the various provisions of Chapter XVI of the code, he must be said to have taken cognizance of the offences mentioned in the complaint. *Shamlal*, A 1965 H. P. 37 following *R. R. Chari v. State of U. P.*, A 1951 S C 207 : 52 Cr L J 775, *Jamuna Singh v. Bhadai Shah*, 1964(2) Cr L J 468 A 1964 S C 1541.

Section 190, (p. 601).—A Magistrate takes cognizance of an offence and he can summon petitioners as accused although police mentioned other persons as accused. *Fatta*, A 1964 Punj 351 ; 1964(2) Cr L J 204 following *Saifuri*, A 1962 C 133 *Mohrab*, A 1924 Sind 71 F B.

Section 190, (p. 602).—Where a Magistrate takes cognizance on a report by a police officer in a non-cognizable offence without authority from the Magistrate, cognizance is taken under Section 190(1)(a) and not under Section 190(1)(b). *Ali Mosan Kutty*, 1965(1) Cr L J 178.

A Magistrate acts within jurisdiction in amalgamating both complaint cases but acts improperly in directing complainants to cross-examine and contradict witnesses examined by other complainant. *Giriraj*, A 1965 A 131 ; 1965 (1) Cr L J 275.

Section 190, (p. 605).—If cognizance is in fact taken on a police report which is assailed as being vitiated by the breach of mandatory provision relating to investigation the trial cannot be quashed unless the illegality in the investigation can be shown to have brought about a miscarriage of Justice. *Gyasiram*, A 1964 Raj 237. See *L. R. v. Khitish Chandra*, A 1962 C 189 : (1962) 1 Cr L J 405.

Section 190, 170, (p. 605).—Magistrate has no power to order Police to charge-sheet any person. *Shamlal*, A 1965 A 1965 H P 37 following *A. K. Roy*, A 1962 C 135 (F B) : 1962(1) Cr L J 285.

Section 192, (p. 617).—The Magistrate to whom a case is transferred has the seisin of the whole case whether it is instituted on a police report or on a complaint and that Magistrate has the power to summon any person as an accused, although he may not have been summoned

by the transferee Magistrate. *Raghunath Dube*, A 1964 P 487 ; 1964(2) Cr L J 568 following *Jamuna Singh v. Bhadai Shah*, A 1964 S C 1541.

Section 195(1)(a), (p. 630).—Where in a proceeding under Section 144 the Magistrate issues an order restraining A from interfering both the possession of B's lands and A in disobedience of that order forms an unlawful assembly armed with lathis, swords and axes and trespasses into the land, the prosecution under Sections 143, 144 and 144/114 I. P. C. without a complaint from the Magistrate is not barred by Section 195(1)(a). *Kashinath Pathak v. Kitu Rajwar*, A 1964 C 486, 1964 (2) Cr L J 405 where *Dhirendra Nath Bera*, 56 C W N 1 (F B) A 1951 C 133 distinguished.

A complaint signed by P. A. for District Magistrate "cannot be a substitute for a complaint in writing of the public servant as envisaged in Section 195 (1) (a). Section 537 does not cure it. *Lokenath Misra*, A 1964 M P 237.

Section 195, (p. 631).—Where the report to Tahsildar with a view to take action is found to be false, the offence under Section 182, Indian Penal Code is complete even if no action is taken on the report. Prosecution under Section 182 Indian Penal Code must be on complaint in writing by the Tahsildar. *Fazlal Huq*, A 1964 A 103 : 1963 A L J 501 : 1964 (1) Cr L J 324.

Section 195, (p. 641).—Pendency of proceedings in which a document is produced is not essential for a complaint under Section 476. *Bhikubai*, A 1965 Guj 70.

Section 195, (p. 643).—The Conciliation Officer is not a Court within the meaning of Section 195(1) (c), hence a complaint by him is not necessary for proceeding under Sections 466 and 471 Indian Penal Code against the accused who produced a forced deed before him. *Wadhu Mal v. Rulia Ram*, A 1964 Punj 389 where *Jaswant Singh Mills Ltd. v. Lakshmi Chand*, A 1963 S C 677 referred to.

An Income Tax Officer acting under Section 37 (4) is a Revenue Court within the meaning of Section 195(1) (b). *Lalji Haridib v. State of Maharashtra*, A 1964 S C 1154 ; *Mulji Manilal*, A 1963 B 70 following *Hossain Kassem Dada*, A 1953 S C 221.

Section 195 (5), (p. 645).—Add to footnote 58, *Nitya Nath*, A 1965 P 154 where *Virendra Kumar Satyawadi*, A 1956 S C 153, *Madhusudan v. Haridas*, 44 C W N 1911, *Becharam Kar*, A 1956 C 102 ; 1956 Cr L J 515 distinguished. *Sudhir Ruhidas*, A 1959 C 450 ; 1959 Cr L J 838 followed.

Section 196-A(2), (p. 653).—Sanction for non-cognizable offence is necessary but when commission of non-cognizable offences is

merely a means to an end, that is the commission of cognizable offence, sanction under Section 196-A(2) would not be necessary. *Abdul Kader*, A 1964 B 133 ; 1964(1) Cr L J 648.

Section 197, (p. 661).—No sanction is necessary for the prosecution of a sub-Inspector of Police who can be dismissed by the Inspector-General of Police. *Nagraj v. State of Mysore*, A 1964 S C 269.

Sanction under Section 197 is necessary for the prosecution of an Assistant Commissioner of Police who refused to grant bail and was prosecuted under Section 348 Indian Penal Code. *Somchand Sanghvi v. Bibhuti Bhusan Chakraverty*, A 1965 S C 588 : 1965 (1) Cr L J 499.

The Sarpanch of a Panchayat is entitled to a protection under Section 197. *Pukhraj*, A 1964 Raj 124.

Sections 197, 203, (p. 664).—Under Section 197 the Magistrate has first to decide the question as to whether a complaint can be entertained for want of sanction from the State Government but if he also decides on the merits on the belief that the higher Court might set aside the order, it is not illegal, it cannot be said to be a dismissal under Section 203 and revision does not lie before the Sessions Judge. *Vishara Mohan v. Mohadev*, A 1964 B 191.

Section 197, (p. 662).—Sanction is not necessary for the prosecution of Vice-President of a District Municipality. *Vishva Mohan v. Mahadev Chaudhri*, 66 Bom L R 28 : A 1964 B 191.

Section 201, (p. 692).—Where trial by a first Class Magistrate proceeded on a complaint, the Magistrate found at a late stage that he had no territorial jurisdiction, he must return the complaint under Section 201 and cannot proceed under Section 346. *Amrit Lal*, A 1964 Guj 248 following *District Magistrate of Cuddapur v. Abdul Rahim*, (1943) M L J 467 Contra ; *Amarendra-nath v. Raghunath Nandan*, A 1952 C 849 : 1952 Cr L J 1736.

Section 202, (p. 698).—Where a Magistrate allowed the accused to cross-examine the complainant before issue of process, held, error is not curable under Section 537. *Hiralal v. Keshab Lal*, 1964(2) Cr L J 146 : A 1964 B 180 following *Anil Kumar Saha v. Promode*, A 1958 C 146 ; *Chandra Deo Singh*, A 1963 S C 1430.

Section 203, (p. 703).—The Magistrate before whom a complaint is filed or to whom a case is transferred as also the successor-in-office can pass an order under Section 203 or 204. *Krishna Dev Prasad v. Mt. Budhni*, A 1965 P 1 F B following *Ram Krishna Singh*, A 1938 C 195 : 39 Cr L J 417.

Sections 207-207-A, (7), Section 215, (p. 721).—In a case of committal on the basis of complaint filed by the Court under Section 476 and not on Police report, Section 207(6) and not Section 207-A (7) applies, consequently revision petition for quashing lies under Section 215 only on a point of law. In re, *Chidra Sangamurthy*, A 1964 A P 248 : 1964(1) Cr L J 688 where *Shankar Shankaram Jadav*, A 1957 B 226 referred to.

Section 207-A, (p. 727).—Add to footnote 35 ; *Rameshwar*, A 1965 C 38.

Section 207-A(4), (p. 728).—Add to footnote, 39 A 1961 S C 674 ; *Behal Singh*, 1964 Punj 468 ; *Sri Ram's* case, followed in *Maheswar*, A 1964 Or 37 and *Bayappa*, A 1964 Mys 61.

Section 207-A(6), (p. 728).—Where the Magistrate finds that there is a *prima facie* case, he must commit accused for Sessions trial, he cannot weigh evidence. *Sumermal Jain*, A 1964 Tripura 41 : 1964(2) Cr L J 209 following *Bipat Gope*, A 1962 S C 1195 ; *Appalu Vetar v. Marucan*, (1964) 1 M L J 101.

In inquiries relating to charges for Sessions offences like murder normally the Magistrate should insist upon the examination of the principal witnesses to the actual commission of the offence. *Kripal Singh v. State of U. P.*, (1964) 3 S C R 992 : A 1965 S C 712 where *Shri Ram v. State of Maharashtra*, A 1961 S C 674 : 1960(1) Cr L J 760 referred to.

Section 207-A(6), (p. 729).—A Magistrate conducting an inquiry under Section 207-A is bound to commit the accused to the Court of Sessions if a *prima facie* case is made out, he is not to deal with the evidence as if he were entrusted with the trial of the accused. *Bahal Singh*, A 1964 Punj 468 1964(2) Cr L J 548 following *Bipat Gope*, A 1962 S C 1195.

Section 207-A(6).—Under Section 207-A(6) it is not open to the committing Magistrate to appreciate evidence. *Munsur Ali*, A 1964 Tripura 45 ; *Bansabhai Nagjibhai*, A 1963 Guj 162.

Section 207A-(6) and (7), (p. 729).—The Supreme Court by a majority held that the Magistrate has the power, if he things necessary to examine the accused for the purpose of enabling him to explain any circumstance appearing in the evidence, such evidence being oral evidence, if any, as may have been recorded and the documents referred to in Section 173(4). The Legislature has used the expression "evidence" at three places in sub-section (6) of Section 207-A. In the first clause of sub-section (6) the evidence is, as the statute expressly enacts the "Evidence referred to in sub-section (4)" and the expression "that such evidence and documents discloses no grounds for committing" indicates having regard to the context

referred to in sub-section (4) alone is comprehended thereby. But the expression "the evidence" in the clause "examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him" is not restrained to the oral evidence recorded under sub-section (4). *Ramnarayan v. State of Maharashtra*, A 1964 S C 949 (952-955).

Section 207-A(6), (p. 729).—Where proper questions were not put to the accused by the Committing Magistrate and when record of examination is tendered in the Sessions Court under Section 287, the accused can claim that she has not been given opportunity to explain the circumstances against her at the earliest opportunity. *Bhargavi Amna*, 1964(2) Cr L J 414 ; A 1964 Ker 241 following *Nazir Ahmed*, A 1936 P C 253 quoted in *Shiv Bahadur Singh v. State of Vindhya Pradesh*, A 1954 S C 322.

Section 207-A(7), (p. 729).—Sub-section (7) is the converse of sub-section (6). To enable the Magistrate to frame a charge and make an order of commitment for trial he is to be of opinion that evidence and documents before him disclose a *prima facie* case. *Rameshwar*, A 1965 C 38 following *Panchanan Ballav*, A 1959 C 207 ; 1959 Cr L J 320.

Section 208, (p. 735).—The accused person has right to lead evidence in defence in proceedings governed by Section 207-A, whereas he has a right to call for fresh evidence in proceedings governed by Section 208. *State of West Bengal v. Tulsidas Mundra*, 1964 (1) Cr L J 443 (S C).

Section 215, (p. 753).—In cases of commitment passed under Section 207-A (7) revision for quashing does not lie under Section 439 but only under Section 215. *Bahal Singh*, A 1964 Punj 468 ; 1964(2) Cr L J 548.

Section 215, (p. 754).—Apart from the fact that under Section 215 commitment can only be quashed on a point of law in the instant case the Supreme Court was satisfied on looking into the record of the case that there was evidence on which the order of commitment can be passed. *Mohinder Singh v. State of Punjab*, A 1965 S C 79.

Section 222, (p. 777).—Particulars of the charge of conspiracy are to be given so that the accused may get notice with which he is charged. *Abdul Kader*, A 1964 B 133 : 1964(1) Cr L J 648.

Section 222(2), (p. 781).—A single charge of falsification of accounts to cover up defalcations by making false entries in various account books without mentioning particulars is vague and does not comply with Sec-

tion 233. *Krishna Murty v. Abdul Sobhan*, A 1965 Mys 128.

Section 229, (p. 794).—Section 229 enables the Court to direct a new trial after the charges have been altered or amended. *Suren Banerjee*, A 1964 C 220 : 68 C W N 487 : 1964 (1) Cr L J 514.

Section 233, (p. 801).—The finding in the Counter case is not a legally admissible evidence in the instant case. *Kalu*, A 1965 Raj 74.

Section 234(1), (p. 811).—Where accused Postmaster received amounts from different persons during one month for remittance by money orders and he made delay in crediting it in the register and he was charged under Section 5(1) (c) of the Prevention of Corruption Act, *held*, charge and single trial of the accused is not improper and is not hit by Section 234(1). *Bepin Chandra*, A 1964 Or 152 : 1964(1) Cr L J 688.

Section 237, (p. 831).—When a public servant charged and tried by the special Court (West Bengal Act XXI of 1949) is an offence under Section 409, Indian Penal Code but a charge under Section 420, Indian Penal Code could have been framed under Section 236, Cr. P.C., the Trial Court or the Appellate Court can in law convict the accused of an offence under Section 237, Cr. P.C. *Held* further on facts that the accused could not be said to be prejudiced in his conviction under Section 420, I.P.C. *Sunil Kumar v. State of West Bengal*, A 1965 S C 706 where *Begu*, 52 I A 191 : A 1925 P C 130, *Ramaswamy Nadar v. State of Madras*, A 1958 S C 56 : 1958 Cr L J 228, *State of Andhra Pradesh v. Kandimalla Subhaiah*, A 1961 S C 1241 : 1961(2) Cr L J 302 relied on, *Nanakchand v. State of Punjab*, A 1955 S C 274 : 1955 Cr L J 721 distinguished.

Section 238, (p. 840).—In a trial on a charge under Section 116 of the Motor Vehicles Act, conviction under Section 112 of the said Act is valid. *Gourchandra*, A 1965 C 363.

Section 239(d), 537, (p. 845).—See *Kalu*, A 1964 M P 182 : 1964(2) Cr L J 185.

Section 242, (p. 861).—Where in a summons case charge was framed without compliance with the provisions of Section 242 or recording under Section 243 the admission of the accused in the words used by him, the conviction was set aside. *Ajmeer Municipality Rama*, A 1965 Raj 107.

Section 247, (p. 873).—Add to footnote 72 after 1959 Cr L J 806, *Johrilal v. Ramjilal*, A 1965 Raj 9.

Section 247, (p. 874).—When a complainant though present in Court did not appear when the case was called on for hearing,

the dismissal of complaint and the acquittal of the accused under Section 247 is illegal. *Mafatlal v. C. C. Shah*, A 1965 Guj 180.

Section 247, (p. 877).—See *Radha Krishna*, A 1964 Raj 216 noted under Section 403.

Section 248, (p. 872).—Where the complainant lodged F. I. R. and during police investigation filed a complaint before a Magistrate, the proper procedure for the Magistrate is to keep the complaint pending and amalgamate it with police case on submission of charge-sheet by Police. Complainant applied for withdrawal of the complaint case on the ground that the police case was pending on the same facts, the Magistrate allowed withdrawal and acquitted the accused under Section 248. *Held*, the principle of *autrefois acquit* under Section 403 has no application and the High Court set aside the order of conviction in the police case and ordered a retrial. *Raimon Ho.*, A 1965 Or 6 ; 1965 (1) Cr L J 55.

Section 251, (p. 899).—The distinctions between Section 251-A and 252 is that under Section 251-A the Magistrate has to satisfy himself that the documents referred to in Section 173 has been given or not, whereas under Section 252 there is no such duty but that does not mean that the accused is not entitled to the documents referred to under Section 173 if he is otherwise entitled. *In re, Kanhaiyalal Daulatramji*, A 1965 M P 53 : 1965 (1) Cr L J 298.

Where the Magistrate on receipt of a private complaint examines the complainant on oath under Section 200 and sends the complaint to the police for an inquiry under Section 156(3), the private complaint becomes a final report under Section 173 and the Magistrate has to proceed under Section 251-A and not under Section 252, *Shivangowda Veerappa*, A 1964 Mys 129.

Section 251-A, (p. 899).—The distinction between Section 251-A and 252 is that under Section 251-A the Magistrate has to satisfy himself that the documents referred to in Section 173 has been given or not; whereas under Section 252 there is no such duty but that does not mean that the accused is not entitled to the documents referred to under Section 173 if he is otherwise entitled. *Kanhaiyalal Daulatramji*, A 1965 M P 53 : 1965 (1) Cr L J 298.

Section 251-A, (p. 900).—Chalan not making accusation of cognizable offence is not police report within the meaning of Section 251-A. Procedure under Section 251-A cannot be followed. *Sham Lal*, A 1965 H P 37 following *Sada*, 26-A 150 (F B), *Premchand Kshetry*, A 1958 C 213.

Section 251-A, (p. 901).—Add to footnote 62, *Abbas Beary*, A 1965 Mys 35 : 1965 Cr L J 187.

Where a Magistrate after passing an order of discharge under Section 251-A(2) *suo moto* revived the case and proceeded with trial, *held*, he acted without jurisdiction. The proper course to follow was to make a reference under Section 438. *Ganga Ram Kolita*, A 1965 Ass 9 : 1965 (1) Cr L J 144.

Section 251-A(2), (p. 901).—Section 403, Explanation. Although the order of discharge under Section 251-A(2) is not an acquittal and on a fresh complaint processes can be issued and the fresh case is not barred under Section 403 but in the instant case fresh complaint after a lapse of 5 years from the date of the event deserved to be dismissed. *Mohd. Mia*, A 1964 Mys 245 : 1964(2) Cr L J 501 following *Gurucharan*, A 1957 A 557 : 1957 Cr L J 918.

Where a Magistrate discharges an accused under Section 251-A(2) on the ground that sanction under Section 106 of the Madras Village Panchayat Act has not been obtained, order by the District Magistrate under Section 436 setting aside the order and directing fresh enquiry is not liable to objection. *S. Rangaswamy*, A 1964 M 435.

The word “charge” in Section 251-A(2) does not carry the same meaning as “charge” in Section 251-A(c). *S. Rangaswamy*, A 1964 M 435: 1964 (2) Cr. L J 430.

Section 251-A, (p. 902).—Add to footnote 72, *Suren Banerjee*, A 1964 C 220 ³/₄ 68 C W N 487 where *held* that the Magistrate is to frame a charge on reference to the documents referred to in Section 173, the prosecution is not required to adduce evidence before the charges are actually framed.

Section 251-A(7), (p. 902).—Where prosecutions witness failed to appear in spite of service of summon issued by the Court, the Court must take steps to compel their attendance and not acquit accused on the ground that there is no evidence. *Polo Mistry*, A 1964 P. 351.

Section 251-A(7), (p. 903).—Where in a case instituted on a police report, the Magistrate ordered that summons be issued on the prosecution witness but after adjournment, he did not take steps for procuring their attendance and after examining the accused, acquitted him, the order of acquittal was set aside. *Paban Chandra v. Dulal Ghose*, A 1965 C 387 where *Jyotirmoyee Bose v. Birendra Nath*, A 1960 C 263 ; 1960 Cr L J 468 distinguished, *Shib Charan Singh*, A 1962 Or 157 followed.

Sections 251-A(7) and (11), (p. 903).—Add to footnote 86 ; A 1960 C 263 dissented from in *Public Prosecutor v. Pachiyappa*, A 1965 A P 162.

Section 251-A(11), (p. 904).—Under the sentence of Section 251-A the Magistrate has to consider the statements recorded in the case diary and if he finds the charge to be groundless he can discharge the accused but where he finds the charge to be *prima facie* substantiated, he is required to frame a charge and then follow the procedure indicated in the several subsections from (6) to (9) of Section 251-A. It is after this stage has been reached that he is permitted to acquit the accused under Section 251-A(11). Court should summon witnesses of its own motion under Section 540. *Public Prosecutor v. M. Sambangi*, A 1965 M 31 (1965) (1) Cr L J 53.

Section 252(2), (p. 908).—Where a patient lost his eye-sight because of the negligence of a medical practitioner who was prosecuted under Section 337 I. P. C. *held*, Court had a duty to summon the Registrar Indian Medicine and directed a retrial. *Baksha v. Iswar Singh*, A 1964 Raj 242 : 1964 (2) Cr L J 583.

Section 253, (p. 909).—Section 253 related to discharge of the accused which can not be ordered unless the whole evidence is taken or the Magistrate comes to the conclusion at an earlier stage that the charge is baseless. *Malapti Srihari Rao*, In re, A 1964 A P 226 : 1964(1) Cr L J 507.

Sections 253, 203, 436, (p. 912).—It is true that an order of discharge under Section 253 or 259 does not by itself debar the complainant from filing a second complainant but the Magistrate on a second complaint cannot be said to have sufficient ground for proceeding with the complaint within the meaning of Section 203 unless he is satisfied that some additional evidence is forthcoming or there has been manifest error on the face of the record or manifest miscarriage of justice. *Munsif Ali v. Ayub Khan*, A 1964 Raj 183.

Section 254, (p. 913).—Add after footnote 75, *Malapti Srihari Rao*, In re, A 1964 A P 226 : 1964 A P 226 : 1964(1) Cr L J 507 : *Polo Mistry*, A 1964 P 351. Where *held* that under Section 254 the Magistrate is not bound to examine all the prosecution witnesses before he frames a charge. The moment a *prima facie* case is made out against the accused of an offence of the description referred to in Section 254, he is at liberty to frame a charge. The witnesses left over, will be examined as remaining witnesses under Section 256.

Section 258, (p. 929).—Where there are several charges against the accused ; where facts do not exist on which an implied acquittal can be pronounced, omission to give a finding does not amount to acquittal. *K. V. Ayyasray*, A 1965 A P 105 : 1965(1) Cr L J 281.

Section 286, (p. 973).—Add to footnote 8 : *Masalti v. State of U. P.*, A 1965 S C 202 : 1965(1) Cr L J 226 where *held* that it is the duty of the prosecution to examine material witnesses which are necessary for unfolding its case but it would be unsafe to lay down as a general rule that every witness must be examined even if it is known that he has been won over or terrorised. In such a case it is always open to the defence to examine such witnesses as their witnesses and the Court can also call such witness as their witnesses in the interests of justice under Section 540. See also *Daya Singh v. State of Punjab*, A 1965 S C 328 : 1965(1) Cr L J 350. *State v. Kalu*, A 1964 M P 182 ; 1964(2) Cr L J 185.

Sections 287 and 207-A, (p. 975).—When proper questions were not put to the accused by the Committing Magistrate and when record of examination is tendered in the Sessions Court, the accused can claim that she has not been given an opportunity to explain the circumstances against her at the earliest opportunity. *Bhargavi Ammal*, 1964(2) Cr L J 430 ; A 1964 Ker 241 following *Nazir Ahmed*, A 1936 P C 253 quoted in *Shiv Bahadur Singh v. State of Vindhya Pradesh*, A 1954 S C 322.

Section 288, (p. 980).—The Magistrate must be satisfied that the prior evidence was true and the evidence given before him was false. In most cases this satisfaction can come only if there is such support in extrinsic evidence as to give a reasonable indication that not only what is said about the occurrence in general but also what is said against the particular accused sought to be implicated in the crime is true. *Sharnappa v. State of Maharashtra*, 66 Bom L R 250 ; A 1964 S C 1357 following *Bhuboni Sahu*, A 1949 P C 257.

Section 288, (p. 983).—Add to footnote 96, *Public Prosecutor v. Shaikh Ibrahim*, A 1964 A P 348.

Section 297, (p. 1000)—Dying declaration.—It is a serious misdirection on the part of a Judge to advise the jury in effect that they should not act on a dying declaration without material corroboration from independent sources. *State v. Ram Ajodhya*, A 1965 C 348 following *Khushal Ram v. State of Bombay*, 1959(1) S C 281 ; A 1958 S C 22.

Section 300, (p. 1026)—Scope.—Section 300 does not contemplate that the jury should after the Judge has summed up the case leave the precincts of the Court or be at large, held, also that when the jury dispersed for the night there was every possibility of their coming into contact with outsiders and it could not be held that there was a proper trial and the accused were ordered to be retried. *Shibnath*, A 1964 C 345.

Section 334, (p. 1074).—Confession of Co-accused.—Its use how to be made in a joint trial.—The confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking an assurance in support of its conclusion. *Haricharan Kurmi v. State of Bihar*, A 1964 S C 1184.

Section 341, (p. 1085).—Add to footnote 84 ; *Kampee Shetty*, A 1965 Mys 95 following *Nooka Mokimusab*, A 1960 Mys 315, *Rudhamal*, A 1960 B 526.

Where the Court forwards under Section 341 the proceedings of a case to the High Court, it must find that the accused cannot be made to understand the proceedings and that the inquiry or trial must result in commitment or conviction. If these requirements are not fulfilled the proceedings cannot be furnished to the High Court. *Nookamma*, A 1964 Mys 182 following *Mohammed Jagat*, A 1960 Mys 315.

Section 342, (p. 1091).—Add to footnote 28, A 1955 S C 792, *Hate Singh v. State of Madhya Bharat*, A 1953 S C 792, *Jaidev v. State of Punjab*, A 1963 S C 612 distinguished in *State v. Babulal*, A 1965 Raj 90.

Section 342, (p. 1093).—Section 342 empowers the Court to put questions at any stage of an inquiry or trial to enable the accused to explain the circumstances appearing against him. *Malapati Srihari Rao*, A 1964 A P 226 : 1964(1) Cr L J 507.

Section 342, (p. 1100).—Statements under Section 342 should be taken into consideration in its entirety. *Chacko Mathai*, A 1964 Ker 222 following *Narain v. State of Punjab*, 1964(1) Cr L J 730 (S C).

Section 344, (p. 1105).—In order to remand an accused under Section 344 the Magistrate must satisfy himself that sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence. *Sahadat Khan*, A 1965 Tripura 27 (29).

Section 344, (p. 1112).—The explanation to Section 344 makes it clear that it relates to a stage where the offence is still under investigation by the police. The explanation must necessarily refer to the circumstances existing before taking of cognizance of the offence by the Magistrate. Section 344 refers to detention after fifteen days. The contention that the provision of Section 173 is a condition precedent to a remand under Section 344(1-A) is wholly without any merit. *Madhavan Kuttam*, A 1964 Ker 222.

Section 350, (p. 1135).—Section 8(3) of Criminal Law Amendment does not contemplate that Section 350 becomes applic-

able to proceedings before a special Judge. *Krishna Lal Dhaiver v. Delhi Administration*, (1963) 2 S C J 350 ; 1964(1) Cr L J 572 (S C).

Section 360, (p. 1150).—Add to footnote 78, *Abdul Rahman*, 54 I A 96 followed in *Ramlal*, A 1964 Punj 211.

Section 364, (p. 1168).—See *Bhargavi Amma Challamma*, A 1964 Ker 241 ; 1964(2) Cr L J 414 and *Babu Singh v. State of Punjab*, (1963) 2 S C J 209 : 1964 (1) Cr L J 566 (S C) noted under Section 164.

Section 367, (p. 1169).—It is well-settled that a case ought to be decided on a broad view of the evidence and a consideration of the salient features of the case. *Sarju Singh v. Mahendra*, A 1964 P 561.

Section 367, (p. 1170).—The burden of proof is always on the prosecution. *Chacko Mathai*, A 1964 Ker 222.

Section 367, (p. 1171).—Court cannot convict accused on suspicion. *Nelar Pal*, A 1964 Punj 391, *Gopal Krishna*, A 1964 A 481 ; 1964(2) Cr L J 497 ; See *Sarwan Singh*, A 1957 S C 1957 Cr L J 1014.

Section 367, (p. 1172).—In a trial for the offence of murder where the witness is a close relation of the victim and is shown to share the victim's hostility to the assailant, that makes it necessary for the criminal Court to examine the evidence given by such witnesses very carefully and scrutinise all the infirmities in the evidence before acting on it. *Daya Singh v. State of Punjab*, A 1965 S C 328 ; 1965(1) Cr L J 350.

Section 367, (p. 1174).—In a case under the Drugs Act, where the trial Court acquitted the accused on the ground that the prosecution had not filed and marked as Exhibit a notification contemplated by Section 1(3) of the said Act, the acquittal was set aside as a Court has to take judicial notice of such notification. *State v. Sitaram Sahu*, A 1964 P 477.

Section 369, 561-A, (p. 1180).—Where the Magistrate dismissed the proceedings under Section 145 on the ground of absence of the person at whose instance the proceedings were started, he has no jurisdiction to set aside the order and direct that the proceedings once dismissed should be restored. *Babu Ram v. Ramji Lal*, I L R (1964) 1 Punj 697 ; A 1964 Punj 444 ; 1964(1) Cr L J 27.

Section 374 & 375, (p. 1186).—In a case where 10 persons had been ordered to be hanged by the trial Judge, this fact necessarily imposes a more serious and onerous responsibility on the High Court in dealing with the appeal. *Masalti v. State of U. P.*, A 1956 S C 202 ; 1965(1) Cr L J 226.

Section 386, 387, (p. 1201).—The provision for realisation of fine imposed as a punishment is contained in Sections 386 and 387

and the Magistrate has no jurisdiction to insist on bail or direct the accused to appear in Court for payment of the fine. *Surendra Chandra Debnath*, A 1964 Tripura 62.

Section 397(1), (p. 1206).—Add to footnote 42, *Sangat Ram*, A 1965 M P 21.

The power to order the sentence to run concurrently is provided under Section 397(1) and the Court can always consider the feasibility of ordering the sentences to run concurrently in two different cases against the same accused. The High Court cannot be in a worse position than that of the trial Court or the appellate Court and for this purpose the provisions of Sections 435 and 561-A can always be invoked. There is no question of altering or reviewing the judgment and overriding the provisions of Section 369 because the order under Section 561-A would be a separate order and complete by itself. *Mullapadi Venkanna*, A 1964 A P 449 following *Baijnath*, A 1961 P 138 See *Mahabir*, A 1965 P 178 where held inherent power under Section 561-A should not be exercised when the Court does not pass the order directing the sentences to run concurrently.

Section 401, (p. 1213).—The effect of the conditional order of remission under Section 401(3) is not to altogether wipe out or efface the remitted portion of the sentence but to keep it in abeyance. *Sohan Singh*, A 1965 Punj 156.

Section 403, (p. 1216).—A plea of *autrefois acquit* which is recognised under Section 403 Cr. P. C. arises when a person is tried again for the same offence or on the same facts on any other offence for which a different charge from the one made against him under Section 236 or for which he might have been convicted under Section 237. *Kharkan Others v. State of Uttar Pradesh*, A 1965 S C 83 ; 1965(1) Cr L J 116.

Section 403, (p. 1217).—Where the accused was convicted of murder under Section 302 I. P. C. and a pistol was used in the commission of the murder, he preferred an appeal to the Supreme Court. He was subsequently acquitted in a Companion Case under Section 19(1) (f) of the Arms Act. Held, the acquittal itself could not be granted by the Magistrate in view of the verdict of convictions by the Sessions Judge in the earlier Trial without recording evidence fully. *Mohinder Singh v. State of Punjab*, A 1965 S C 79 ; 1965(1) Cr L J 112.

Does not preclude the applicability of the rule of issue estoppel or *res judicata* against the prosecution and it cannot be pleaded as a bar to the trial

of the accused for a different or distinct offence but does not preclude the reception of evidence to disturb that finding of fact when he is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2). The rule is not the same as the plea of double jeopardy or *autrefois acquit*. The rule relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court. *Manipur Administration v. Bira Singh*; A 1965 S C 87 : 1965 (1) Cr L J 120. Where *Gurucharan Singh v. State of Punjab*, A 1963 S C 340 ; 1963(1) Cr L J 323 and *R. v. Connelly*, 1963-3 All E R 510 explained. *Pritam Singh v. State of Punjab*, A 1956 S C 415 ; 1956 Cr L J 805 affirmed, *Mohinder Singh*, A 1965 S C 79 referred to and *State of Bombay v. S. L. Apte*, 1961-3 S C R 107 ; A 1961 S C 578 followed.

Sections 403, 247 and 249, (p. 1229)—Complaint under Section 7 of Prevention of Food Adulteration Act.—An order consigning the case to the records temporarily on account of the non-availability of the accused obviously cannot be construed as to imply a completion of trial, hence order of the Magistrate does not amount to an acquittal under Section 247. Order passed by the Magistrate in such a case under Section 249 is a nullity. Fresh complaint in the instant case by the Food Inspector for the same offence and proceedings instituted were not in contravention of the provision of Section 403. *Radha Krishna*, A 1964 Raj 216 : 1964(2) Cr L J 459.

Explanation.—The effect of the explanation is that a fresh trial is barred only in cases of a acquittal or conviction, fresh proceeding against a person discharged are permitted by law. *Rangamoyee v. Sudhir Kumar*, A 1965 Tripura 29.

Section 417, (p. 1255).—Add to footnote 23, *B. Dulabhai Jadav v. State of Maharashtra*, 1964(2) S C J 263 ; where held, the High Court in dealing with an appeal against acquittal has power to review evidence and to arrive at its own conclusion on the evidence. See also to the same effect, *Radhakrishnan v. State of Uttar Pradesh*, A 1963 S C 822 printed at p. 46 in Addenda (2).

Section 417(3), (p. 1255).—Add to footnote 24, *Jamuna Singh v. Bhadaï Shah*, A 1964 S C 154 ; 1964(2) Cr L J 468 where held that when the case is instituted upon a complaint and the Magistrate after examining the complainant on oath under Section 200 orders the police to institute a case and report and a charge-sheet is submitted by the police and the case is ultimately committed, cognizance is taken upon complaint and not on police report and the report of the police officer, though purporting to be a report under Sec-

tion 173, shall be treated as a report only under Section 202. See also *Aditya Narayan*, A 1964 P. 538 : 1964(2) Cr L J 679.

Section 417(3), (p. 1256).—Where the complaint was filed by a Food Inspector under Section 716 of the Prevention of Food Adulteration Act after obtaining consent of the Medical Officer under Section 20 of that Act and the accused was acquitted, the Medical Officer applied for special leave under Section 417(3), *held*, the appeal was not maintainable as the appeal should have been filed by the Food Inspector who is the complainant within the meaning of Section 4(h) Cr. P. Code. *State v. Iswar Saran*, A 1964 A 497 : 1964(2) Cr L J 502.

Limitation.—Add to footnote 29-a, *Mst. Dhani*, A 1965 Raj 70 following *Kaushlaya Ram v. Gopal Singh*, A 1964 S C 260 (case under the old Limitation Act) distinguished in *Health Inspector v. P. Kalappa*, A 1965 Ker 31. Where *held*, amended Section 29 of Limitation Act 36 of 1963 makes applicable Sections 4-24 of the Act to all proceedings under special and local law unless their applicability is specially excluded. There is no such exclusion in sub-section (4) to Section 417 and therefore Section 5 of the Limitation Act will have application to Section 417(3).

Section 420, (p. 1261).—Where accused preferred a jail appeal and another appeal through counsel but the jail appeal was dismissed without notice to the accused's counsel, although that appeal was pending, *held*, dismissal of the jail appeal was irregular. In re, *Paramayan*, A 1965 M 211 ; 1965(1) M L J 173.

Section 423, (p. 1272).—**Appeal from Acquittal.**—Add to foot-note 63-a, *State v. Koushalya Devi*, A 1965 or 38, *Chandra Sekhar v. Kamti Kayan*, A 1964 Ker 277 : 1964(2) Cr L J 549.

Section 423(1)(a), (p. 1272).—A single appeal against acquittal of several person jointly tried is not maintainable. *Ram Prakash*, A 1964 Guj 223.

Section 423, (p. 1282).—**Appeal before Supreme Court.**—The question of of sentence is in the discretion of the trial Court and would not ordinarily be disturbed by the High Court if the discretion has been exercised judicially. There is still less reason to interfere with sentences by the Supreme Court but where some of the accused were women folk and no specific part had been allotted to them their sentence were reduced. *Mathri v. State of Punjab*, A 1964 S C 986.

Section 423(2), (p. 1283).—Once the High Court holds that there is a serious misdirection in the charge to the jury, in an appeal against acquittal, the High Court has power to

review entire evidence and come to its own conclusions. *State v. Ram Ajodhia*, A 1965 C 348 following *M. G. Agarwal v. State of Maharashtra*, A 1963 S C 200 : 1963(1) Cr L J 285, *Samiwal Singh v. State of Rajasthan*, A 1961 S C 715 ; 1961(1) Cr L J 766.

Section 423, (p. 1293).—Powers of Appellate Court either for ordering re-trial or taking additional evidence should not be exercised in order to enable prosecution to fill up lacunae in the case. *Kashmira Singh*, A 1965 J & K 37.

Section 431, (p. 1298).—Principles of Section 431 can be applied to appeals before the Supreme Court under Articles 134 and 136 of the Constitution against sentence of fine and not against sentence of imprisonment. *B. Ganpath Rao v. State of Andhra Pradesh*, A 1964 S C 1645 ; 1964(2) Cr L J 598.

Section 439, (p. 1344)—**New plea.**—Is not allowed on a second revision to the High Court after moving the Sessions Judge, *Bool Chand v. Parameshri Bai*, A 1964 Punj 280 ; 1964(1) Cr L J 698.

Where the Sessions Judge in appeal has discussed the prosecution evidence only and he has omitted to discuss the evidence of defence witnesses, the High Court in its revisional jurisdiction should consider fact and evidence which the Sessions Judge has omitted to consider. *Basanta*, A 1965 A 120, following *Ram Gopal Ganpatram*, A 1958 S C 97 : 1958 Cr L J 244 ; *Moti Ram v. Suraj Bhan*, A 1960 S C 655 ; 1960(2) S C R 896.

Section 439, (p. 1351).—The question of sentence is a matter of discretion for the trial Court and it is well settled that when that discretion has been properly exercised, the appellate Court should not interfere unless there are very strong grounds. *Sulaiman*, A 1964 Ker 185.

Section 439, (p. 1352).—High Court in exercise of its revisional jurisdiction can pronounce the correctness or otherwise of an order under Section 3 or 4 of the Probation of Offenders Act. *Baidyanath Prosad v. Awadesh Singh*, A 1964 P 358 ; 1964(2) Cr L J 176.

High Court can revise orders passed under Section 172 of the Sea Customs Act. A 1964 C 391 ; 1964(2) Cr L J 285.

Section 439, (p. 1353).—Add to footnote 7, *Dorapet Bhawani*, 66 Bom L R 281 ; A 1965 B 6 where held that the High Court in revision has no power to enhance the sentence to an amount higher than the amount of maximum fine which is fixed by law for a Presidency Magistrate.

Section 439, (p. 1356)—**Interference with order of Acquittal.**—The Supreme Court has held that there should be some glaring defect in procedure, manifest error of law

and consequent miscarriage of justice for interference in revision with an order of acquittal. *Fakir Chand v. Kamal Prosad*, 1964(2) Cr L J (S C) 74 ; following *Chinnaswamy*, A 1962 S C 1788 ; 1963(1) Cr L J S C 8 ; *Madhab Chandra v. Nalini Mondal*, A 1964 C 286 ; *Sarjoo Singh v. Mohendra*, A 1964 P 561 : 1964(2) Cr L J 711.

Add to footnote 31, *Serju Singh v. Mahendra*, A 1964 P 561.

Where there is no appeal by the State, High Court will not on revision by the complainant set aside the order of acquittal and send the case back for a retrial only on the basis of a retracted confession which did not impress the trial court. *Natar Pal*, A 1964 Punj 397.

Section 439(5) (p. 1358).—Where the accused on a trial by a Presidency Magistrate was sentenced to a fine more than Rs. 200 no revision can be entertained as the order was of appealable under Section 411. The revision cannot be treated as an appeal, if the appeal has long become barred by limitation. *Jeswani & Co. v. Corporation of Calcutta*, 67 C W N 497.

Section 476, (p. 1386).—Where the High Court has ordered the Registrar to make a complaint in writing against the appellants for their prosecution under Sections 193, 199 and 211 I. P. C., the Supreme Court in appeal will ordinarily do no more than examine whether the High Court had fairly considered a case to reach the conclusion that *prima facie* there is good reason to launch the prosecution, that there is a reasonable prospect of conviction and that it is expedient in the interests of justice to order a prosecution. *Hari Das v. State of West Bengal*, A 1964 S C 1773.

Section 479-A, (p. 1404).—Where there is no material on the record at the time of disposal of the case for the Court to form an opinion that certain witness is giving false evidence and perjury was detected by the Court only subsequent to disposal of the case by it, *held*, proceeding under Section 476 was not barred by Section 479-A and conviction under Section 193 I. P. C. was not vitiated. In *re Gumamuthu*, A 1964 M 446 : 1964(2) Cr L J 435, where *Kasi Thevar v. Chinniah Kumar*, A 1960 M 77 followed and *Sabir Husain v. State of Maharashtra*, A 1963 S C 816 distinguished.

Section 479-A is an absolute bar to the District Judge entertaining an application under Section 476 when the offence is one of perjury. *Subharayan v. V. P. N. Cheeku*, A 1964 Ker 157 following *Mahalinga Bhetta v. Venkataran Bhetta*, A 1963 Ker 215 : 1963(2) Cr L J.

Section 479-A, (p. 1405).—Is not applicable to an offence under Section 471 I. P. C. when that offence is also mentioned in the petition along with Section 193 P. C. Section 479-A may be restored to in cases falling within first paragraph of Section 193 and Sections 194 and 195 I. P. C. *Babulal v. State of U. P.*, A 1964 S C 725 ; 1964(1) Cr L J 555 following *Raghubir Prasad Dudhwala v. Chananlal Mehra*, 1964(1) Cr L J 489 S C and explaining *Shabir Hussain*, A 1963 S C 816 ; 1963(1) Cr L J 803.

Add to footnote 75-a after *Shabir Hussain v. State of Maharashtra*, 1963(1) Cr L J 803 followed in *S. R. Ramlingam*, A 1965 M 100 : 1965(1) Cr L J 311 *Pachamuthu*, (1964) 2 M L J 429.

Section 479-A(5), (p. 1406).—A combined reading of both sub-section (1) and (3) makes it abundantly clear that if the trial Court wants to make a complaint against a witness for intentionally giving false evidence, giving an opportunity of being heard to the person affected is entirely left to its discretion but if on the other hand the appellate Court wants to make a complaint, it is incumbent on it to give such opportunity. That is the difference between the scope of sub-section (1) and sub-section (5) of Section 479-A as is clearly brought out by the language of sub-section (5). In *re Jevajji Uthamal*, A 1964 A P 368. See cases referred to.

Section 488. (p. 1432).—While construing 'child' in Section 488 regard must be had to particular circumstances obtained in each family and its status. *Abdul v. K. M. Azra*, A 1965 A 125 ; *Ismail Shariff v. Narain*, 1965 M L J (Cr) 83.

A person is a 'child' within the meaning of Section 488(1) so long as the person who may be of any age after majority has not attained legal majority and is not *suit juris*. *S. A. Ibrahim v. Saidani Bi*, (1964) 2 M L J 70 ; where *Hemanta Kumar Dauji v. Manorma Debi*, A 1955 C 480, *Subamma*, A 1950 M 394 ; *Ramchhadda*, S A 1949 B 36 relied on ; *Abdul v. K. M. Azra*, A 1965 A 125.

Section 488(3), (p. 1435).—An interim order of protection from arrest passed by an Insolvency Court does not take away the powers of the Magistrate to order the imprisonment of the husband under the section, where he has failed without sufficient cause to pay his wife the maintenance ordered by Court. *Mylaswami v. Muthammal*, I L R (1964) 2 M 409 : A 1965 M 77.

Section 488, (p. 1436).—Second marriage by husband provides just ground for wife referred to live with the husband, wife is entitled to a reasonable maintenance when there was evidence to show illtreatment and the husband's

financial capacity. *Giribala v. Nithananda*, A 1965 S C 190.

Section 488(3), p. 1437).—‘Living in adultery’ Add to footnote 5-a, *Pancham-mal v. Perumal*, (1964) 2 M L J 473.

Section 488(3), (p. 1441).—**District meaning of in Section 488(8).**—Dis-trict means any Court in district in which husband resides and jurisdiction is under Section 488 not limited to that Court in district within whose juris-diction husband resides. *Shantabai v. Vishnupat*, A 1965 B 107 following *In the petition of Sheikh Fokirud-din*. 9 B 40.

Section 488, (p. 1443).—On a Second revision to High Court under Section 439 Cr. P. Code after moving the Sessions Court in a case under Section 488 new plea cannot be taken up for the first time during hearing before the High Court. *Boolchand v. Parameshri Bai*, A 1964 Punj 284.

Section 489(2), (p. 1445).—Where a competent Civil Court has pronounced an order which runs counter to the order for main-tenance, it may still remain discretionary with the Magistrate to cancel or vary the order of main-tenance under Section 489(2). The proper remedy for the husband is to apply to the Criminal Court under Section 489(2). *Shaila Rani v. Durga Prasad*, A 1965 Punj 79 ; I L R 1964(2) Punj 477 where *Giribala Devi v. Nirmalbala Devi*, 62 C 404 ; A 1955 C 108 referred to.

Section 491, (p. 1449).—Determination involving complicated questions of fact cannot be undertaken in proceeding of *habeas Corpus* petition. *Habatullah*, A 1964 Guj 128.

Section 491, (p. 1450)—**Preventive Detention Act.**—The High Court does not possess the power of investigating the truth of falsity of the particulars upon which an order of detention is based, it can only confine to the ques-tion whether the detenue could exercise his consti-tutional right of making an effective representation against the order made. *Saberuddin*, A 1964 231 ; 1964(1) Cr L J 555, *Priyanath Majumdar*, A 1963 C 589 following *Dawaraka Das Bhatia*, A 1957 S C 144.

Section 491, (p. 1453).—In India the writ of *habeas Corpus* is probably never used by a husband to regain his wife and the alternative remedy under Section 100 is always used, then there is the remedy of a Civil Court for resti-tution of conjugal rights. *Mohd. Ikram Hussain v. State of U. P.*, A 1964 S C 1625 : 1964(2) Cr L J 596 in the instant case it was further held that no rule of the Court has laid down that evidence shall not be required if the Court requires it.

Defence of India Act, Section 45—Defence of India Rules, 1962, Rule 30.—Section 45 D. I. Act 1962 lays down that no order made in

exercise of any power conferred by or under this Act shall be called in question in any Court. The Government is therefore not bound to disclose the grounds. It is open to the person detained under Rule 30 of the Defence of India Rules, 1962 to challenge the *bona fides* of Government and contend that the order is *mala fide*. *Sohanlal v. State of Bihar*, A 1964 P 237. The Supreme Court has held in *Makhan Singh Tarkika v. State of Punjab*, A 1964 S C 381 ; 1964(1) Cr L J 249 that the Court can only go into the allegations of *mala fide* in such cases.

Section 491, (p. 1457).—In a case under Rule 30 of the Defence of India Rules, although the orders use different expressions, if it appears on reading the whole order that the detaining authority was satisfied, *held*, the order is not illegal. The Supreme Court further held that though technically the order out of which the appeal is arisen has been revoked, there is nothing to preclude the Supreme Court from deciding the appeal, though ordinarily it would not do so. *Godevari v. State of Maharashtra*, A 1964 S C 1128.

Where a *habeas corpus* petition filed by a stranger without any information from or consent of the detainee ; and the affidavit filed in support of the petition was inadequate, the application was held not *bona fide* and was dismissed. *Kapildas*, A 1965 P 209.

The verification of the affidavit should invariably be modelled on the lines of Order IX, Rule 3 of the Civil Procedure Code. *Har Kishan Singh*, A 1964 Punj 198 ; 1964(1) Cr L J 535.

Section 497(3), (p. 1478).—It is plain from Rule 155 of the Defence of India Rules, 1962 that a person accused of contravention of a notified Rule is not entitled to bail unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contraventions and that the prosecution has been given an opportunity to oppose the application for such release. *Suren Banerjee*, A 1964 C 220 ; 68 C W N 487 1964(1) Cr L J 514.

Section 498, (p. 1478).—An order by the Sessions Judge assigning bail application for disposal of the Additional Sessions Judge on the ground that due to pressure of other works he had no time to dispose of the application is not incompetent. *Mohinder Singh*, A 1964 Punj 543 1964(2) Cr L J 728.

Section 498, (p. 1481).—Bail should be granted when there has been long delay in police investigation in cases where persons have been arrested under Section 54. *Sahadat Khan*, A 1965 Tripura 27 (29).

Section 499, (p. 1484).—Where the petitioner, according to the terms of the bond executed by him was required to produce the

accused in the Court of the Sub-divisional Magistrate and not in the Court of the Second Class Magistrate, *held*, the Second Class Magistrate was obviously in error in forfeiting the bond and imposing a penalty upon him. *Abdul Rahman*, A 1965 Raj 1 following, *State of Bihar v. M. Homy*, A 1955 S C 478 ; 1955 Cr L J 1017.

Section 503, (p. 1491).—No hard and fast rule can be laid down as to when a pardanashin lady should be examined on commission. Generally, it is desirable that in Sessions Trial commission should not be issued even for examination of a pardanashin lady. But when the accused is charged not of a Sessions Offence and the evidence of the witness is not very important it may order her examination on commission. *Om Prakash*, A 1964 Raj 230 ; 1964(2) Cr L J 579 following, *Dharamdas Pant v. State of U. P.*, A 1957 S C 594 (598) ; 1957 Cr L J 894.

Section 510, (p. 1502).—‘Duly submitted for examination’ the word “duly” means “properly”. *Koushalya Devi*, A 1965 Or 38.

Section 510-A (p. 1503).—Does not give a free hand either to the prosecution or the accused to adduce evidence by filing affidavits. It is for the Court to consider whether the evidence of a witness sought to be tendered by way of an affidavit is of a formal character before it permits the filing of an affidavit. *In re Mallikarajama Rao*, A 1964 A P 438.

Section 515, (p. 1518).—Add to footnote 17 *Ijat Ali*, A 1965 Tripura 14 where *held*, District Magistrate does not include Additional Magistrate *see contra* Calcutta view in unreported Cr. Rev. 121 of 1963 decided by Das Gupta J. on 26-11-64.

Section 522, (p. 1539).—High Court in revision against Magistrate’s order can pass an order for restoration of possession. *Joban Dass v. Shibu*, A 1964 H P 30 ; 1964(2) Cr L J 295.

Where the appellate Court dismissed an appeal against an order of conviction and after one month from date of dismissal an application for an order under Section 522 was made to the appellate Court, *held*, no such order could be passed by the Court on the application. *Sailendra Nath Bhattacharjee v. Jagadish Mondal*, 68 C W N 996.

Section 523, (p. 1541).—Where a truck is seized under the provisions of the Bihar and Orissa Excise Act for transporting contraband goods, the Magistrate cannot dispose of it by an order under Section 523 on the basis of Section 5(2). *Ramjas Thakur*, A 1964 P 416 ; 1964(2) Cr L J 331.

- Section 527, (p. 1574).**—In proceedings for transfer under Section 527 of pending cases the Court does not examine witnesses in support of allegations of fact made by either side. Ordinarily the Court acts upon the affidavit of one side or that of the other. But if one side omits to make an affidavit in reply, the affidavit of the other side remains uncontroverted. Where sufficient grounds are made out by the petitioner the Court will not hesitate to transfer the case outside the State. *Hazara Singh Gill v. State of Punjab*, (1964) 2 S C J 413 ; A 1965 S C 720.
- Section 528(1)(c), (p. 1577).**—Sessions Judge cannot transfer a case *suo motu* but only on an application made in that behalf. *Narachandra*, A 1964 Manipur 39.
- Section 531, (p. 1518).**—Add to footnote 11, *Abdul Samad*, A 1965 All 158.
- Section 537 23(d), (p. 1603).**—Where there is no charge of conspiracy, joint trial is not justified. In absence of prejudice conviction was upheld. *Kalu*, A 1964 M P 18 ; 1964(2) Cr L J 185. See *Krishna Murthi v. Abdul Subhan*, A 1965 Mys 128.
- Section 537(a), (p. 1605)—Offence under Section 188 I. P. C.**—Complaint lodged by personal assistant to the public servant concerned is not a valid complaint. The Magistrate gets no jurisdiction to take cognizance. Irregularity is not curable under Section 537(a). *Lakenath Mishra*, A 1964 M P 237 : 1964(2) Cr L J 420.
- Section 539-B, Section 145(4).**—Noted at p. 387 Add after footnote 3. See *Appaya Naika*, A 1964 Mys 177 ; 1964(2) Cr L J 313 ; *Chando Sharma v. Inder deo Singh*, A 1964 P 239 ; 1964(1) Cr L J 534.
- Section 540, (p. 1616).**—The Judge has to exercise caution in using his powers under Section 540. The mere fact that evidence is directed to be taken after the entire case is over is not in itself in excess of the powers under Section 540. *Shreelal Karjaria*, A 1964 B 165 ; 65 Bom L R 772 where *Mahedu Raghavji*, A 1928 B 388, *R. S. Mani*, A 1951 M 707 referred to.
- If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution. The powers of the Court under Section 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require but that does not justify the contention that the failure of the Court to have exercised its powers under Section 840 has introduced a serious infirmity in the trial itself. *Dasaya Singh v. State of Punjab*, A 1965 S C 328.
- Section 540 (p. 1617).**—The powers of the Court under this section is not controlled by the proviso to Section 145 (4) and the

Court has wide discretion to summon any person as a Court witness for the purpose of arriving at a just decision of the case. *Raj Kishan v. Niranjana*, A 1964 or 226: 1964 (2) Cr L J 563 Where *Mirza Mohd Aziz v. Safdar Hussain*, A 1962 A 68 : 1962 (1) Cr L J 116 and *Bhagirat Singh*, A 1959 A 763 ; 1959 Cr L J 1384 was relied on *Ghulamathu v. Rajaraj*, *Ghutu Akonda v. Samsher Ali*, A 1964 Ass 105 ; 1964 (2) Cr L J 272 (1) 1964 M 263 ; 1964 (1) Cr L J 674.

Court's power under Section 540 can be exercised even in proceedings under Section 20-A. *State of West Bengal v. Tulsidas Mundra*, 1964 (1) Cr L J 443 (S C) : (1963) 2 S C J 204.

Section 556 (p. 1642).—In order to attract the provisions of Section 556 it is necessary that the Magistrate should either be a party to, or personally interested in the case. If he incurs such disqualifications, he will not be competent to try the case, the defect will not be cured under Section 537. Issue of warrant under Section 100 Cr P Code for wrongful confinement does not disentitle the Magistrate from taking cognizance of the offence. In re *Malapati Srihari Rao*, A 1964 A P 226 : 1964 (1) Cr L J 507.

Section 561-A (p. 1648).—It is not well-settled that Section 561-A contains no new powers on the High Court. It merely safeguards all existing inherent powers possessed by the High Court necessary (among other powers) to secure the ends of justice. Where the High Court made a sweeping remark against the entire police force of a State, the remarks were expunged upon the application by the State to the Supreme Court. *State of Uttar Pradesh v. Mohd. Naim*, A 1964 S C 703 ; 1964 (1) Cr L J 549 where *Jairam Das*, 72 I A 120 ; A 1945 P C 18 referred to ; *Kinhimanagalam*, A 1965 Ker 37 ; 1965 (1) Cr L J 171 *Karam Das v. Sougat Ram*, A 1964 N P 87.

Section 561-A (p. 1650).—Where theft of a truck was alleged but it was found that the question of title in the truck claimed by the complainant was doubtful, proceedings were quashed as there was a *bona fide* claim of title pleaded by the accused. *Niranjana Prakash v. Manrilal*, (1964) (2) Cr L J 369 A 1964 A 433 following *R. N. Kapur v. State of Punjab*, A 1960 S C 866 ; 1960 Cr L J 1239 ; *Chiranjil Lal v. Raja Ram Singh*, A 1964 Raj 267.

Even though a petition was not competent under Section 99-B Cr. P. Code for want of an order of forfeiture under Section 99-A, still as the illegality has been brought to the notice of the High Court it could interfere under Section 561-A and property seized was allowed to be returned. *Nawal Kishore*, A 1964 Punj 269 (F B) ; 1964 (1) Cr L J 696.

Expunging objectionable remarks.—Where a Magistrate, while disbelieving a witness, made remarks against him, High Court will not interfere if the remarks were not irrelevant or unjustified. *Pradip Kumar Das*, A 1964 Ass 100 ; 1964 (2) Cr L J 145.

Section 561-A (p. 1651).—High Court has no inherent power to alter or review its own judgment. *Kinhimanagalam v. Food Inspector, Cannanore*, A 1965 Kar 37 ; 1965 (1) Cr L J 171 following *Taleb Haji v. Madhukar Purshuttam*, A 1958 S C 376 ; 1958 Cr L J 701.

High Court can quash under Section 561-A illegal commitment to Court of Sessions under Section 207-A (10). *State v. Joseph*, 1964 (1) Cr L J 588 (Cal).

Section 561-A (p. 1652).—Add to footnote, *Walu*, A 1965 Or 7 following *U. J. Chopra v. State of Bombay*, A 1955 S C 633 ; 1955 Cr L J 1410 distinguishing *Biyama, In re*, A 1963 Mys 326 and not following *Rajuaguin*, A 1959 A 315 (F B) where *held* that the High Court has no power to review its own order passed in Criminal revision petition even when the fact of Section 6 of the Probation of Offenders' Act being extended to a District was not brought to its notice before disposing of the revision petition.

ADDENDA No. 4

(1966—August 1969)

S. 4(1)(f)(p. 16)

Giving information to police that accused committed cognizable offence amounts to institution of criminal proceeding, *Albert*, A 1966 Ker 11 (F.B.) : 1966 Cr L J 26. See *Chandmal*, A 1967 M. P. 52.

S. 4(1)(h)(p. 17)

Complaint need not be signed by the complainant, *G. K. Mazumdar*, A 1967 Guj 15.

S. 4(1)(h)(p. 20)

Application under Section 107 is not a complaint, *In re Manika Reddy*, A 1968 M. 225.

S. 4(1)(h)(p. 22)

Magistrate has no power of reviving complaint dismissed in default under S. 259—*Bajrangi Singh*, A 1967 Punj 361 Contra *Rayappa v. Shivamma*, A 1964 Mys. 1 : 1964(1) Cr L J 49.

S. 4(1)(l)(p. 28)

Investigation starts when police-officer forms definite opinion for investigating crime, *Sirajuddin*, A 1968 M. 117.

S. 4(1)(m)

Recording confession during investigation is not a judicial proceeding, *Mohd. Rahmatulla*, A 1968 Mys. 95.

S. 5(2), 14(1), 29(p. 29)

Special Magistrates for trying cases under Motor Vehicles Act are courts constituted under S. 29(2), *In re Bhare Khan*, A 1967 M. P. 94.

S. 6(p. 39)

Magistrate seized of committal proceedings is a Court, *Kulmain Singh*, A 1966 A, 495.

S. 10(2)(p. 46)

Additional District Magistrate can accept a bond under S. 514 furnished by accused—*Debendra Bhattacharjee v. State of West Bengal*, A 1969 S. C. 189 : 1969 Cr L J 401, he cannot appoint a Public Prosecutor, *Rajkishore*, A 1969 C 321 See *Panchu Gopal*, A 1968 C. 58 : (High Court Sessions Case).

S. 10(2)(p. 46)

Additional District Magistrate cannot exercise powers delegated to specified class of officers, *Sambhunath*, A 1966 C.577 : 1966 Cr L J 1248: *Ajab*

Singh v. Gurbachan Singh, A 1965 S C 1619-1965(2) Cr L J 533. See *Harichand*, 1969 Cr L J 803.

S. 15(p. 55)

Nyaya Panchayat collectively can sit as a Bench, *Rammurti*, A 1969 A. 35.

S. 21(p. 67)

Cases like Criminal Trespass ought not to be transferred to Honorary Presidency Magistrates, *Md. Ali v. Dr. Ramdas*, A 1966 M 441.

S. 28(p. 72)

Juvenile offenders should be tried by Juvenile Court, *Hanumantha*, A 1966 Mys. 271 : 1966 Cr L J 1168.

Ss. 31(1), 423(p. 78)

The power of Appellate Court to pass a sentence must be measured by the power of the Court from whose judgment appeal preferred, *Jagat Bahadur v. State of M. P.* A 1966 S C 945 : 1966 Cr L J 709.

S. 32(p. 63)

Award of Sentence is a matter of discretion—*Gopishankar*, A 1967 Raj 159, *Tycheppa*, A 1967 Mys. 51, *Babulal*, A 1967 P. 263 ; See *Anant Kumar*, A 1962 C 428.—Deterrent Sentence in Rash Driving Cases, *Ramkant Jeshwant*—A 1968 Goa 77.

S. 33(p. 64)

Sentence in default of fine is not to be passed in conviction under Municipal Act, *Dhoopa*, A 1966 Raj. 238.

S. 35(p. 90)

Bar under Section 64, I P C, attracted, *Mritunjoy*, A 1967 p. 286 ; See *Biro Swain*, A 1969 Or 146.

S. 35(p. 92)

Consecutive sentences—See *Tetor Gope v. Ganawari Gope*, A 1968 p. 289.

S. 54(p. 111)

Arrest of accused without written authority is illegal, *Mulla Singh*, A 1968 A. 132.

Ss. 75, 79, 80 (p. 134)

Warrant mentioning 6 days for execution endorsed by O. C. Thana is valid, *Inder Mondal*, A 1967 p. 141.

Ss. 75—86, 555 (p. 135)

Warrant against Fugitive Offender at Hong Kong—Warrant sent by C. P. M. Calcutta for Extradition invalid, *Jugal Kishore More*, 71 C W N 508 : A 1968 C. 220.

Ss. 79, 96(p. 138)

Apply to search warrant issued under Hyderabad Gambling Act, *Siddanah*, A 1966 Mys. 209.

S. 83

Warrant sent by issuing Court cannot be sent to any body for execution, S. 537 applies, *Debendranath*, A 1969 C 340.

Ss. 99A-99D(p. 171)

Requirements about stating grounds of opinion by Government is imperative, *Md Khalif*, A 1968 Delhi 13(F B).

S. 103(p. 180)

Inapplicable to search under Bihar Sales Tax Act, *Sheonath Prasad*, A 1968 S C 1517 : 1969 Cr L J 37—applicable to Railway Protection Act, *Dakhina Mistry*, A 1969 M 201.

S. 103(p. 183)

Search does not become illegal because search witnesses are not inhabitants of the locality *Raoji*, A 1967 Mys. 47, *Radhakissen v. State of U. P.*, A 1963 S C 822 : 1963(1) Cr L J 509.

S. 107, 112—(p. 197)

Order under Section 112 must be passed before proceedings under Section 107 can be initiated, *Balraj Madhok*, A 1967 Delhi 31.

Ss. 107, 145(p. 201)

Magistrate may proceed either under Section 107 or Section 145 in land dispute, *Daitari Prodhan*, A 1967 Or 17 following *Abbas*, 39 C 153 (F B).

S. 107, 112, 117(3)—(p. 257)

Composite order under Section 117(3) and S. 112 is not invalid, *Satyanarayan*, A 1967 Or 133, *Jagadis*, A 1957 p. 106, *Probhakar*, A 1960 A 467.

S. 117(3)(p. 269)

When bonds undertaken, petitioners need not be arrested—*Sankar-naryan*, A 1969 Ker. 188.

Ss. 127, 128(p. 299)

Magistrate or police officer can command an assembly to disperse, *Hanuman Singh*, A 1969 A 130.

S. 133(p. 319)

Order directing demolition of private building is not proper, *Manual Philip*, A 1967 Goa 1 (F B), *Sumer Singh*, A 1955 C 554 : 1954 Cr L J 1385.

S. 133(p. 321)

“PUBLIC PLACE”—Government acquiring the land—does not make the land, *Kayati Vegetable Market*, A 1967 Ker 44 Contra *Ram Kripal Singh*, A 1945 p. 319.

S. 139A(p. 333)

'RELIABLE EVIDENCE' explained, *Atul Krishna*, A 1966 C 215 : 1966 Cr L J 528.

S. 144(p. 350)

Is not unconstitutional, *Ram Manohar Lohia*, A 1968 A 100 ; *Babulal Perate*, A 1961 S C 844 : 1961(2) Cr L J 16.

S. 144(p. 353)

Magistrate must record grounds for action, *Dhaulla Municipality*, A 1968 Punj 303.

S. 144(4) (p. 365)

Jurisdiction to rescind an order of Subordinate Magistrate is a special one, *Hruthikesh v. Balaram*, A 1967 Or 72.

S. 144(6)(p. 367)

Order under Section 144 lasts sixty days—allegations of illegal confinement, police unable to give protection, *Morbes v. Imanuddin*, A 1968 C. 364.

S. 145(p. 379)

SCOPE — Magistrate is primarily concerned with the question of actual possession, *Chakrapani v. Dharubacharan*, A 1967 Or 39 ; *Nata Prodhan*, A 1968 Or 36 ; *Probhu Krishna*, A 1968 Or 239.

S. 145(p. 396)

Magistrate can arrive at satisfaction that a dispute likely to cause breach of peace exists from police report and upon other information (application to the party dispossessed), *R. H. Bhulani v. Mani J. Desai*, A 1968 S C 1444 : 1969 Cr L J 13—Omission on the point of satisfaction is curable under S. 537, *Bhagwat Saran*, A 1967 A 104.

S. 145 (p. 410)

Parties whose names are not mentioned in the initial order may be added, *Jawargowda v. Mallagowda*, A 1967 Mys. 169 ; *Charan Singh*, A 1969 Punj 101 ; *Chandra Kumar*, A 1968 C. 216.

S. 145(4)—Proviso (p. 414)

Affidavits require consideration, *Vijay Ram v. Luxman Bai*, A 1968 Mys. 16 ; *Sarjug Singh v. Ram Ekbal Singh*, A 1968 p. 129.

S. 145(4)—Proviso (p. 414)

Preliminary order must be passed within 2 months of dispossession, *K. D. Kohli*, A 1968 Delhi 231.

S. 145, S. 539-AA (p. 416)

For affidavit in Section 145 proceeding no particular authority is specified in the Code, *Ahmed Din v. Abdul Salem*, A 1966 Punj 528, *Hemdam*, A 1966 Raj 5 ; 1966 Cr L J 60.

S. 145, 2nd proviso (p. 419)

‘Forcible dispossession’—The dispossession mentioned herein is one that amounts to an act of forcible and wrongful driving out a party from his possession, *A. H. Bhutani v. N. G. Desai*, A 1968 S C 1444 : 1968 Cr L J 980.

S. 145(9), S. 540(p. 426)

A Magistrate has power to examine a person as a witness even though his affidavit has not been filed, *Adinath Chakraborty*, A 1967 Tripura 10, *Khemchand*, A 1967 A 44 : *N. L. Singh*, A 1967 Manipur 23.

S. 145(4)(p. 409)

Proceedings under—do not contemplate joint possession, *Khemchand*, A 1967 A 44.

S. 145(p. 410)

‘Parties concerned in such dispute—mean all persons claiming to be in possession at the time of initial order, *Hari Ram v. Anwarilal*, A 1967 Raj 378 following *Krishna Kamini v. Abdul Jabbar*, 30 C 155 (F. B.).

S. 145 (p. 418)

Finding possession in favour of accused 2nd party in a case under Section 379 I. P. C. for theft of crop is not binding in—proceeding, *Keramaswami v. Natha*, 1966 Or 186.

S. 146(1-A)(p. 434)

Proceeding arising on reference under Section 146(1-A) is a civil proceeding, *Kailash v. Amarnath*, A 1969 A 82, *Ramchandra Agarwal v. State of U. P.*, A 1966 S C 1888.

S. 146(1-B)(p. 434)

The words in Section 146(1) have reference only to Territorial jurisdiction and not to pecuniary jurisdiction—*Ramlakhan v. Raghunath*, A 1969 Assam 81, *Raja Singh*, A 1962 p. 243(F. B.) ; *Gajbir Singh*, A 1968 Punj 301 ; *D. Achari v. Reddi*, A 1967 M. 91.

S. 146(p. 434)

Reference is to a Constitutional Court and not to a person designate, *Ramcharan v. State of U. P.*, A 1966 S C 1883 ; *Kailashnath v. Amarnath*, A 1969 A 82.

S. 146(1-D)(p. 436)

Order cannot be disturbed in appeal or revision—*Chandikumar*, A 1968 C 216 ; *Bijayanandan Das*, A 1966 Or 119.

S. 146(p. 437)

Powers of Receiver under—are wider than Receiver under Section 145, *Sankarnarayan*, A 1969 Ker 188.

Ss. 151, 157, 54. (p. 463)

Gherao Case, Joy Engineering Works, 72 CWN 441 ; A 1968 C. 407 (S. B.)

S. 154(p. 467)

F. I. R. is earliest information, *Mannalal*, A 1967 Cr 478.

S. 154(p. 470)

F. I. R. is not substantive evidence—corroborates or contradicts informant only, *A Nagesia v. State of Bihar*, A 1966 C 119 : 1966 Cr L J 100 ; *Dhandapati v. D. Durordgan*, A 1968 Or 117.

S. 154(p. 470)

Suppression of material particulars in F. I. R., *Mannalal*, A 1967 C 478, *R. P. Kapur v. Pratap Singh Kauron*, A 1961 S C 1117.

S. 155(2), S. 190, 200(aa)(p. 476)

Police investigating cognizable case can investigate non-cognizable case—Section 155(2) is no bar. A Magistrate can take cognizance without examining police-officer on oath, *Safder Hassan v. Abdul Rahim*, A 1967 M 4 ; *Provin Chandra v. State of A. P.*, A 1965 S C 1185 : 1965(2) Cr L J 250 see *Jogendra Singh*, A 1969 Punj 465.

S. 156(p. 478)

Information denotes collection of evidence by a police officer or by a person authorised by a Magistrate, *Bandikottaya*, A 1966 A P 377.

S. 157(p. 482)

Report of every information does not start investigation, *In re Tamappa*, A 1967 Mys. 71.

S. 157(p. 482)

Police officer who is an eye-witness should not investigate, *Bhagwan Dayal*, A 1968 A 398.

S. 161(p. 491)

Entire proceedings and investigation are not vitiated by taking signed statements, *Sirajuddin*, A 1968 M 117 ; *China*, A 1961 Raj 35.

S. 161(p. 491)

Report made by deceased at police station being dying declaration is substantive evidence, *Motital*, A 1968 A 83.

S. 162(p. 498)

Accused was not aware of *Taperecording* of his conversation with police officer in a bribery case, held, conversation was not hit by, *Yusufali v. State of Maharashtra*, A 1968 S C 147 : 1968 Cr L J 103.

S. 162(p. 498)

F. I. R.—Statements recorded after starting of investigation are hit by Section 162, *Ibrahim Hossain*, A 1969 Goa 68 ; *Sirajuddin*, A 1968 M 117.

S. 162(p. 503)

Evidence led in police case found unsatisfactory, evidence in complaint case cannot be attacked, *Krishna Chandra*, A 1968 Or 172.

S. 162(p. 514)

Unfortunate that law does not admit or cross-examination of defence witnesses in respect of statements before police, *Laxman v. State of Maharashtra*, A 1968 S C 1390(1392) : 1968 Cr L J 1647.

S. 162(p. 505)

Prosecution cannot refer to earlier statement, defence can use it for contradiction only, *Madanlal*, A 1967 p. 68 ; *Nandkishore*, A 1967 A 373 but when a witness admits he made a statement to police which was the truth, statement is inadmissible under, *Bhanu Prasad v. State of Gujrat*, A 1969 S C 1313 : 1968 Cr L J 1495.

S. 162(p. 510)

Illegality committed in investigation or trial does not affect jurisdiction or Trial unless point was taken at an early stage, *State of Maharashtra v. Atma Ram*, A 1966 S C 1780 following, *State of A. P. v. Venugopal*, 1964 (1) Cr L J 16(S C) *Narayan Hari v. Yashwant Rowji*, A 1928 B. 352 (F B).

S. 163(p. 511)

Police officer is prohibited from beating confessing persons with a view to induce them to make statements, *State of Maharashtra v. Atma Ram*, A 1966 S C 1780.

S. 163(p. 511)

S. 163 applies to investigations under the Code, *Lakshman Das*, A 1968 B 400.

S. 164(p. 520)

Statements made in answer to notice under Section 171A of Act of 1878 are not confessions recorded under Section 164. S 30. Evidence Act is applicable, *Haroon Haji Abdulla v. State of Maharashtra*, A 1968 S C 832. : 1968 Cr L J 1017.

S. 163(3)(p. 529)

Where the endorsement of the certificate by the Magistrate is not in proper form, it does not mean that any threat was given to the witness, *Ramcharan v. State of U. P.*, A 1968 S C 1270 (1272) : 1968 Cr L J 1473.

S. 164(p. 531)

Accused not admitting the offence cannot be said to confess, *Lokenath*, A 1967 Or 24.

S. 164(p. 532)

Retracted Extra Judicial Confession—Corroboration can be made by statements of accused before committing Court, *M. Malik*, A 1967 Or 24 ; *A. M. Theba*, A 1967 Manipur 11.

S. 164(p. 533)

Retracted Confession—cannot be acted upon unless corroborated in material particulars—*Haroon Haji Abdulla v. State of Maharashtra*, A 1968 S. C. 832 : 1968 Cr L J 1017 *Ramchandra v. State of Bihar*, A 1967 S C 349 ; *Ram Prokash v. State of Punjab*, A 1959 S C 8.

S. 164(p. 534)

Confession of co-accused can only be used to lend support of other evidence against the accused, *Sahoo v. State of U. P.*, A 1955 S C 40 : 1966 Cr L J 68 ; *Sahar Singh*, A 1966 p. 448.

S. 165(p. 537)

Person issuing the authorisation must record reasons, *Balwant Singh*, A 1969 Delhi 91.

S. 165(p.537)

Safe guards under Section 165 apply to searches under Section 41 of Madras Sales Act—*Board of Revenue Madras v. R. S. Jhaver*, A 1968 S C 59 : (1968) 2 S. C. A. 560. Recording of reasons is not necessary in case of search under Section 105, Customs Act—*Gopikisen*, A 1957 S C 1298 See *Mithukhan*, A 1969 Raj 121.

S. 165(p. 537)

Search of a house must be in accordance with law, *Bhusain Singh*, A 1968 Delhi 201 (F. B.).

Ss. 167, 344(p. 544)

Magistrate passing orders of remand for more than fifteen days, police officers deposed that there was no evidence, *held*, subsequent detention was illegal, *In re Raju Thevan*, A 1966 M 349.

S. 167(p. 545)

Non-compliance with Section 167 (1) in proper case may lead to the inference that the prosecution evidence is tainted, *Hanepa*, A 1966 Ker 229.

S. 173(p. 561)

Magistrate has no jurisdiction to require police to submit charge-sheet where final report already submitted, *Abhinanda Jha*, A 1968 S C 117 : 1968 Cr L J 97 : *Jaanhari Mal*, A 1969 A 241 ; *Laksman v. Sudhakar* A 1969 Goa 149 ; *A. K. Roy*, A 1962 : C 185 (F. B.).

S. 173(s)(p. 562)

Copies of statements and documents must be supplied to accused, *Jamhari Mal*, A 1969 A 241, *Thacker Kaku*, A 1966 Guj 217.

S. 173(4)(p.562)

Applies only when investigation is made by a police Officer and not by Customs officer, *Bashir Hussain v. Gulam Mohammed*, A 1966 B 253, *State of Punjab v. Barkatram*, A 1962 S C 276.

Ss. 177, 179(p. 577)

Offence of *cheating* can be tried at the place where conspiracy had its origin or at the place where cheating was completed—*Monohar Lal*, A 1966 Or 219 *Purshottam Das v. State of W. B.* A 1961 S C 1589 : 1961 (2) Cr L J 728 ; *L. N. Mukherjee v. State of Madras*, A 1981 S C 1601 ; 1961 (2) Cr. L J 78 —offence of *defamation*, See *Sunilakhya Chaudhury*, A 1968 C 266 ; *Narain Singh*, A 1967 Punj 403.

S. 179(p. 577)

A share-holder can file a complaint against company for non-payment of dividend—*Manuman Prasad Gupta*, A 1967 A 135.

S. 190(p. 599)

'Taking cognizance'—meaning of, *Madhaban Nair v. Gopal Parida* A 1969 Ker 97, *Raghubans Dubey v. State of Bihar*, A 1967 S C 1167.

S. 190(p. 599)

Cognizance of offences triable by Nyaya Panchayat—*Chotey Lal*, A 1967 A 229.

S. 190(1)(b). S. 251A(p. 599)

Magistrate takes cognizance of an offence and not of offenders, *Raghubans Dubey v. State of Bihar*, A 1967 S C 1167 : 1967 Cr L J 1081 ; *Provin Chandra Mody v. State of U. P.*, 1965 (2) Cr L J 250 (S. C.) ; *Kamala Prasad*, A 1967 p. 270.

S. 190(p. 600)

May take cognizance—"may" should be read as "must", *A. C. Agarwal v. Ramkant*, A 1968 S C 1 : 1968 Cr L J 980 Contra *Gopal Das v. State of Assam*, A 1961 S C 986.

S. 190(p. 600)

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Ss. 190, 195(1)(b)(p. 601)

The question about legality of Cognizance has to be judged in relation to the data on which Cognizance was actually taken, *M. L. Sathi v. R. P. Kapur*, A 1967 S C 528 ; *Joginder Singh*, A 1966 Punj 465, *Bondi Kuttaya*, A 1966 A. P. 397.

S. 190, 537(p. 601)

If report of Drug Inspector is invalid, Court cannot take cognizance, an error antecedent to trial is curable, *Hatam Bhai*, A 1969 A. P. 99.

S. 190(1)(a), (f)(p. 605)

Central Excise Officer can only make a complaint under clause (a). His report is not a police report, *Badka Joti v. State of Mysore*, A 1966 S. C. 1746 ; 1966 Cr L J 1353.

Ss. 190(p. 608)

Cognizance taken of an offence triable as a Summons case, it can be converted into a warrant case, *Shanuga Sundera v. Sadasivam*, A 1968 M. 60 : 1968 Cr L J 183.

S. 192(p. 615)

Naraji petition should not be referred to another Magistrate for inquiry and report, *In the matter of State of Kerala*, A 1969 Ker 116.

S. 192(p. 615)

The Transferee Magistrate can dismiss a complaint, *Jauhari Mal*, A 1969 A 241.

Ss. 192, 200, 202(p.615)

Order of A. D. M. in sending a case to the S. D. M. for enquiry and report does not amount to a transfer of the case, *Gurdit Singh v. Abhoy Das*, A 1967 Punj 244 ; *Biswanath*, A 1969 p 97.

S. 194(2)(a)(p. 621)

Sanction by State held not necessary in contempt of court proceeding, *Sher Singh v. R. P. Kapoor*, A 1968 Punj 217 (F. B.).

S. 195(1)(b)(p.630)

Does not bar trial for the trial of a distinct offence (S. 353 I. P. C.) although Section 186 I. P. C. requires complaint, *Durgacharan v. State of Orissa*, A 1966 S C 1775 (1779) ; *Radhashyam*, A 1968 A 342.

S. 195(p. 630)

It is not permissible for the prosecution to drop a Sessions charge and select one which does not require the procedure under Section 195, *Dr. S. Dutt v. State of U. P.*, A 1966 S C 523 : 1966 Cr L J 459.

S. 195(1)(b)(p. 631)

Postulates only the proceeding pending and not in contemplation, *M. L. Sathi v. R. P. Kapoor*, A 1967 S C 528 : 1967 Cr L J 528.

S. 195(1)(b) (p. 631)

Proceedings under Sections 182 and 211 I. P. C. quashed, proceedings under Section 467, 471 held to continue, *State of Punjab v. Brijlal*, A 1969 S C 355.

S. 195(1)(b)(p. 632)

Forged entries made by Lekhpals being in relation to a proceeding falls under Section 193 I P C, for private complaint prosecution under Section 218 I P C maintainable, *Kamala Prasad Singh v. Hari Prasad Singh*, A 1968 S C 19 : 1968 Cr L J 86.

S. 195(1)(b)(p. 633)

Perjury committed on advice of Counsel not to enter into compromise — not a fit case for complaint under, *Kalicharan*, A 1968 A 65.

S. 195(1)(b) (p. 634)

Proviso is not attracted in a case under Section 211 I P C where police filed final report, *Kuhamad*, A 1966 Ker 242.

S. 195(1)(c) (p. 638)

If a forged document is produced or given in evidence, bar is attracted, *Vitikanand*, A 1969 A 189(191).

S. 195(1)(c), S. 476 (p. 638)

Court has no jurisdiction to make a complaint under Section 476(1) in respect of an offence not mentioned in Clause (b) or (c), *Mulchand v. Kamala Bai*, A 1966 S C 1873 : 1966 Cr L J, *K. Goundan*, A 1967 S C 170.

S. 195(p. 645)

A settlement officer is not a Revenue Court, *Rafiq Khan v. R. M. Singh*, A 1964 A 88 ; *Nagraj v. State of Mysore*, A 1964 S C 269 : 1964(1) Cr L J 161.

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S. 195(1)(c) (p. 643)

Competent authority.—Slum Areas Act 1956 does not possess attributes of "Court", *Trilokinath*, A 1966 Punj 407 ; *Virendra Kumar Satyabadi*, A 1956 S C 513 : 1956 Cr L J 326.

S. 195(5) (p. 645)

There is no provision for filing an appeal against the order of a public servant refusing to lodge complaint in a case under Section 188 I P C — *Batta*, A 1967 p. 95 Contra, *Public Prosecutor v. Muhammad Ali*, 1966 A P 41.

S. 196(p. 651)

State Government by general order can empower subordinate officers to grant sanction, *Ghulam Rasul*, A 1968 A 215 ; *Gour Chandra Rup*, A 1963 S C 1198 : 1963(2) Cr L J 194.

S. 197(p. 660)

'Removable from office'.—meaning of, *B. Ram Chandra Rao*, A 1968 Mys 243, *Baijnath*, A 1966 S C 220.

S. 197(p. 662)

An officiating Class I Railway Officer is not a public servant, Sanction is not necessary, *K. N. Sukla v. Nowmitlal*, A 1967 S C 1331: 1967 Cr L J 1200— but sanction is necessary for prosecution of Lekhpal, *Sitaram*, A 1968 A 207 and for Chairman of a Municipality, *Ledu Ram v. Rameshwar*, A 1968 Raj 136, or a Sarpanch, *Ramdev*, A 1968 Raj 125.

Trial is not vitiated for want of sanction nor when the act abetted was done in discharge of official duty, *Bakshish Singh v. State of Punjab*, A 1967 S C 752 : 1967 Cr L J 656 following, *Satwant Singh v. State of Punjab*, A 1960 S C 261, distinguishing, *Sunil Kumar Paul v. State of W. B.*, A 1965

S C 706 ; *Munshi Ram v. Delhi Administration*, A 1968 S C 700 : 1968 Cr L J 805. See *Baijnath v. State of M. P.*, A 1966 S C 220 : 1966 Cr L J 179 ; *Chamanlal v. Muluk Raj*, A 1967 Punj 51 ; *Prabhaker v. Shankar*, A 1969 S C 666.

S. 200, 4(2) (p. 685)

Naraji petition under Section 202 is a complaint, *Sunil Majhi*, A 1968 C 238.

Ss. 200, 202 (p. 685)

Second examination of complainant not required where complainant was examined before police report submitted, *Khitish Chandra Shome*, A 1967 C 111. See *K. V. Subbaiah*, A 1969 Mys 184, *B. C. Khatri v. Peshavan*, A 1968 B 30.

S. 202 (p. 696)

Enquiry Magistrate cannot issue summons to witnesses, *MaLenan* A 1968 C 195.

S. 202 (p. 701)

Second judicial enquiry is not prohibited, *Monohardas v. Khadar Datta*, A 1966 C 633.

S. 202(2-A), S. 203 (p. 701)

Magistrate cannot permit an accused to cross-examine prosecution witness in enquiry under Section 202, *Jamuna Hazra v. Adya Singh*, A 1967 p. 122 following *Chandradeo v. Prokash Bose*, A 1963 S C 1430.

Ss. 203, 154 (p. 704)

Magistrate erred in dismissing complaint without examining witnesses for complainant, *G. Mohiuddin v. Nagaji*, A 1968 Mys 210.

Ss. 203, 537 (p. 708)

Absence of record of reasons before dismissing complaint is an illegality, *Vasantlal*, A 1968 Guj 211 ; *Chandradeo v. Prokash Chandra Bose*, 1963(2) Cr L J 397 S C.

S. 204(1-B) (p. 713)

Summons should be accompanied by a copy of the petition of complaint. Provisions are directory, *Prabhu Dayal v. R. Mudgil*, A 1966 Punj 373.

S. 205, 540-A (p. 715)

Personal exemption should not be granted in respect of offences of a serious nature, *Sachidananda*, A 1969 Mys 95.

Ss. 205, 540-A

Magistrate is to examine the accused personally under Section 342, *Bibhuti v. State of W. B.*, 1969 Cr L J 634 : A 1969 S C 381 overruling, *Prava Debi v. Fernandez*, A 1962 C 203 (F B): 1962 (1) Cr L J 565. See *Munni Begum*, A 1968 Delhi 208.

S. 207-A(4)(p. 728)

Principles giving Section 209 are not different from those enshrined in Section 207-A, *K. P. Raghavan*, A 1967 S C 740 : 1967 Cr L J explaining *Bipat Gope*, A 1962 S C 1195 ; *Bhudiram*, A 1968 Or 165.

S. 207A(b)(p. 728)

Committal was set aside as Magistrate did not give reasons for non-examination of eye-witnesses, *Sate Singh*, A 1968 Or 70, *Sri Ram* A 1961 S C 674. *Ananda Reddy*, A 1966 Mys 211, *Kripal Singh*, A 1965 S C 712 ; *Satanna*, A 1966 Mys 248 ; *Abdulla*, A 1968 J & K 78.

S. 207-A(7)(p. 728)

Magistrate is to commit if there is a prima facie case, *Saday Chand Meheteb* ; A 1966 C 217 : 1966 Cr L J 530 ; *Badaruddin*, A 1968 Ass 28 ; he should discharge if he is of opinion that there is no ground for committing; if it appears that he shall try such person himself, he must proceed accordingly, *Ramekhal v. Madan Mohan*, A 1967 S C 1156 : 1967 Cr L J 1076, *Naz's* ; A 1967 M P 49.

S. 208(p. 732)

Provisions under Section 208 are mandatory, *Puttalu*, A 1966 A 535 : 1966 Cr L J 1233.

S. 209(p. 738)

An express order of discharge is contemplated, *Ramekhal v. Madan Mohan*, A 1967 S C 1156. *T. J. Kurian*, A 1969 Ker 68, where sufficiency of grounds doubtful, Magistrate is to commit accused, *Padamcharan v. Netrananda*, A 1968 Or 63.

S. 221(p. 771)

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S. 221(p. 771)

Charge of Forgery — should state that a false document was prepared dishonestly or fraudulently, *In re M. Gangachari*, A 1967 Mys 86. See *Munafkha*, A 1968 B 298.

S. 221(7)(p. 774)

Charge should state date of commission of first offence, *Badri*, A 1966 Raj 203 ; *Teetha Rao*, A 1968 A P 19.

S. 222(p. 780)

Charge of Criminal Breach of Trust—items of misappropriation beyond one year may be excluded of, *Chedaman Narayan*, A 1969 B 8.

Ss. 226, 227(p. 786)

A Sessions Judge cannot altogether omit a charge framed by the Committing Court, *In re Sakharam*, A 1969 M 320.

S. 233(p. 813)

Trial for six different similar offences — Evidence recorded in one case used in other cases is not permissible under Sections 234-239, procedure is illegal, *Kali Raja*, A 1966 Guj 239. See *Pandaran Mani*, A 1966 Ker 1 (F B).

S. 235(p. 819)

Offences committed in same transaction cannot be split up to assume jurisdiction, *Radheshyam*, A 1968 A 342.

S. 235, 239(p. 820)

Directors and Company can be tried jointly in offences under Companies Act, *Madan Gopal De*, A 1968 C 79 : 1968 Cr L J 1421 ; *Dulal Chandra Dhar*, 66 C W N 852.

Ss. 237, 535(p. 833)

Charge under Section 302/34 I P C, appellants can be convicted under Section 302/34, *Jagir Singh v. State of Punjab*, A 1968 S C 43 : 1968 Cr L J 89; charge under Section 307/34, accused can be convicted under Section 307, *Bhimar Kankar*, A 1968 B 254.

S. 239(p. 845)

Section 537 does not cure violation of express provision of Section 239, *Nabi Hussain*, A 1967 A 445.

S. 239(p. 847)

Same transaction — Test—unity of purpose and continuity of action are necessary, *Narayan Sett*, A 1966 Mys 243, *Lachman Nanda*, A 1966 M P 261 ; *Madan Gopal De*, A 1968 Cr L J 1421.

S. 239(p. 848)

Amalgamation of police case and complaint case charged in the same transaction — no prejudice to accused, *Jagabandhu v. Khetrabari*, A 1968 Or 26 ; *Bhuika Gope*, A 1968 p. 62.

S. 239(p. 853)

The validity of a joint trial depends upon the initial accusation in the charge, *Debi Prasad*, A 1967 A 44.

S. 243(p. 862)

Trial by Mobile Court — Accused convicted on his own plea, *Hadu Sahu*, A 1967 or 37.

S. 245(1)(p. 868)

Acquittal by looking into papers is illegal, Magistrate has to take evidence, *Thakeobari Sukhabai*, A 1968 Guj 15.

S. 247(p. 873)

A Magistrate need not wait till the rising hours of the Court for passing order of acquittal, *K. Dulabhai*, A 1969 Guj 176, *P. Thimappa*, A 1969 A P 222 ; *Mohd. Yamin*, A 1968 Delhi 149.

S. 247(p. 874)

Discretion to adjourn must be properly exercised, *Lal Bahadur*, A 1968 A 55.

S. 247(p. 871)

Report of Excise officer is Police report, acquittal for absence of officer is illegal, *Dasarath*, A 1969 p. 253, *Dasarath Mundar*, A 1968 p. 342, *Nawal Mahato*, A 1968 p. 392.

S. 247(p. 875)

Proviso see *Prabh Dayal v. R. Mudgi*, A 1966 Punj 372; 1966 Cr L J 1045.

S. 250(2)(p. 893)

Provision is mandatory, *Kailash Chandra v. Laxminarayan*, A 1966 Raj 263.

S. 251-A(p. 899)

Object.—‘Take all such evidence’ — See *Kali Ram*, A 1968 Punj 87.

S. 251-A, 190(1)(b)—(p. 900)

Report of an Excise or Customs officer if they are required as made under Section 190(1)(b) must attract the provisions of Section 251-A *Malaya Banerjee*, A 1967 C 352, *Provinchandra Modi*, A 1965 S C 1185, *Pannalal*, A 1969 A 123, *Nireswar Gogoi*, A 1969 Ass 36.

S. 251-A(p. 899)

Object.—Take all such evidence — See *Kali Ram*, A 1968 Punj 87.

S. 251-A, 173(p. 900)

Under Section 7(1) Essential Commodity Act offence is cognizable, police report comes under Section 173, *J. B. Roy*, A 1968 A P 236(237).

S. 251-A(7)(p. 903)

The prosecution cannot keep back eyewitnesses, *Karnesh Kumar v. State of U. P.*, A 1968 S C 1402 (1407) : 1968 Cr L J 1655.

S. 251-A(2), 561-A(p. 902)

When petition summoning a person not charge-sheeted is rejected, Magistrate can summon such person. *Suo moto—Chunilal*, A 1968 C 18; *Sirajuddin* A 1968 M117.

S. 251-A(7)-(11)(p. 904)

Order of acquittal without taking steps for securing attendance of witnesses held not invalid, *Narayan Roy*, A 1968 C 512.

S. 252, 259(p. 906)

A warrant case instituted on complaint is governed by Section 252-259, accused is not entitled to copies of documents mentioned in Section 173(4), *Gulam Moh.*, A 1966 B 253, *Narayan v. State of A. P.*, A 1957 S C 737, *Noorkhan v. State of Rajasthan*, A 1964 S C 286. See *Keshar Sao*, A 1969 p. 105.

S. 252, 256, 540

Prosecution closing its precharge evidence is not entitled to add to the list of witness but the Magistrate under Section 540 can examine them as court witness, *Dalip Singh v. R. Biswas*, A 1967 Punj 95 ;

S. 253(2)—(p. 910)

For reasons to be recorded police report under Section 202 cannot be considered, *Batu Ram*, A 1968 Punj 274.

S. 253(2)—(p. 910)

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S. 253(2)—(p. 911)

A Magistrate must apply his mind to the evidence before passing an order of discharge, *Gopala Panikar v. Kesoram*, A 1966 Ker 243 ; 1966 Cr L J 1138.

S. 254(p. 914)

Charge will be framed after some witnesses examined prove ingredients of offence, *T. K. Appa Nair*, A 1967 M 262.

S. 255—(p. 917)

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S. 256—(p. 922)

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S. 256—(p. 923)

Accused has a right to ask the prosecution to produce documents even if those are with third party, *Manilal*, A 1969 or 176.

S. 256—(p. 923)

Accused need not pay expenses for recalling prosecution witnesses, *Kodu v. Bauamali*, A 1969 M P 20, or for summing defence witnesses under Section 257, *Thirapulliah*, A 1966 A P 272.

S. 256(2), S. 242(p. 924)

Filing of written statement by accused need not always be depreciated, *Harbans Singh v. State of Punjab*, A 1966, S C 69 ; 1966 Cr L J 82.

S. 257—(p. 923)

There is no absolute right of accused to summon P. W's. for cross-examination after he enters on his defence, *Ramkrishna v. Godadhar*, A 1966 or 195 ; 1966 Cr L J 1173 ; see *Lakshman*, A 1968 B 400 (recalling P W).

S. 258—(p. 928)

Acquittal by a special Court holding erroneously that it had no jurisdiction to take cognizance is a nullity. Section 403 is no bar, *Mohammed Safi v. State of W. B.* A 1966 S C 69 See *Mukutdhari Singh v. Jonardhan*, A 1966 S C 1356.

S. 259—(p. 931)

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S. 264, 414—(p. 945)

Evidence must be recorded whenever an appellate sentence can be passed, *Anotonia Vicente*, A 1968 Goa 80.

S. 270—(p. 953)

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S. 271(2)—(p. 954)

Plea of guilty—charge of murder—Judge must record the plea if satisfied accused understood the implication of such plea, *In re Gesapddappa*, A 1968 Mys 145.

S. 256(p. 973)

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S. 288(p. 979)

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S. 288(p. 979)

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S. 288(p. 982)

Prosecution evidence tainted, unreliable accused is entitled to acquittal, *Mohan*, A 1968 Punj 467 following *K. M. Nanavati v. State of Maharashtra*, A 1962 S C 615, 1962(1) Cr L J 521.

S. 347, 494(p. 1070)

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A special Judge can grant pardon under C. L. Act. Sections 337, 338, 540 cannot be read with Section 8(2) Act, *Lt. Commander Pascal v. State of Maharashtra*, A 1968 S C 594 : 1968 Cr L J 550.

Ss. 337-339, 435—(p. 1070)

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S. 337(p. 1074)

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S. 340(p. 1083)

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S. 342(p. 1090)

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S. 342, 342-A(p. 1099)

Statement of accused is not strictly evidence 4, the statement can be used as evidence if accused offers in writing to give evidence and is examined under Section 342-A, *State of Maharashtra v. R. R. Choudhury*, A 1968 S C 110 ; 1968 Cr L J 95.

S. 342—(p. 1099)

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S. 342—(p. 1100)

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S. 344—(p. 1108)

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S. 345—(p. 1121)

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S. 345(6)—(p. 1122)

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S. 347, 206—(p. 1127)

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S. 350—(p. 1134)

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S. 350—(p. 1135)

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S. 352—(p. 1141)

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S. 352—(p. 1141)

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S. 356(2), 537—(p. 1147)

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S. 361(1)—(p. 1152)

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S. 367—(p. 1170)

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S. 367(p. 1171)

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S. 367(p. 1172)

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S. 367(p. 1171)

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nal, A 1966 Mys 125.

S. 367(p. 1172)

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S. 367(p. 1172)

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S. 367(p. 1173)

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S. 367(p. 1173)

T. I. Parade.—Accused did not claim it, failure is not fatal, *Nel Kantha*,
A 1967 A 447.

S. 367(p. 1173)

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S. 367(p. 1173)

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S. 367(p. 1174)

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S.397(1)(p. 1206)

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S. 403(p. 1213)

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S. 403(p. 1222)

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A 1956 S C 415, *Bira Singh*, A 1965 S C 87 ; *Kishan Rao*, A 1966 Mys 241 ; *Bindu* A 1966 Raj 43 ; 1966 Cr L J 166.

S. 402(p. 1223)

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S. 403(p. 1225)

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S. 417(p. 1254)

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S. 417(3)(p. 1254)

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S. 417 (3)(p. 1254)

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S. 417(3)(p. 1254)

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S. 417(1255)

Police case filed against two accused, complaint against three accused amalgamated, appeal by Government is maintainable, *Ganesha*, A 1968 Raj 116, *Raghubans Dubey v. State of Bihar*, A 1967 S C 1167 ; 1967 Cr L J 1081.

S. 417(3)(p. 1255)

Case instituted on police report, application under Section 417 (3) is not maintainable, *Harbans Singh v. Doroga Singh*, A 1962 p 27.

S. 417(4)(p.1256)

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S. 417(4)(p. 1256)

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S. 420(p. 1261)

Jail appeal filed earlier, appeal through counsel heard earlier but dismissed, Jail appeal allowed, held Jail appeal prevailed, *Sunderlal A* 1968 A 320.

S. 421(p. 1262)

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S. 423, 374(p. 1270)

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S. 423(1), S. 561 A (p. 1271)

Court ought not to hear an appeal even in absence of accused but not where accused obtained bail and jumped bail, *Lakshman Das*, A 1968 B 400.

S. 423(1)(b)(p. 1278)

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S. 423(p. 1279)

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S. 423(p. 1281)

'Alter the nature of the sentence'.—No enhancement when sentence of imprisonment and sentence in default of fine do not exceed the original sentence, *Niranjan Singh* A 1968 Raj 46.

S. 423(1)(d), S. 522(p. 1282)

'Incidental or consequential Orders' Appellate Court can interfere with the order for restoration even if conviction is upheld—*Gordhan Das* A 1968 Raj 201 See contra *Viswanath*, A 1968 A 415 ; *Sakaldip Singh*, A 1966 p. 473.

S. 423(p. 1284)

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S. 423(p. 1285)

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S.423(p. 1285)

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S. 423(p. 1285)

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S. 429(p. 1295)

What is laid before the third Judge is the "case" and not the points of difference, *Nemai Mandal*, A 1966 C 194 ; 1966 Cr L J 522.

S.431(p. 1298)

Does not provide for the death of the complainant, appeal does not abate, *Ashwini v. State of Maharashtra*, A 1967 S C 983.

S. 431(p. 1278)

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S. 432(p. 1300)

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S. 435, 438(p. 1307)

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S. 435(p.1307)

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S. 435, 439(p. 1309)

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Ss. 435, 439 (p. 1309)

Concurrent findings of fact are not to be interfered with unless those are perverse, *Leograd Lob Lobe*, A 1967 Goa 60 ; *Kirtan Das*, A 1969 Or 36 ; *Jogindra Singh*, A 1968 Raj 13.

S. 437(p. 1325)

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S. 437—(p. 1327)

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S. 438—(p. 1333)

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S. 439, S. 423(1-A)—(p. 1331)

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S. 439—(p. 1339)

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S. 439—(p. 1342)

Party can move High Court without moving Sessions Judge, *Narayan*, A 1968 Ker 126 F B See *Banka Behari Mandal*, A 1969 C 287.

S. 439—(p. 1343)

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S. 439—(p. 1345)

Practice of High Court about entering into facts, *Jogindar Singh*, A 1968 Raj 13, not to interfere with interlocutory orders, *R. H. Bhutani v. M. J. Desai*, A 1968 S C 1344 ; 1969 Cr L J 13 ; *Ambalel*, A 1966 B 243 ; *Pukhraj v. K. K. Ganguly*, A 1968 B 433.

S. 439, 494—(p. 1345)

Withdrawal of prosecution under Section 494 is revivable, *Kedar Prasad*, A 1969 p. 140.

S. 439—(p. 1349)

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S. 439—(p. 1356)

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S. 439, 561-A—(p. 1358)

High Court can pass suitable orders even if all concerned parties have not applied, *Sunilakhya Chowdhury v. H. M. Jardine*, A 1968 C 260.

S. 439, 561-A—(p. 1358)

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S. 439, 537—(p. 1359)

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S. 469, 471—(p. 1368)

Condition of mind at the time of inquiry and not at the time of commission of offence is relevant, *Daljit Kumar*, A 1968 Or 125 ; *Seotharam*, A 1964 Mys 50.

S. 476, 479-A—(p. 1404)

False affidavit sworn by a witness, Section 479-A and not Section 476 applies, *Baban Singh v. Jagadish Singh*, A 1967 S C 66 where *Babulal v. State of U. P.*, A 1964 SC 725 distinguished; *Gangawara*, A 1969 Mys 114; *Saifuddin*, A 1969 Guj 195 ; *Ajab Singh v. Joginder Singh*, A 1968 S C 1422 ; 1969 Cr L J 4. *Parmananda Mahapatra*, A 1968 Or 144. See contra *Virram v. Sunder Singh*, A 1966 Punj 458 (application under Section 107 dismissed).

S. 476-A—(p. 1393)

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S. 476-B—(p. 1398)

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S. 479(1) and (5)—(p. 1406)

High Court can in revision order prosecution of witnesses, *Kamta Prasad*, A 1966 M P 203 ; 1966 Cr L J 762.

S. 480—(p. 1408)

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S. 482—(p. 1411)

Cognizance of an offence punishable under Section 228 I P C can be taken on complaint by Court or offender may be dealt with under, *Saherangshu*, A 1968 249.

S. 488—(p. 1424)

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S. 488—(p. 1426)

Order for Judicial Separation passed, order under this section need not be cancelled, *Nathuram v. Atarkhan*, A 1969 A 191 Contra, *Rajendra Kumar*, A 1966 A 135.

S. 488—(p. 1427)

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S. 488—(p. 1432)

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S. 488—(p. 1432)

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S. 488(3)—(p. 1434)

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S. 488(3)—(p. 1435)

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S. 488(p. 1437)

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S. 488(3)—Proviso, S. 488(4)—(p. 1438)

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S. 488(5)—(p. 1439)

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S. 488(6)—(p. 1441)

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S. 488(8)—(p. 1442)

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S. 488—(p. 1443)

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S. 488, 489(2)—(p. 1445)

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S. 491—(p. 1449)

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S. 491—(p. 1450)

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S. 491—(p. 1455)

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S. 493—(p. 1462)

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S. 494—(p. 1463)

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S. 494—(p. 1463)

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S. 497—(p. 1475)

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S. 497—(p. 1477)

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S. 497(3)—(p. 1478)

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S. 497(3-A)—(p. 1478)

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S. 498—(p. 1480)

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S. 514—(p. 1513)

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S. 517—(p. 1527)

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S. 523—(p. 1541)

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S. 523—(p. 1541)

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S. 526(1)(2)(ii)—(p. 1563)

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S. 526(8)—(p. 1569)

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S. 527—(p. 1574)

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S. 528(2), S. 10(2)—(p. 1577)

Under Notification, Orissa dated 25, 60 order under Section 10(2) does not confer powers in Additional District Magistrate to withdraw cases under Section 528, *Manoharlal*, 1966 Cr L J 1301 (Orissa).

S. 529—(p. 1584)

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S. 537—(p. 1610)

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S. 539, 539-AA, S. 510-A—(p. 1612)

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S. 540—(p. 1617)

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S. 540—(p. 1617)

Provides the power of the Court exercisable to reach a just decision, *Jamairaj v. State of Maharashtra*, A 1968 S C 178(201) : 1968 Cr L J 231.

S. 549—(p. 1634)

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S. 559—(p. 1643)

‘Personally interested’.—See *Ram Chandra*, A 1967 Raj 211; *Rameshwar Bharia v. State of Assam*, A 1952 S C 405.

S. 561-A—(p. 1631)

High Court cannot exercise inherent power where the statutory remedy is barred by time, *Gurdit Singh v. Abhoy Dass*, A 1967 Punj 244, *Kutubuddin*, A 1967 Raj 224 Contra *Nathmal Patadi*, A 1967 C 150 (petition of revision converted into petition of appeal A 1967 C 150).

S. 561-A—(p. 1649)

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S. 561-A(p. 1651)

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S. 562—(p. 1657)

Probation of Offenders Act.—Shall come into force in Districts Cuddapeh, Kusnoral, Anantpur, Krishna, *A. P. Gazette*, 11-7-1968, Pt I I p. 1281.

S. 562(1-A)—(p. 1658)

Provisions of the section apply to all offences under Penal Code punishable with more than two years rigorous imprisonment, *Akrappa Katta Malu v. Purnachandra*, A 1967 S C 1363 ; 1967 Cr L J 1212.

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VOL. II

CHAPTER XXIII

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

A.—Preliminary

266. “High Court” defined.—In this Chapter, except in Sections 276 and 307, and in Chapter XVIII, the expression “High Court” means the High Court, not being a court of the Judicial Commissioner, and includes such other Courts as the State Government may by notification in the Official Gazette, declare to be High Courts for the purposes of this Chapter and of Chapter XVIII.

State Amendments.—

Madras.—In Chapter XXIII in the heading the words “High Courts and” have been omitted by S. 18 of the Madras Act 34 of 1955. Section 266 has also been omitted by S. 19, *ibid.*

Bombay.—In sub-sec. (1) of this section before clause (b) the following clause was inserted, namely, any Presidency Magistrate *vide* Bombay Act LIV of 1959.

High Court.—By the Judicial Commissioner’s Courts (Declaration as High Courts) Act 15 of 1950 every Judicial Commissioner’s Court has been declared to be a High Court for the purpose of Articles 132-134 of the Constitution.

267. Trials before High Court to be by jury.—All trials under this Chapter before a High Court shall be by jury ;

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent or law by which the High Court is constituted or continued, the trial may, if the High Court so directs, be by jury.

SYNOPSIS

1. Corresponding sections in former Codes.
2. State Amendments.

1. Corresponding sections in former Codes.—This section corresponds to S. 32 of Act X of 1875 and excepting the words “Indian High Courts Act 1861 substituted in the Code of 1872” for the words “Twenty-fourth and Twenty-fifth of Victoria Chapter 104” is the same as that of the Code of 1882.

2. State Amendments.—

Bombay.—In the marginal note of S. 267, after the words “High Court” and in S. 267, after the words “High Court” where they occur for the first time the words “or the Court of Session for Greater Bombay” were inserted by Bombay Act 32 of 1948. In S. 267 “All Trials” and ending with the words “notwithstanding anything herein contained” shall

be omitted, and in the marginal note the following shall be substituted, namely, "Trials before High Court in certain cases to be by jury" *vide* Maharashtra Act No. XXIII of 1961 published in Maharashtra Gazette Extraordinary Part V, dated 18th January, 1961. The object is to abolish the jury system in Greater Bombay.

Madras.—Section 267 has been omitted by S. 19 of the Madras Act 34 of 1955.

Offences under S. 396, I. P. C.—Where the only offence with which the accused is charged was one under S. 396, I. P. C., which is not one of the offences triable by a Jury under the Government order; *held* the accused should not have been tried by the Jury at all.¹

268. Trials before Court of Session.—All trials before a Court of Session shall be either by jury or by the Judge himself.

SYNOPSIS

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|--|---------------|
| 1. Corresponding sections in former Codes. | —Bombay. |
| 2. Legislative Changes | —West Bengal. |
| 3. State Amendments. | —East Punjab. |

1. Corresponding sections in former Codes.—This section corresponds to S. 324 of the Code of 1861, S. 232 of the Code of 1872 and is the same as thereof the Code of 1882.

2. Legislative Changes (1955).—This section has been substituted by S. 38 of Act 26 of 1955 for the Old Section which read as follows: "All trials before a Court of Session shall be either by a jury or with the aid of Assessors."

3. State Amendments.

Bombay.—The words and figures "subject to the provisions of S. 267" are inserted at the beginning of the section by Bombay Act 32 of 1948.

West Bengal.—Section 268 in its application to the City Sessions Court has been replaced by the following S. 268 by the City Sessions Court Act 20 of 1953 :—

"Section 268. All trials before the City Sessions Court shall be by Jury. It was further amended by the West Bengal Criminal Law Amendment Act, 26 of 1956 as follows :—

Trials before the City Sessions Court to be by jury.—Notwithstanding anything contained in Sections 268 and 269 of the Code all trials before the City Sessions Court shall be by jury and such Court, if it is satisfied that the interests of justice so require may on application made to it or of its own motion, by order direct that any trial before it shall be by juror summoned from a special jury list and may revoke or alter such order."

East Punjab.—Section 38 (2) of the East Punjab Safety Act V of 1949 provides that for the purpose of trials under that Act, the old S. 268 of the Code shall be deemed to have been omitted.

269. State Government may order trials before Court of Session to be by jury.—(1) The State Government may by order in the Official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may revoke or alter such order.

(2) The State Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by

1. *Sripal Singh*, 20 Cr LJ 691 : 52 IG 659 (Oudh).

jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Judge himself, for such of them as are not triable by jury.

(4) When, in respect of a trial in which the accused is charged with an offence triable by jury, it appears to the High Court, on an application made to it or otherwise, that having regard to the volume or complexity of the evidence in the case, the trial is not likely to be concluded within two weeks from its commencement, or that the case would involve consideration of evidence of a highly technical nature, which renders it undesirable that it should be tried by a jury, the High Court may, notwithstanding anything contained in any order made under sub-section (1), by order, direct that that case shall be tried by the Judge himself without a jury and the Judge shall proceed to try the case accordingly.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Effect of Amendment. |
| 2. Legislative Changes. | 5. Scope. |
| 3. State Amendments. | 6. Particular class of offences. |
| —Bombay. | 7. Sub-section (3). |
| —West Bengal. | 8. Sub-section (4). |
| —Saurashtra. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 322 of the Code of 1861, S. 233, paragraphs 1 and 2 of the Code of 1872.

The words “with the previous sanction of the Governor General in Council” introduced in the Code of 1898 after the words “The Local Government only” in S. 269 (1) were omitted by the Devolution Act (XXXVIII of 1920).

2. Legislative changes (1955).—The words “by the Judge himself” after the words “Triable by Jury” in sub-sec. (3) were substituted for “by the Court of Session with the aid of the jurors as assessors” by S. 39 of Act 26 of 1955 and sub-sec. (4) was inserted by S. 39 of the said Act.

3. State Amendments.

Bombay.—In sub-sec. (1) after the words “The State Government may” insert the words “in consultation with the High Court” and (2) after the word “Session” insert the words “other than the Court of Session for Greater Bombay”.

Jury system in Greater Bombay has been abolished, except trials before High Court in certain cases. In S. 269 (1) for the words “other than” the word “including” was substituted by Maharashtra Act No. XXIII of 1961. In West Bengal by a Notification No. 6661-J dated 6th October, 1961, published in *Calcutta Gazette* dated 9th November, 1961 except before the High Court and the City Sessions Court, Jury trial has been abolished since 11th November, 1961.

West Bengal—“Special Jury.”—The City Sessions Court may, on application made to it of its own motion, by order direct that any trial before it shall be by jurors summoned from a special jury list and may revoke or alter such order”, *vide*, the City Sessions Courts Act, 20 of 1953.

Saurashtra.—In sub-sec. (1) after the words “The State Government may” the words “in consultation with the High Court” were inserted by Saurashtra Act 4 of 1952.

4. Effect of Amendment.—With the abolition of trial with the aid of assessors, there has been a consequential amendment in sub-sec. (3), the Legislative however inadvertently retained the opening words of sub-sec. (3) “when the accused is charged at the same trial with several offences of which some are and some are not triable by jury”. The following cases under the unamended Code which, in such cases, enjoined upon the Sessions Judge by constituting the members of the jury as assessors and to take their opinion as assessors on the charge not triable by jury² are no longer good law. Sub-section (4) has been enacted to ensure speedy trial and empowers the High Court to dispense with the trial by jury in cases where the trial, having regard to the volume of evidence or complicity is not likely to be finished within two weeks from its commencement.

5. Scope.—Trial by jury, though a valuable right has not been guaranteed by the Constitution. Section 269 (1) is an enabling section and empowers the State Government to direct that the trial of all offences or of any particular class of offences before any Court of Sessions shall be by jury. The section does not take notice of individual accused or of individual cases.³

Section 269 cannot be read with S. 29. The offences must be before the Court of Sessions.⁴

6. Particular Class of offences.—The notification under this section for trial by jury being in respect of classes of offences there is no contravention of Art. 14 of the Constitution.⁵ Section 269 (1) does not empower the State Government to deal with individual cases but compels the State Government to deal with all offences or particular classes of offences within the District all at once. Hence there is no contravention of Art. 14 of the Constitution.⁶

Powers of the Local Government.—The Criminal Procedure Code, in so far as it interferes with the right of a British Subject to be tried by Jury is not *ultra vires* of the Indian Legislature.⁷

Or of any particular class of offences.—The contention that the “class of offences” referred to in this section must be ascertained according to some classification recognised by the Legislature—such as is found in the Penal Code or in the Criminal Procedure Code is putting a narrow construction on the words. Offences may be classified according to the persons who commit them, *i.e.*, the offences, the offenders, or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed.⁸

2. *Panjari Paharappa*, 21 MLJ 540; *Ram Krishna Reddi*, 26 M 508; *Anga Vallyan*, 22 M 15; *Ganapati Vannanar*, 23 M 632; *Sakhwat*, A 1937 N 277; *Narul Amin*, A 1939 C 335; *Ram Govind Ghose*, 42 CWN 781 (conspiracy charge was triable by jury as assessors); *Ram Das*, A 1934 A 61; 35 Cr LJ 1349; *Mansingh Bachar*, 33 B 423.

3. *Dhirendra Kumar v. Supdt. and Remembrancer of Legal Affairs, West Bengal*, A 1954 SC 424.

4. *Prithivinath*, A 1938 N 56; 39 Cr LJ 650.

5. *Radhanath*, 58 CWN 243; A 1953 C 602.

6. *Badri Prasad Missir*, 57 CWN 350; A 1953 C 394.

7. *In the matter of Ameer Khan*, (1870) 6 BLR 392, 309, followed in *Barindra Kumar Ghose*, 37 C 467 (483 and 516, 517); 14 CWN 1114.

8. *Ganapathi Vanninavar*, (1900) 23 M 632 (635).

Notification making an offence under S. 436 triable by a Jury whether applicable to a trial for an offence under Ss. 436/149, I. P. C.— The effect of such notification (11th September, 1921 in *Official Gazette*) was to make a change under Ss. 436/149 triable by a Jury and when the trial was held with the aid of Assessors, the trial was held to be without jurisdiction.⁹

7. Sub-section (3).—“*When the accused is charged at the same trial.*” The words “same trial” in sub-sec. (3) do not take away the right of appeal governed by S. 410.^{9a}

When the accused is charged at the same trial with some offences which are triable by jury, *e.g.*, murder and some offences, *e.g.*, conspiracy, not triable with jury, the trial will be by the Judge himself, for such of them as are not triable by the Jury. Hence *Ram Govinda's Case* and other cases¹⁰ which held that jurors would sit as assessors for charges not triable by the jury have been modified.

8. Sub-section (4).—Applies to all trials in which an accused is charged with an offence triable by jury. The High Court can in the circumstances mentioned in sub-sec. (4) direct a case pending trial before the Court of Session for Greater Bombay to be tried by the Judge himself without a jury.¹¹

270. Trial before Court of Session to be conducted by Public Prosecutor.—In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

Corresponding sections in former Codes.—This section corresponds to S. 360 of the Code of 1861, S. 235 of the Code of 1872 and is the same as that of Code of 1882.

See Chapter XXXVIII for Provisions dealing with Public Prosecutors.

B.—Commencement of proceedings

271. Commencement of trial.—(1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Plea of guilty.—(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Sub-section (2). Plea of guilty. |
| 2. Scope. | 6. Statements of accused must be taken as a whole. |
| 3. The charge shall be read out in Court and explained to the accused. | 7. What does not amount to a plea of guilty. |
| 4. Record must show that the Charge was read over and explained to the accused and plea taken. | 8. Conviction on a plea of guilty. |
| | 9. Plea of guilty in murder cases. |

9. *Ram Sunder Isser*, (1925) 5 P 238.

9a. *Per Napier J., in Karuppa Gounden*, 18 Cr LJ 346 : 38 IC 730.

10. 42 CWN 871 : 39 Cr LJ 625 ; *Nurul*

Amin, A 1939 C 336.

11. *State v. Ram Gopal Ganapatram Ruia*, A 1959 B 1 (FB) : 1959 Cr LJ 28.

1. Corresponding sections in former Codes.—This section corresponds to S. 362 of the Code of 1861 and S. 237 of the Code of 1872.

2. Scope.—Stephen, J., observed—“Sections 271 and 272 of the Criminal Procedure Code contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of the judicature. The accused can plead ‘guilty’ under S. 271, he can claim to be tried, or he can refuse to plead, which is taken to be the same as claiming to be tried”.^{11a} Under the Code of 1898 a Court of Sessions did not possess the power to withdraw a case from the Jury on any ground whatsoever.¹² The Court has a discretion to enter upon evidence or not when accused pleads guilty. It is not however usual to accept a plea of guilty where the natural sequence would be a sentence of death.¹³ A confession of guilt on arraignment does not become a plea of guilty unless and until, it is accepted by the Judge, when the accused appears or is brought before the Court for the purposes of S. 271, his counsel should also be present and the accused must in such cases have sufficient opportunity to consult his counsel.¹⁴

3. The charge shall be read out in Court and explained to the accused.—When arraigning an accused, and before receiving his plea, the Court should be careful to ensure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead.^{14a} Where the charge was not explained to the accused, *held* there was no legal trial¹⁵ and conviction was quashed.¹⁶

4. Record must show that the Charge was read over and explained to the accused and plea taken.—Where no record of the prisoner’s plea as required by S. 237 of Act X of 1872 appeared on the proceedings nor did it appear that the charge had been explained as well as read to the prisoner, *held* that the conviction was bad.¹⁷ It should be quite clear, from the record of a Sessions trial, what was the charge that was read over to the accused under this section.¹⁸

5. Sub-section (2). Plea of guilty.—Under S. 271 (2) all that is incumbent on the Court is to record a plea of guilty. It is not obligatory on the Court to convict the accused thereon.¹⁹ The Court should not, after it has decided not to act upon the accused’s plea of guilty, to allow it to be proved, the Crown Counsel cannot be allowed to refer to it.²⁰

Plea of ‘guilty’ or ‘not guilty’ to be made by accused.—The accused should plead by his own mouth and not through his Counsel or Pleaders, though of course his Counsel or Pleader may at the proper time

11^a. *Nirmal Kanta Roy*, 41 C 1072 (1084) : 18 CWN 723 : 15 Cr LJ 460 : 24 IC 340, over-ruled by *Barendra Kumar Ghose*, 52 IA 191 on the point of construction of S. 34 IPC.

12. *Jogeshwar Ghose*, (1901) 5 CWN 411.

13. *Chinia Bhika*, (1906) 8 Bom LR 246, *Bhadu*, (1897) 19 A 119, *Lakmya Shiddappa*, (1897) 19 Bom LR 356 : 18 Cr LJ 699, followed in *Hesamuddin, Mohammad*, AIR (1928) C 775.

14. *Abdul Kader*, 49 Bom LR 25 : A 1947 B 345 (SB) (Case under S. 302 I. P. C.).

14^a. *Vambilee*, (1880) 5 SC 826.

15. *Trimbaka Dewji*, (1910) 3 Bom LR 489.

16. *Aiyavu*, (1885) 9 M 61.

17. *In the matter of the petition of Gopal, Dhanuk*, (1881) 7 C 96.

18. *Jagdeo Prasad*, (1920) 18 ALJ 442 : 21 Cr LJ 410 : 56 IC 58.

19. *Shanker*, (1925) 24 ALJ 318 ; *Gobrey*, A 1943 Mah 409.

20. *Per Sen J.*, (*Rajadhyaker J. Contra*) in *Abdul Kader*, A 1947 B 345 : 48 Cr LJ 329.

address the Court on his behalf.²¹ Batty, J., in *Sursing Mathuradas*,²² observed:—"No Pleader can be called upon to plead on behalf of his client 'guilty' or 'not guilty' and it is improper for Magistrate to act on such a plea." Aston, J., in the same case observed: "It would perhaps have been more regular in form if the Magistrate had called on the petitioner to say with his own lips whether he denied the truth of the complaint."

6. Statements of accused must be taken as a whole.—Where a prisoner pleads guilty, but goes on to say that he did not commit the offence with which he was charged, the plea is really one of not guilty.²³

7. What does not amount to a plea of guilty.—Where the prisoner admitted that he had accompanied the dacoits for a short distance, but declared that he had turned back almost immediately and had nothing to do with the dacoity that afterwards took place, and did not know that such an offence was in contemplation; it was held that this statement taken in its entirety was no evidence either direct or presumptive to prove that the prisoner had committed the dacoity.²⁴ When there is a clear *prima facie* case of murder, a Sessions Judge cannot legally, without trying the case, accept a statement made by the accused, who is charged with the offence of murder, as sufficient to establish his plea of guilty of the offence of culpable homicide not amounting to murder on the ground of grave and sudden provocation, and convict and sentence him accordingly for such offence on his own plea.²⁵

8. Conviction on a plea of guilty.—A conviction of a prisoner on a plea of guilty before a Court of Session was held to be valid although there were no Assessors.²⁶ The trial of an accused person does not necessarily end if he pleads guilty under S. 271 of the Code. Where an accused pleads guilty, "the plea shall be recorded" and the accused "may be convicted" thereon; but evidence may be taken in Sessions cases as if the plea had been one of "not guilty" and the case decided upon the whole of the evidence including the accused's plea.²⁷

Plea of guilty—Charge cannot be altered.—When an accused pleads guilty to a charge already framed, the Sessions Judge has no power to alter the charge upon the evidence on the record. Upon a charge of murder the accused pleaded "guilty"—the Sessions Judge taking into consideration the circumstances of the case reduced the charge to homicide not amounting to murder; *held* that the proceeding was illegal.²⁸

'He may be convicted thereon.'—When one of several accused on their joint trial pleads guilty, it is not always incumbent on the Court to accept the plea of guilty and remove him from the dock. The Court may for sufficient reasons refuse to accept the plea of guilty and continue to try him jointly with the other accused and then in the trial take his confession into consideration against the other accused.²⁹ Where there is doubt the Crown should proceed with the trial and the trial must proceed in the usual way (S. 272) and the verdict of the jury should be taken.³⁰

21. *Roopa Gowalla*, (1871) 15 WR (Cr) 42.

22. (1904) 6 Bom LR 861; *see Sangaya*, (1900), 2 Bom LR 751.

23. *Mittun Chowdhury*, 11 WR (Cr) 53; *Sonaoollah*, 25 WR (Cr) 23; *Sakharam*, 14 B 564; *see also Netai Luskar*, (1885) 11 C 410.

24. *Greedhary Manjee*, 7 WR (Cr) 39.

25. *Malhari, Ratanlal*, 410.

26. *Srikanta Charal*, 2 BLR 23 (FB) : 10 WR (Cr) 43.

27. *Chinna Pavuchi*, 23 M 151.

28. *Gobardhan Bhuyan*, (1870) 4 BLR App. 101 : 13 WR (Cr) 55.

29. *Sukdeb Tewari*, 13 CWN 552 : 9 CLJ 291 : 10 Cr LJ 484 : 4 I C 57 : *see Chinna Pavuchi*, 23 M 151.

30. *Mohamed Ismail*, 6 Bom LR 671.

Where several accused persons are being tried jointly for the same offence, and some of them plead guilty, it is unfair to defer convicting those who have pleaded guilty merely because their confessions may be considered against the other accused.³¹ The proper procedure to follow in cases of trial where a co-accused pleads guilty is that if the Judge convicts the accused on his plea of guilty, he should be removed from the dock in which case he can be called as a witness against the other accused, or the Judge should put it on record that he decides to put the accused on his trial in spite of his plea of guilty.³²

It is in the discretion of the Presiding Judge in each particular case to determine whether in spite of the plea of guilty it is or is not desirable to enter upon the evidence. But it is not in accordance with the usual practice to accept a plea of guilty in a case where the natural consequence would be a sentence of death.³³

9. Plea of guilty in murder cases.—In a case of murder it has long been the practice of the Allahabad High Court not to accept the plea of guilty.³⁴ In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty, it is advisable for the Court to take evidence and not to convict solely on the plea of the accused.³⁵ See cases of *Chinia Bhika* and other cases.³³ A plea of guilty should not be accepted in capital offences.³⁶ But the Nagpur Court held a contrary view in *Manjoo*.³⁷

272. Refusal to plead or claim to be tried.—If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall, in a case triable by jury, proceed to choose jurors as hereinafter directed and to try the case, but in any other case, the Judge shall proceed to try the case himself:

Provided that, in cases triable by jury, the same jury may, subject to the right of objection hereinafter mentioned, try as many accused persons successively as the Court thinks fit.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Or if he claims to be tried. |
| 2. Legislative Changes. | 7. 'The Court shall proceed to choose Jurors to try the cases'. |
| 3. Effect of Amendment. | 8. Proviso. |
| 4. Scope. | |
| 5. 'If the accused refuses to, or does not | |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 347, 363 of the Code of 1861, Ss. 238, 665 of the Code of 1872, Ss. 30, 34 of Act X of 1875 and is the same as that of the Code of 1882.

31. *Paltua*, 23 A 53 ; *Kheoraj*, 30 A A 540 : 5 ALJ 505, See contra *Chinna Pavuchi*, (1899) 23 M 151 ; *Pahuji*, 19 B 195, *Kanhaiya*, 12 Cr LJ 605.

32. *Kesho Singh*, 18 Cr LJ 742 : 40 IC 742 ; *In re K. K. Swami*, A 1957 M 379.

33. *Chinia Bhika Koli*, 8 Bom LR 240 : 3 Cr LJ 337, *Laxmya Shiddappa*, 19 Bom LR 356 : 18 Cr LJ 699 : 40 IC 699 ;

followed in *Hesamuddin Mohammed*, ALR (1928) C 775 : *Abdul Kader*, A 1947 B 347 (SB).

34. *Dalli*, (1922) 20 ALJ 321.

35. *Bhadu*, 19 A 119 : (1896) Awn 192.

36. *Pala Singh*, (1905) 54 PR 1905 (Cr) : 169 PLR 1905 : 3 Cr LJ 80 following *Bhadu*, 19 A 119.

37. 24 Cr LJ 570 : 73 IC 266 (N).

2. Legislative Changes.—This section has been substituted for the old section by S. 40 of the Act 26 of 1955.

3. Effect of Amendment.—As the trial by the Judge with the Assessors has been abolished, it is a consequential amendment. See *Nirmalkanta Roy's* case 41 C 1072 (1084); Abdul Kadir's case A 1947 B 345 (F B) quoted under the last section.

4. Scope.—The section must be read subject to the provisions of S. 438 under which the Sessions Judge, may refer the matter to the High Court.³⁸

5. 'If the accused refuses to, or does not, plead'.—When an accused person makes no answer to the inquiry whether he is guilty or has any defence to make, an enquiry should be made whether the person is obstinately mute or dumb or *exvisitione Dei*. If he be found to be obstinately mute, a plea of not guilty should be recorded and the trial proceeded with. If found to be dumb *exvisitione Dei* an enquiry should be made as to whether he is sane or insane and capable of being tried; if found sane, a plea of 'not-guilty' should be recorded and the trial proceeded with; but if found to be insane, the procedure laid down in chapter XXVII of the Code of Criminal Procedure, should be followed.³⁹

6. 'Or if he claims to be tried'.—“As the assessors are chosen under S. 272 only if the accused has refused to or does not plead to the charge or claims to be tried, it is clear that in a Court of Sessions the trial 'with the aid of assessors' does not commence with the reading of the charge.”⁴⁰

7. 'The Court shall proceed to choose Jurors to try the cases'.—In a trial before a Sessions Judge with assessors when the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty.⁴¹

When there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot, under such circumstances, be sustained.⁴²

8. Proviso.—“The law (S. 265 of Act X of 1872) declares that 'the same Jury may try as many accused persons successively as to the Court seems fit'. By this we understand that one trial is to follow the other,—that is, that, on the conclusion of one trial, the same Jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the Jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused”.⁴³

273. Entry on unsustainable charges.—(1) In trials before the High Court, when it appears to the High Court, at

38. *Ananta Narayan*, A 1945 B 413; 47 Cr LJ 138.

39. *Reg v. Satty*, (1869) Rat 19: case under S. 363 of Act XXV of 1861.

40. *Bastiano*, (1890) 15 B 514; *Jayram*, (1900) 25 B 694; *Abdul Kader*, A 1947 B 345 (S B); 48 Cr LJ 329.

41. *Anon*, (1869) 4 MHGR App XXXIX.

42. *Ruttan Das*, (1871) 16 WR (Cr) 19 (20).

43. *Per Prinsep, J.*, in *Hossein Buksh*, (1880) 6 C 96 (99): 9 CLR 521; *Rajatulla Paikar*, A 1931 C 709.

any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Effect of entry.—(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Madras. |
| 2. State Amendment. | 3. Scope. |
| | 4. Effect of entry. |

1. Corresponding sections in former Codes.—This section corresponds to S. 14 of Act X of 1875 and is the same as that of the Code of 1882.

2. State Amendment.

Madras.—Section 273 has been omitted by Act 34 of 1955.

3. Scope.—This section is a special power given to the High Court, the Judge may make an entry in the charge to the effect that the charge is unsustainable. It has no reference to illegal commitment. The Section is intended to provide a short and effective way by which charges which have no merits may be disposed of.⁴⁴ If on the evidence recorded by the Committing Magistrate, it is found that no offence has been committed, the proper procedure for the Court is to make an entry that the charge is not sustainable.⁴⁵ Where there are no grounds in the evidence taken as a whole upon which any tribunal could arrive at a conclusion that the accused was guilty, the jury should not be allowed to gamble and speculate on possible inferences, the Court should stay proceedings by making the entry under this section.⁴⁶

4. Effect of entry—is a stay of the proceedings⁴⁷ and has not the effect of an acquittal.

C.—Choosing a Jury

274. Number of jury—(1) In trials before the High Court the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than seven or more than nine, as the State Government, by order applicable to any particular district or to any particular class of offences in that district, may direct :

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist, if practicable, of nine persons.

44. *Girish Chandra*, 57 G 1042 : A 1929 C 756 (FB).

45. *Hussainali Vilayetali*, A 1942 B 212 ; 43 Gr LJ 773.

46. *Narendra Nath Majumder*, A 1951 C

140 : 52 Cr LJ 1241.

47. *Suku Raur*, (1893) 21 C 97 (99), overruled on this construction of S. 372 IC in view of the amendment of that section.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Bombay. |
| 2. Legislative Changes. | —Madras. |
| 3. State Amendments. | 4. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 327 of the Code of 1861 and S. 236 of the Code of 1872. The Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The proviso was added by S. 13 of Act XII of 1923 and the word “five” in sub-sec. (2) was substituted for “three” by the same Act.

1955 Amendment.—In sub-sec. (2) the word “Seven” has been substituted for “five” and the words “of not less than seven persons and” which occurred after “shall consist” in the proviso have been omitted by S. 41 of Act 26 of 1955.

3. State Amendments.

Bombay.—In S. 274, (a) in sub-sec. (1) after the words “High Court” the words “or the Court of Session for Greater Bombay” were inserted; and (b) in sub-sec. (2) for the words “before the Court” the words “before any other Court” were substituted by Bombay Act 32 of 1948.

Madras.—Sub-section (1) of S. 274 has been omitted by Madras Act 34 of 1955.

4. Scope.—In a murder case where the number of jurors summoned is fourteen, nine of whom appear and are chosen by lot, the trial is not bad.⁴⁸ It is desirable that where nine persons are not empanelled on a murder charge, the order-sheet should show that the Judge considers it not practicable to obtain more.⁴⁹ A trial of an offence punishable with death by a jury consisting of five persons is invalid.⁵⁰

Where the local Government had by notification under this section directed that in trials by Jury before a Court of Session the Jury should consist of five, it was held that a trial before a District Magistrate with a Jury consisting of seven persons was held before a tribunal not properly constituted and must be set aside.⁵¹

In cases of ‘murder’ the District Magistrate should summon 18 persons as jurors⁵² and where only fourteen jurors were summoned of whom eleven attended and of them seven were empanelled, *held* that there was a breach of the statutory provisions contained in the proviso, and the jury were illegally constituted.⁵³

Where in a trial for murder, eighteen persons are summoned as jurors, nine attend and only seven are empanelled, the Judge stopping as he draws the seventh name and leaving out the other two without any objection being taken to them the proviso to S. 274 (2) is violated.⁵⁴ The trial by a jury in excess of the number fixed by the local Government under S. 274 (2) is a nullity.⁵⁵

48. *Erman Ali*, 57 C 1298 : 34 CWN 296 (FB) over-ruling *Tanianddis Ahmed*, 33 CWN 1054.

49. *Asgar*, A 1945 C 467.

50. *Santa Singh*, A 1950 Nag 49 ; 51 Cr LJ 474.

51. *George Booth*, (1903) 26 A 211.

52. *Serajul Islam*, (1927) 55 C 794.

53. *Dwarika Malo*, (1929) 33 CWN 692.

54. *Kishori Khanna*, 47 CWN 345 ; A 1943 C 515 where *Supdt. & L. R. v. Bhaju Majhi*, 57 C 1062 : 34 CWN 106 distinguished.

55. *Pandu Kusha*, A 1944 B 17 ; 45 Cr LJ 270 following *George Borth*, 26 A 211.

275. [*Repealed by the Criminal Law (Removal of Racial Discrimination) Act, 1949 (17 of 1949) S. 3.*]

276. Jurors to be chosen by lot.—The jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct :

Provided that—

Existing practice maintained.—*first*, pending the issue under this section of rules for any Court the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

Persons not summoned when eligible.—*secondly*, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

Trials before special jurors.—*thirdly*, in a trial before any High Court in the town which is the usual place of sitting of such High Court—

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed ; and

fourthly, in any district for which the State Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

SYNOPSIS

1. Legislative changes.
2. Corresponding sections in former Codes.
3. Proviso 2.

- Persons not present in Court asked to attend.
4. Rules and Orders for selecting Jury by lot.

1. Legislative changes.—Section 276 of the Code of 1882 as amended by Bill VI of 1891 was the same as in the Code of 1898. It was overruled by S. 75 of Act XVIII of 1923. The amendments have been introduced by S. 75 of Act XVIII of 1923. In the Code of 1882 *fourth clause* was introduced by Bill VI of 1891 *vide* G. I. March 26, 1887, Part V, and this clause was added by Act XIV of 1896, *vide* G. I. 1896, Part V, Pp. 175-177, proceedings in the Council, Part VI, G. I. 1896, Pp. 85-90.

2. Corresponding sections in former Codes.

(S. 342 of the Code of 1861)

Whenever a trial by Jury is to be held, the persons who are to constitute the Jury shall be chosen by lot immediately before the commencement of the trial from the jurors who attend in obedience to the summons.

If the trial is to be held with the aid of assessors the Judge shall select from the persons summoned to act as assessors, two or more persons to assist him in such trial.

"The Sessions Judges of district in which trials by Jury are held, and all Sessions Judges presiding over trials in which, under S. 323 of the Code of Criminal Procedure (1861), special Juries shall be empanelled, should, before commencing the proceedings of the trial, record in English the names of all the Jurymen in attendance at the Sessions, and, after the selection by lot, under S. 342, of the persons who are to constitute the Jury in the particular case before the Court, they shall also mark the names of these selected. These papers should form part of the record of the case".⁵⁶

Act X of 1875

33. The jury shall consist of nine persons, who shall be chosen by lot from the persons summoned to act as jurors :

Number of Jurors.

Provided that, in case of deficiency of such persons, the number required may, with the leave of the Court be chosen from such other persons as may be present.

38. Every person tried in Calcutta, Madras or Bombay shall be tried before a special Jury,

Trials before special Jury.

(a) if charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs.

49. Save as herein provided, the High Court of Judicature at Fort William, Madras and Bombay shall retain all their present powers respecting the summoning, empanelling, qualification, challenging, and service of jurors, and shall have power to make such rules on these subjects (consistent with the provisions of this Act) as seem to them to be proper.

Powers of Presidency High Courts as to jurors.

All rules relating to jurors now in force in the same High Court shall (so far as they are consistent with this Act) remain in force until repealed or altered by new rules made under this section.

(Ss. 240 and 243 of Act X of 1872)

240. When the trial is to be by Jury, the Jury shall be chosen by lot from the persons summoned to act as Jurors.

243. As each Juror is chosen his name shall be called aloud, and upon his appearance the accused person shall be asked if he objects to be tried by such Juror.

Names of Jurors to be called.

56. Circular No. 4, 3 WR Cr Cir. 1.

The power of directing how Jurors shall be chosen by lot has been transferred to the High Court from the Local Government (S. 277). *Vide*—G. I. 1881, 26th March, p. 89.

“We have declared (in accordance with Act X of 1872, S. 407) that in the Presidency Towns no person shall be summoned as Juror more than once in six months, unless the number cannot be made without him. And we have provided for summoning supplemental jurors, when during the continuance of the Sessions it appears that a sufficient number has not been summoned”—G. I. 9th January 1875, p. 12, *vide* Report of the Select Committee, G. I. 31st Dec. 1874.

Act X of 1882 was published in G. I. March 11, 1882, for Proceedings of the Council, *vide* Supplement to G. I. March 11, 1882, at p. 312 (389).

The Viceroy as President observed “Technically it is a re-enactment, in reality it is a reprint with certain amendments. The only point on which the definite opinion of the Government is expressed is the point to which these amendments relate.”

The *object* of the provisions in Ss. 326 and 276-279 of the Criminal Procedure Code is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case, and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality.⁵⁷

If there is no choosing of the jury by Court, as provided for, the violation cannot be cured by S. 537.⁵⁸

3. Proviso 2—Insufficiency of jurors summoned—Election of other jurors from persons present—Waiver of objection—Defect, if cured by S. 537.—The defect, if any, caused by not selecting jurymen by lot in a Sessions case triable by Jury is curable by S. 537.⁵⁹ There is no provision for requisition of jurors from outside the Court. Selection of jurors will have to be made from jurors attending in obedience to summons and chosen in the manner provided by S. 276, or if there is no such other juror present then any other person present in the Court, whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury may be selected.⁶⁰

Persons not present in Court, asked to attend.—Four out of ten persons summoned as jurors attended the Court. Two out of the four persons were objected to. Therefore certain persons not present in Court were asked to come to Court for the purpose of being called as jurors. This was adopted by the Judge : *Held*, that the persons who were asked to attend were not persons present in Court, and hence could not be chosen to serve as jurors.⁶¹

The Calcutta High Court by a full bench has held in a case where the jury are found to be short at the end of the ballot, it is entirely for the Judge to exercise his discretion as to whether to adjourn the Trial or to proceed with it with the aid of the by-standers.⁶² The Judge has no duty to send

57. *Brojendra Lal Sarcar*, (1902) 7 CWN 188 where *Jhubbo Mahton*, (1882) 8 C 739 which held the disregard of law to be a mere irregularity was not followed.

58. *Bradshaw*, (1911) 33 A 385 : 8 ALJ 182 ; 9 IC 278.

59. *In re Ani Palladu*, (1917) MWN 1 : 18 Cr LJ 15 : 36 IC 847.

60. *Abedali Fakir*, (1928) 33 CWN 722 ; *Muhammod Segiruddin*, AIR (1928) C 551.

61. *Sadarat Sheikh*, (1928) 48 CLJ 479 ; *Abedali Fakir*, 56 C 835 : A 1929 C 638.

62. *Panchu Sheikh*, 34 CWN 1154 : A 1931 C 178 : 32 Cr LJ 190 (FB) ; *Israil*, 36 CWN 377.

for jurors from adjacent Sessions Court room and bring from there such jurymen as were available. The Legislature did not intend that the persons must be actually within the Court room; persons who are within the precincts of the Courts are also persons present.^{62a} The section merely says that in case of deficiency the number of jurors may, with the leave of the Court, be chosen from such persons as are present.⁶³

Shall be chosen by lot.—A full bench of the Calcutta High Court in *Kedarnath Mahto*,⁶⁴ has given effect to this circular when it has held that the proper procedure for empanelling a Jury is that in the first instance there will be a ballot among the persons summoned under S. 326, all of whom may or may not be present. When their names have been exhausted, if a jury has not yet been empanelled, the Court may in its discretion allow the number requisite to complete the Jury to be chosen from among the by-standers or may adjourn the case for a fresh Jury to be summoned. As each name is drawn and called aloud, if the person summoned answers, or as each juror is chosen from among the by-standers, the accused shall be asked if he objects to be tried by such Juror. Should the objection be allowed, the Court should proceed as laid down in S. 279 (2) adopting the course prescribed accordingly as there are no persons left from among those summoned whose names have not been drawn.

Proviso 2—Deficiency.—The “deficiency” will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist.⁶⁴

The second proviso applies to special jurors as much as to common jurors.⁶⁵ Objection, if any to the choosing of jurors should be taken at the time of selection and not towards the end of the trial.⁶⁶ When the procedure of choosing the jury has been in accordance with the statute, the manner in which the jury were constituted will not be ground for interference in revision.⁶⁷

It was held under the unamended proviso that where an accused person charged with an offence punishable with death has been tried with seven Jurors it must be assumed that it was not practicable to have nine jurors unless there is an indication on the face of the record itself or there is other material before the Court which tends to the conclusion that it was or might have been practicable to have the jury composed of nine jurors rather than seven.⁶⁸ Proviso 2 applies also to the deficiency in the case of both special and common jurors.⁶⁹ The word ‘jury’ in the proviso, means the actual jurors and not potential jurors.⁷⁰

Leave of the Court.—Mukerji, J., in *Kedar’s* case⁶⁴ held, “S. 276

62a. *Israil*, 59 C 1123 where *Kedarnath*, 55 C 371 (FB) : 32 CWN 221 explained.

63. *Mukunda Murare*, 61 C 190 : A 1934 C 10 ; *Ahadali Fakir*, 56 C 835 : A 1929 C 728.

64. (1927) 55 C 371 : 32 CWN 221 : 47 CLJ 43, over-ruling *Bholanath*, (1926) 44 CLJ 541 and *Rosan Ali*, (1927) 46 CLJ 160 ; see also *Rahmat Sheikh*, (1927) 54 C 1026 : 31 CWN 711 ; *Akbar Ali*, 7 P 50 : A 1928 P 1.

65. *Monir Sheikh*, 60 C 725 : A 1933 C 638 ; *Sahebali*, 35 CWN 711.

66. *L. R. v. Ajit Mondal*, A 1932 C 750 (2).

67. *Kishori Khanra*, 47 CWN 345 : A 1943 C 515 (519).

68. *Benat Pramanik*, 39 CWN 954 following *Damullya Molla*, 34 CWN 1127 and dissenting from *Saheb Ali*, 34 CWN 1127 ; *Mirza Akbar*, 67 IA 336 : A 1940 PC 176 ; *Mukunda Murari*, 61 C 190 ; *Kauser Ali*, A 1944 C 249 : 46 Cr LJ 131 ; *Eskander*, 53 CWN 1 Dr 123 ; *Benzoin Ahmed*, 34 CWN 735 : A 1930 C 716.

69. *Saheb Ali*, 58 C 1272 : A 1931 C 731 ; *Munir Sheikh*, A 1933 C 638 : 60 C 725.

70. *Lula*, 56 A 210.

with all its provisos is a general section and dealing with the general nature of the procedure, and the details of that procedure are given in Ss. 277 to 279. I am of opinion that the words 'with the leave of the Court' in the second proviso to S. 276 give a discretion to the Court to proceed or not to proceed in this particular way, namely, allowing persons in Court to come in as jurors accordingly as it thinks fit : it is not difficult to imagine cases in which such a procedure will not be resorted to".

It may be submitted not only that proviso (2) is a bad draft but that the aforesaid full bench decision does not interpret the language of the section. The Full Bench decision in *Kedar's* case has negatived the argument strenuously put before the Court on behalf of the accused that what the section contemplates is actual lottery or in other words double the number required must be on the panel to permit of a lottery. In view of the said full bench decision in 9 cases out of 10 the accused does not get actual lottery. In *Kedar's* case the learned Judges have, it appears, followed the formality of the law not the spirit of Jury Trial as it obtains in England.

4. Rules and Orders for selecting Jury by lot.

Bengal Rules :

(1) **For Courts of Sessions.**—In order to nominate a jury for the trial of any prisoner, or other persons to be tried by jury, the Sessions Judge shall cause to be put together in one box cards or pieces of paper containing the names of all the persons summoned to attend, except such of the said persons as shall have been excused by the Sessions Judge from serving on that day in consequence of their having served as jurors on the previous day, or for any other cause. Such cards or pieces of paper shall be, as nearly as may be, of equal size, and each shall bear the name of one person summoned to attend. The Sessions Judge shall then, in open Court, draw or cause to be drawn, out of the said box, one after another, as many of the said cards or pieces of paper as may represent the number of jurors required to try the case, and if any of the jurors whose names shall be so drawn shall not appear, or if any be objected to, and the objection so drawn be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case.^{70a}

(2) **District Magistrate's Court.**—The above rules, *mutatis mutandis* shall apply to the selection of Jurors in cases before District Magistrates, in which the accused is an European British subject, and claims to be tried by a Jury.⁷¹

Even where the appeal was admitted on the ground of reduction of sentence only, C. C. Ghose and Gregory, JJ., held that the High Court should order a trial when it is brought to the notice of their Lordships that the jury had not been properly empanelled.⁷²

Bombay Rules.—The practice in the High Court of Bombay, original criminal jurisdiction, regarding choosing persons by lot is described in *Vithaldas*.⁷³ It has been held in *Phillip Spratt no. 1*⁷⁴ that a trial for Sedition before the High Court should ordinarily be before a special jury.

70a. Cal HCC Circ. Part 1 p. 18, Rule No. 4, 25th June 1885.

71. Calcutta H. C, Cir. 4, June 23, 1865.

72. *Intez Mandal*, (1928) 32 GWN 1172.

73. *Vithaldas Pranjivandas*, 1 B 462.

74. (1927) 30 Bom LR 313.

Madras Rules.—*See*.⁷⁵

Patna Circular.—The rule made by the Patna High Court directs that the names of all the persons summoned to attend, except such as have been excused from attendance by the Sessions Judge, shall be put into a box and in open Court as many names as are required to make up the jury shall be drawn out one after another and if any of the jurors whose names shall be so drawn shall not appear, or if any be objected to and the objection be allowed, then such further number shall be drawn as may be necessary to complete the number of jurors required for the case.

This rule was interpreted by a Special Bench⁷⁶ where out of 10 jurors summoned to try a case in the Court of Sessions only five attended, *held per Ross and Allanson, JJ., (Wort J., dissentiente)* that the jurors had been chosen in the manner provided by law when the Judge included in the box from which the names of jurors were to be drawn the names of all the jurors summoned. This case did not follow *Bholanath Hazra*⁷⁷ which has been subsequently overruled in *Kedarnath's*.⁶⁴ It seems that the decision of the majority is in accordance with the Patna Circular but the view of Wort, J., before the Special Bench seems to represent the correct view. *See also the decision in Tajali Mean*,⁷⁸ before the Special Bench decided *Akbar Ali's case*.⁷⁶

Uttar Pradesh.—

For rules made under this section in conjunction with S. 313 by the Allahabad High Court, *see*⁷⁹.

Proviso (3).—In the absence of words to the contrary in the context, the word 'chosen' in Provisos 3 and 4 must mean chosen by lot.⁸⁰

277. Names of jurors to be called.—(1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Objection to jurors.—(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated :

Objection without grounds stated.—Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Government and eight on behalf of the person or all the persons charged.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | — Bombay. |
| 2. State Amendments. | — Madras. |
| | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 343 of the Code of 1861, S. 243 paragraphs 1 and 2 of the Code

75. High Court Proceedings, No. 1353, dated 11th April 1883.

76. *Akbar Ali*, (1927) 7 P 61 (SB).

77. (1926) 44 CLJ 541.

78. (1927) 7 P 50.

79. United Provinces and Oudh Gazette, 1902 Pt. II p. 539.

80. *Shewram Jathanand*, A 1939 S 209 : 41 Cr LJ 28.

of 1872, Ss. 47, 53 of the Act X of 1875 and is the same as S. 277 of the Code of 1882.

2. State Amendments.

Bombay.—In sub-sec. (2) after the words ‘High Court’ the words “or the Court of Session for Greater Bombay” were inserted by Bombay Act 32 of 1948.

Madras.—In S. 277 the proviso to sub-sec. (2) was omitted by Madras Act 34 of 1955.

3. Scope.—Under S. 276 the Judge should proceed to choose by lot from among the jurors who are present subject to the making of objections in accordance with the provisions of this section.⁸¹ Parties have a right to challenge any juror after he is chosen by Court and on his appearance.⁸² The constitution of the jury cannot be assailed because the junior pleader, who was present during the absence of his senior did not challenge any juror.⁸³

Omission to comply with the provisions of S. 277 (1) is cured by S. 536 (2).⁸⁴

If in accordance with S. 343, an objection be raised to any juror, the name of the objector, the nature of the objection, and the decisions of the Court shall also be recorded—Cr. Circ. No. 4, 3 W.R. (Cr.) Circ. 1.

278. Grounds of objection.—Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

- (a) some presumed or actual partiality in the juror ;
- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;
- (c) his having by habit or religious vows relinquished all care of worldly affairs ;
- (d) his holding any office in or under the Court ;
- (e) his executing any duties of police or being entrusted with police-duties ;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

81. *Brojenara Lal Sarkar*, (1902) 7 CWN 188.

82. *Shewaram Jathanand*, A 1939 S 209 : 41 Cr LJ 28 ; *Lala*, A 1933 A 941 ;

Mamfru Chaudhuri, 51 C 418 (428).

83. *Boozlur Rahman*, 33 CWN 136 : 30 Cr LJ 494.

84. *Illahi Bux*, (1909) 13 CWN cxi.

SYNOPSIS

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|---|----------------|
| 1. Corresponding sections in former Codes. | 4. Clause (c). |
| 2. Objection as to presumed partiality allowed. | 5. Clause (d). |
| 3. Illness of the presiding Judge. | 6. Clause (g). |
| | 7. Clause (h). |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 244, 245, 405, 406 of the Code of 1872 and Ss. 47, 54, 57 of Act VIII of 1875 and is the same as S. 278 of the Code of 1882.

2. Objection as to presumed partiality should be allowed.—Where an accused person objects to a juror on the ground of partiality the objection must be upheld^{84a}. Ross, J., in the said decision held that the objection should be allowed where the accused presumed partiality in the juror.

3. Illness of the presiding Judge—Is the trial to be *de novo* when trial proceeded up to the opening of prosecution case?—The trial can proceed before another Judge. It need not commence *de novo*.⁸⁵

4. Clause (c).—The allowing of an objection of a Juror coming within the 3rd clause of this section (corresponding to S. 344 of Act XXV of 1861) is in the discretion of the Court, and although the Judge is not bound to admit the objection, yet he should not treat it as frivolous.⁸⁶

5. Clause (d).—The fact that a person is a clerk in the office of the Magistrate of the District is not sufficient to disqualify him from sitting on a jury.⁸⁷

6. Clause (g).—Where one of the jurors did not understand English the language in which some of the evidence was given and in which the addresses by the Counsels and the summing up by the Judge were made, *held*, that the convictions following on such a trial could not be sustained.⁸⁸

7. Clause (h).—Where in a retrial on remand the foreman of the first trial was included in the jury in the second trial, *held*, that the case should not proceed by merely discharging this juror, but it should be before an entirely new jury.⁸⁹

279. Decision of objection.—(1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Supply of place of juror against whom objection allowed.—(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by Section 276, or if there is no such other juror present, then by any other person

84a. *Tajalimian*, (1927) per Wort, J., in 7 P 50 (54) : 28 Cr LJ 843 : A I R (1928) P 31.

85. *Dorabji Pestonji Gora*, (1926) 29 Bom LR 254.

86. *Krishno Churn*, 1871) 16 W (Cr) 66.

87. *Rochia Mahto*, (1881) 7 G 42 : 8

CLR 273.

88. *Rash Behari Lal*, 60 IA 354 : A 1933 P 208 : 34 Cr LJ 843 ; *Kapil Das Sukla v. State of U. P.*, A 1958 SC 121, (1958) SCA 385.

89. *Salamatullah*, A 1941 C 328.

present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under Section 278 and allowed.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Scope. |
| | 3. Sub-section (2). |

1. Corresponding sections in former Codes.—This section corresponds to S. 243 paragraphs 3 and 4 of the Code of 1872, Act X of 1875, Ss. 48 and 56. It is the same as that of the Code of 1882.

2. Scope.—S. 279 Cl. (2) indicates that the manner of choosing by lot provided by S. 276 applies only to jurors attending in obedience to summons, and not to persons chosen from those present in Court.⁹⁰ The trial judge has a wide discretion in the matter of accepting or overruling objections to jurors and his decision is final.⁹¹ Where the Court finds that some presumed or actual partiality in the juror has been made out but overrules the objection, the decision might perhaps be challenged in appeal.⁹² All that the petitioners can claim in a revision petition is to show that the Sessions Judge has decided wrongly.⁹³

3. Sub-section (2).—Selection of jurors will have to be made from jurors attending in obedience to summons and chosen in the manner provided by S. 276 or if there is no such other person present, then any other person present in the Court, whose name is in the list of jurors or whom the Court considers a proper person,⁹⁴ is to be chosen.

280. Foreman of jury.—(1) When the jurors have been chosen, they shall appoint one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

Corresponding sections in former Codes.—This section corresponds to S. 246 of the Code of 1872 and S. 58 of Act X of 1875 and is the same as that of 1882.

281. Swearing of jurors.—When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Forms of Oath. |
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90. *In re Ani Palladu*, (1917) MWN ; 18 Cr LJ 15 : 36 IC 847.

91. *Machu Khan*, 29 CWN 652 : A 1925 C 798 : *Bindashi*, A 1936 Oudh 268 (allegation of misconduct of a Juror).

92. *Yawar Bakht*, 44 CWN 474 ; A 1940 C 277.

93. *Gajo Singh*, A 1923 P 238.

94. *Abdali*, 33 CWN 722.

1. Corresponding sections in former Codes.—This section is the same as S. 281 of the Code of 1882.

2. Forms of oath.—The following are the forms of oaths and affirmations introduced by the several High Courts:—

Bengal, see Cal. H. Ct. Cir. 12, June 7, 1873.

(OATH)

I swear that I will justify and truly try and determine the questions submitted to the jury in this case, and will give a true verdict according to the evidence, so help me God.

(AFFIRMATION)

I solemnly declare that I will justify and truly try and determine the questions submitted to the jury in this case, and will give you a true verdict according to the evidence.

In the North Western Provinces, see Cir. 4, May 2, 1873 and in the *Punjab* (C. Ct. Punjab Cir. IX, May 8, 1873).

(OATH)

I shall well and truly try and true deliverance make between our Sovereign Lady the Queen and the prisoner at the Bar, and give true verdict according to the evidence, so help me God.

Madras, (Mad. H. Ct. Aug. 16, 1873).

(OATH)

I shall well and truly try and true deliverance make between our Sovereign Lord, the King Emperor of India and the prisoner at the bar, and a true verdict give according to the evidence so help me God.

(AFFIRMATION)

I solemnly affirm in the presence of Almighty God that I will judge truly between the Queen and the prisoner at the bar, and will give a true verdict according to the evidence.

282. Procedure when juror ceases to attend, etc.—

(1) If, in the course of a trial by jury at any time before the return of the verdict,—

- (a) any juror, from any sufficient cause, is prevented from attending the trial on any day, or
- (b) if any juror absents himself and it is not practicable to enforce his attendance, or
- (c) if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted,

the Court, in any case falling under clause (a), may either adjourn the trial or discharge the juror and in any case falling under clause (b) or clause (c), shall discharge the juror; and in any case where any juror is so discharged, the jury shall be deemed to be

reconstituted with the remaining jurors as if the jury had consisted of such persons only from the commencement of the trial and the trial shall proceed before the jury so reconstituted; and notwithstanding anything contained elsewhere in this Code, such trial shall not be invalid by reason only of the fact that the number of persons originally constituting the jury has been reduced.

(2) Notwithstanding anything contained in sub-section (1), if, in the course of a trial by jury, the number of persons constituting the jury is so reduced that,—

(a) when the jury originally consisted of nine persons, it falls below seven, or

(b) when the jury originally consisted of seven persons, it falls below five,

the jury shall be discharged and a new jury chosen, and in each of such cases, the trial shall commence anew.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Clause (a). |
| 2. Legislative Changes. | 6. Clause (c). |
| 3. Effect of Amendment. | 7. Discharge of jury for misconduct. |
| 4. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 254 of the Code of 1872 and is the same as S. 282 of the Code of 1882.

2. Legislative Changes (1955).—This section has been substituted for the original section by S. 42 of Act 26 of 1955.

3. Effect of Amendment.—The object appears to be to obviate a retrial in case of one or two jurors being discharged on the ground of illness or other cause as also for not being able to understand the language in which the evidence is given or the addresses by the Counsels and the summing up. Cl. (c) corresponds to Cl. (g) of S. 278.

4. Scope.—Section 282 gives a discretion with the Court either to postpone trial or discharge a jury.⁹⁵ The Sessions Judge has inherent power to discharge the jury, before the verdict, for misconduct or other similar and sufficient ground and to empanel another.⁹⁶ So far as the Code of Criminal Procedure is concerned, the power of the Court to discharge a jury is confined to Ss. 282 and 283 thereof. The Court has nevertheless, an inherent power to discharge a jury which is not confined to cases of misconduct as such, but plainly extends to a case where the Judge finds reasons for doubting the impartiality.⁹⁷

95. *Manmotho Nath Mitter*, (1926) 31 CWN 144 : 99 JC 349 : AIR (1927) C 199.

96. *Rahim Sheikh*, (1923 April) 50 C 872 : 37 CLJ 595 followed in *Rebatimohan*

Chakravarty, (1928) 32 CWN 945.

97. *Alfred D' Cruz*, 54 CWN 321 : A 1950 317. where *Bindashi*, A 1936 Oudh 268 referred to.

5. Sub-section 1—Clause (a).—Contemplates temporary absence of a juror for short illness or from any sufficient cause. If a juror is taken ill, taken out of the jury box and accompanied by doctors and rejoins the jury and the prisoner is convicted, *held* that there had not been a mistrial.⁹⁸ Clause (a) does not apply to a case where a juror has been discharged on the ground of misconduct.⁹⁹

6. Clause (c).—On a trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place. The trial, however, was not commenced afresh, but the evidence given by the two witnesses was read over to and admitted by them. *Held* that this procedure was inadmissible and the trial so held invalid.¹ Inability of the jurors to understand Hindi when the evidence, address and summing up is in Hindi will not invalidate the trial.^{1a}

Where it was discovered that one of the jurors empanelled in a dacoity case was deaf and partly blind, a retrial was directed.² Inability of one of the jurors to understand English in which the evidence recorded and address made renders the conviction following on such a trial illegal.³

7. Discharge of jury for misconduct.—The Code has not specifically conferred any right on the ground of misconduct but every judge has an inherent power to discharge a jury when he is satisfied that reasonable grounds exist to discharge a jury.⁴ The Sessions Judge has an inherent power to discharge the jury and his decision is not open to review.⁵

283. Discharge of jury in case of sickness of prisoner.—The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Defence witnesses not attending.

1. Corresponding sections in former Codes.—This section corresponds to S. 99 of Act X of 1875 and is the same as that of the Code of 1882.

2. Defence witnesses not attending.—When in a Sessions trial, a witness summoned for the defence does not attend, and a postponement is consequently asked for by the defence, *held*, the Sessions Judge is not authorised to discharge the Jury on that account in the middle of a trial.^{5a}

D.—Choosing assessors

284. Rep. by the Code of Criminal Procedure Amendment Act, 1955 (26 of 1955), S. 43.

98. *Pramatha v. Basanta*, 11 Cr LJ 402.
99. *Bymkesh Sanyal*, A 1959 Ass 238 : 1959 Cr LJ 1418.

1. *Narain*, (1914) 36 A 481 : 12 ALJ 802 : 15 Cr LJ 538 : 24 IC 946.

1a. *Ram Babu*, A 1938 P 60 : 39 Cr LJ 302.

2. *Virasami*, (1896) 19 M 375.

3. *Rash Behari*, 60 1A 354 ; A 1933 PC 208.

4. *Alfred D' Cruz*, A 1950 G 317 ; *Bipat*

Gope, 16 P 8 ; A 1937 P 369 ; 38 Cr LJ 777 ; *Nagen Kundu*, 61 C 498 ; *Rahim Sheikh*, 50 C 872 ; A 1923 C 724.

5. *Sovarani Ghose*, A 1960 C 344 ; *Abdul Rashid*, 53 CWN (1 D R) 53, 33 CWN 425 ; *Bymkesh Sanyal*, A 1959 Ass 238.

5a. *In re Puttaswamy*, (1902) 4 Bom LR 939.

284A. *Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), S. 3.*

285. [*Procedure when assessor is unable to attend.*] *Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), S. 43.*

[DD.—Joint Trials]

285A. *Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), S. 3*

E.—Trial to close of cases for prosecution and defence

286. Opening case for prosecution.—(1) In a case triable by jury, when the jurors have been chosen or, in any other case, when the Judge is ready to hear the case, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Examination of witnesses.—(2) The prosecutor shall then examine his witnesses.

SYNOPSIS

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| 1. Legislative Changes. | 5. Duty of the Public Prosecutor. |
| 2. Effect of Amendment. | 6. Tender of witnesses for cross-examination by accused. |
| 3. The Prosecutor shall open his case. | 7. Cross-examination must follow examination. |
| 4. Duty of the prosecution in calling material witnesses. | |

1. Legislative Changes (1955).—In Sub-sec. (1), the words ‘in a case triable by jury, when the jurors have been chosen or, in any other case, when the Judge is ready to hear the case’, have been substituted by S. 44 of Act 26 of 1955 for the words “when the jurors or assessors have been chosen”.

2. Effect of Amendment.—With the abolition of trial with the aid of assessors, the change in the language of Sub-sec. (1) is a mere consequential amendment.

The provisions of S. 342 must not be regarded as in any way superseding the clear directions contained in this section.⁶

3. The prosecutor shall open his case.—A full bench of the Calcutta High Court held that so far as criminal cases are concerned the opening for the prosecution might always be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case where a doubtful question of

6. *Sukhia*, (1922) 20 ALJ 669.

admissibility should be either raised or decided.^{6a} See also the case of *Adam Haji Janna*.⁷ In opening the case the prosecutor has to state by what evidence he expects to prove the guilt of the accused.⁸

4. Duty of the prosecution in calling material witnesses.—The Supreme Court has held that the Court cannot normally compel the prosecution to examine a witness which it does not choose to and the duty of a prosecutor extends only to examine such of the witnesses as are necessary for the purpose of unfolding the prosecution story in its essentials, the defence is entitled to comment upon it and to ask the jury to draw an adverse inference in respect of the portion of the case to which the evidence of the witness related.⁹ The Privy Council in *Malek Khan's* case¹⁰ held; “It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution but important as it is, there is no obligation compelling Counsel for the prosecution to call all witnesses who speak to facts which the Crown desires to prove.” The prosecution is not bound to call a witness, who it believes, is not going to speak the truth.¹¹

The Supreme Court in *Habeeb Mohamed v. The State of Hyderabad*,¹² held that when a material witness is not called by the prosecution not only does an adverse inference arise against the prosecution from his non-production but the circumstance of his being withheld from the Court casts a serious reflection on the fairness of the trial. Non-examination of material witnesses like the investigating officer and the failure to explain it are serious omissions which can not but throw suspicion on the whole prosecution case,¹³ but non-examination of prosecution witnesses mentioned in first information report or delay in examination of witnesses before police do not affect credibility of prosecution's story.¹⁴ No adverse inference can be drawn from the non-production of a witness, who is a suborned witness and who is not a witness essential to the unfolding of the narrative on which the prosecution is based.¹⁵

See Commentary on S. 208 *Supra*.

5. Duty of the Public Prosecutor.—It is the duty of the prosecutor to represent not the police but the Crown and to place before the Court all materials irrespective of the questions as to whether they help the accused or go against them.¹⁶ In a case where death is due to injuries or wounds caused by a lethal weapon it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to

6a. *Per Rankin, C J., in Padam Prasad*, 33 CWN 1121 (FB) : A 1929 C 617.

7. A 1948 P C 63 ; 49 Cr LJ 440 ; (case from Somaliland Ordinance, S. 226 (1) of which corresponds to S. 286).

8. *Mt. Niamat*, A 1936 L 533 (SB) : 37 Cr LJ 742.

9. *Sardul Singh v. State of Bombay*, A 1957 SC 747 : 1957 Cr LJ 1325 ; *Stephen Seneveratul*, A 1936 PC 289.

10. 50 CWN 145 : A 1946 PC 16.

11. *Kasamali Mirzalli*, A 1942 B 71 ; *Aftab Ahmed Khan v. State of Hyderabad*, A 1954 SC 436 ; *Govinda Reddy*, A 1958 Mys 150.

12. *Habeeb Md. v. State of Hyderabad*, A 1954 SC 51 distinguished in *Ranganath Raoji*, A 1958 B 390 : 1958 Cr LJ 1300.

13. *Niru Bhagat*, A 1922 P 582.

14. *Shafi*, A 1953 A 502.

15. *Bakshish Singh v. State of Punjab*, A 1957 SC 904.

16. *Ranganath Raoji*, A 1958 B 390, *Kunja Subudhi*, 8 P 279 : A 1929 P 275 ; *Nagendra Nath Sen Gupta*, 19 CWN 923 ; *Ramranjan*, 42 C 422 (428) ; *Major Wanchoppa*, 61 C 168 : 38 CWN 187 : A 1933 C 800 ; *Amallesh Chandra*, A 1952 C 481 : 1952 Cr LJ 1013 ; *Karuppa Thevor*, A 1942 OO 227 ; *Kandasani Solagar*, A 1942 M 213 ; *Daljit Singh*, A 1937 N 274 ; *Kasam Ali Mirzalli*, A 1942 B 71 (FB) ; *Baldeo Paswan*, A 1951 P 470 ; *Hari Gope*, A 1947 P 354 ; *Gayadin*, A 1942 Oudh 45 ; *Sarfaraz Ali*, A 1941 Oudh 599.

have been caused with the weapon with which and the manner in which they are alleged to have been caused.¹⁷ But the prosecution is not expected to produce evidence which will demolish its case.¹⁸

6. Tender of witnesses for cross-examination by accused.—Witnesses summoned on behalf of the prosecution and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right and if such a witness is called and examined by the Court under S. 165 of the Evidence Act, the prisoner should be allowed to cross-examine.¹⁹ There is nothing in S. 165 of the Evidence Act deferring or disqualifying a party to a proceeding from cross-examining any witness summoned by the Court.²⁰ It is open to the Public Prosecutor to decline to examine at the Sessions trial a witness when he had examined before the Committing Magistrate but whose cross-examination by the defence was reserved. It is however his duty to tender the witness for cross-examination and if he declines, the Court of Sessions ought to call the witness for cross-examination.²¹

Section 288 does not dispense with the examination of the witness as directed by S. 286.²² Merely “tendering a witness for cross-examination” is not a practice which should be encouraged specially in murder cases.²³ The practice is irregular and inconsistent with S. 138 Evidence Act.²⁴

7. Cross-examination must follow examination.—When the Judge at a Sessions trial ordered all the witnesses for the prosecution to be examined one day but permitted their cross-examination to be recorded to a subsequent date, *held* the procedure was irregular.²⁵

When at the Sessions trial the defence Counsel applied after the examination-in-chief of the first prosecution witness for postponement of the cross-examination of the witnesses till the next day, on the ground of unpreparedness but did not apply for an adjournment of the trial, *held* the application was a reasonable one which should have been allowed although the accused could not claim it as a matter of right.²⁶

287. Examination of accused before Magistrate to be evidence.—The examination of the accused if any recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Confession. |
| 2. Legislative Changes. | —Unsigned confession inadmissible. |
| 3. Analogous Law. | 7. By or before the Committing Magistrate. |
| 4. ‘The examination of the accused.
—Statement of the accused must be taken as a whole. | 8. Shall be tendered by the prosecutor. |
| 5. Duly recorded. | 9. Read as evidence. |
| | 10. Magistrate’s attestation. |

17. *Mohinder Singh*, A 1953 SC 415.

18. *In re Vengala Reddy*, A 1956 A P 26 ; *Kasamali, Mirzalli*, A 1942 B 71, B. *Mani Sani*, A 1954 Mys 81 ; *Bhuban*, 37 CWN 1098, *contra Kunj Subuddhi*, P 279 ; *Hari Gope*, A 1947 P 354.

19. *Grish Chandra Talukdar*, (1879) 5 C 614 ; *per Kemp J. in Ishan Dutt*, (1871) 15 WR (Cr) 34. *Contra Radhanath Dhara*, 58 CWN 243 : A 1953 C 602 ; A 1945 PC 42, *Mazaha-*

rul Haque, A 1958 P 422.

20. *Gopal Lal Seal*, (1897) 24 C 288.

21. *Mausang Bhavan*, (1909) 11 Bom LR 1162 : 10 Cr LJ 538 : 4 IC 273.

22. *Subba*, (1885) 9 M 83.

23. *Veera Kereyan*, 53 M 69 : A 1929 M 906.

24. *Sadappa*, A 1942 B 37.

25. *Gothuri Venkatappa*, (1890) Weir II, 38.

26. *Sadasiv Singh*, (1913) 41 C 299.

1. Corresponding sections in former Codes.—This section corresponds to S. 366 of the Code of 1861, S. 248 of the Code of 1872, S. 60 of Act X of 1875 and is the same as that of the Code of 1882.

This section deals with the procedure that the examination of the accused before the Magistrate shall be tendered by the prosecutor and read as evidence.

2. Legislative Changes (1955).—The words “if any” after the words “the Examination of the accused” were substituted for ‘duly’ by S. 45 of Act 26 of 1955.

3. Analogous law.—See notes under S. 342 for ‘examination of accused,’ S. 364 for the record of such examination, S. 164 for the record of statements and confessions, S. 271 for the record of the plea of the accused and S. 533 for non-compliance with provisions of S. 164 or 364.

4. The examination of the accused duly recorded.—When the examination of the prisoner by a Magistrate has not been recorded in full so as to include the questions as required by Ss. 2 and 5, Cr. P. Code it cannot be given in evidence at the trial before the Court of Sessions and S. 366 without further proof.^{26a} In view of the amendment which is consequential to the insertion in S. 207-A (7) of the words ‘such examination if any’ and S. 210 and the language in S. 207-A (6) “and has, if necessary examined the accused”, the Magistrate can omit to examine the accused if he feels that there are no circumstances for the accused to explain.^{26b}

Presumption under S. 114, 111 (g), Evidence Act should be drawn from the omission to examine witnesses who were examined in the Committal Court and who had not been treated a hostile by the prosecution when there is no satisfactory explanation for the omission.²⁷ For further commentary see notes under S. 256. The object of the statement recorded under S. 209 is to enable the accused to explain the circumstances appearing in evidence against him. The object is not to record a confession. If in the course of this explanation he confesses his guilt, such confession can be brought on the record under S. 287.²⁸ A statement made by an accused where the order of commitment is passed after perusing the police statements under S. 207-A, cannot be admitted as evidence under S. 287.²⁹ In view of the amendment by Act 26 of 1955, the Committing Magistrate is not obliged to examine accused in cases whether instituted upon police report or on a petition of complaint as S. 207-A (6) as S. 210 will show but if the statement of the accused has been duly recorded, it cannot be brushed aside.^{29a}

Statement of accused recorded by one Magistrate—case committed by successor.—Where the Magistrate who had recorded the statement of the accused at the inquiry was succeeded by another Magistrate who committed the case for trial, *held* that in view of S. 350 the statement was rightly admitted in evidence under S. 287.³⁰

26a. *Petumber Dhobee*, (1870) 14 WR (Cr 10); *Kally*, 2 Bom HGR 395.

26b. *Ramdas*, A 1955 A 616.

27. *In re Ram Chandran*, A 1957 M 505; *Naser Bhagat*, A 1922 P 582; *Dhirendra Nath*, A 1952 C 621; 1952 Cr LJ 1427; *Jadaja Danubha*, A 1952 Sau 3; *Raban Lalu Sheikh*, A 1938 S 97; 39 Cr LJ 618,

28. *Mt. Ktkhinia*, A 1957 MB 75; 1957 Cr LJ 201.

29. *Ram Pyaree*, A 1961 Guj 193 (195) (FB); *Kilkubhai*, 1961 (2) Cr LJ 763, where *Ramdas*, A 1960 B 124; 1960 Cr LJ 327 dissented from, *Anadi Belankar*, A 1958 Or 241; 1958 Cr LJ 1334.

29a. *Mt. Khimia*, A 1957 MB 75.

30. *Ghulam Jannat*, (1925) 7 L 70.

Statement of the accused must be taken as a whole.—The examination of the accused including every question put to him and every answer given by him, should be recorded in full and shall be shewn or read to him.³¹

No distinction can be drawn between a statement made by the accused person and a *confession* made by him as regards the point that the statement should be admitted and considered in its entirety.³²

See notes on Ss. 342 and 364 *infra*.

5. Duly recorded.—In a case where, asked by the Committing Magistrate if he wished to make a statement, the accused said that he did not, but on the following date he made a statement to the Superintendent of the Jail, *held* that this statement under the circumstances was admissible under this section.³³

6. Confession.—See notes under S. 164 *supra* and the next section.

Unsigned confession inadmissible.—The confession of an accused person, taken by a Magistrate having no jurisdiction to commit or try him, is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence.³⁴

7. By or before the committing Magistrate.—The phrase 'committing Magistrate' in Ss. 287 and 288 is merely a compendious way of referring to the Magistrate or Magistrates who held the preliminary enquiry on which the commitment was made.³⁵ Section 288 as amended, however does not contain this expression.

A *quaere* was raised in the case of *Fakirappa Appa*³⁶ whether the statement made by an accused before the committing Magistrate is governed by S. 287 or by S. 24 of the Evidence Act.

8. Shall be tendered by the prosecutor.—It is not in the discretion of the Counsel for the prosecution to determine whether to put in the examination of the accused or not.³⁷ It is not optional with the prosecution to put in the record of confessional statements of persons whom the Judge treated as accused.³⁸

9. Read as evidence.—Section 287 allows a previous statement of the accused to be read as part of the prosecution case only so far as such statement refers to the offence for which the accused is being tried and not so far as it relates to a previous conviction. The latter portion cannot be read out to the Jury or Assessors under S. 310 until they have given their verdict.³⁹ If the examination of an accused person taken before the Magistrate is afterwards read in evidence at the trial before the Sessions Court the whole of it should be read out.⁴⁰

10. Magistrate's attestation.—It is not necessary for a Sessions Judge to read out to the prisoners confessions made by them before a Magistrate

31. *Niruni*, (1867) 7 WR (Cr) 49.

32. *Supdt. and Remembrancer of Legal Affairs v. Lalit Mohan Sinha Roy*, (1921) 25 CWN 778.

33. *Chidambaram Pillai*, (1908) 32 M 3

34. (15).

35. *Bai Ratan*, (1873) 10 Bom HCR 166.
Sessons Judge of Mangalore v. Malinga, (1907) 31 M 40 : 7 Cr L J 29.

36. (1915) 40 B 220 : 17 Bom LR 1059 : 17 Cr LJ 33.

37. *Sheik Mehar Chand*, (1870) 13 WR (Cr) 63.

38. *Rama Tevan*, (1892) 15 M 352.

39. *Teka Ahir*, 5 Pat LJ 706 : 22 Cr LJ 219 : 60 IC 331.

40. *Proceedings* 11th Novr. 1869, 5 MH CR App W.

and ask them if they have any objection to the reception of these confessions. The examination of prisoners before a Magistrate is to be received in evidence, and the attestation of the Magistrate is *prima facie* proof of the circumstances.⁴¹

288. Evidence given at preliminary inquiry admissible.—The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

SYNOPSIS

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|---|--|
| 1. Corresponding sections in former Codes. | 10. Statements to Police and committing Magistrate—Retraction—if evidence under this section, |
| 2. Legislative Changes. | 11. Conviction upon such statement if retracted whether right. |
| 3. Report of the Select Committee. | 12. May, in the discretion of the presiding Judge, be treated as evidence in the case. |
| 4. Effect of the Amendment. | 13. If such witness is produced and examined. |
| 5. Object of the amendment.—Object. | 14. Deposition of witness can be put on record of Sessions Court only when his attention has been drawn to it. |
| 6. Scope. | 15. Evidence for all purposes. the Indian Evidence Act, 1872. |
| 7. Duly recorded in the presence of the accused under Chapter XVIII.—Deposition not admissible in the absence of the accused. | |
| 8. Admissibility of Approver's evidence recorded in preliminary inquiry. | |
| 9. Statement if retracted whether evidence. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 249 of the Code of 1872, S. 75 of Act X of 1875. The section in the Code of 1898 was similarly worded as in the Code of 1882.

2. Legislative Changes.—The words “*duly recorded in the presence of the accused under Chapter XVIII*” were substituted for the words “duly taken in the presence of the committing Magistrate” and the words “*for all purposes subject to the provisions of the Indian Evidence Act, 1872*” for “be treated as evidence in the case” by S. 78 of Act XVIII of 1923.

3. Report of the Select Committee.—“We think the amendments proposed in S. 288 effect a considerable improvement but we would lay down that the evidence of a witness before the Committing Magistrate can only be treated as evidence for all purposes subject to the provisions of the Indian Evidence Act. We considered the suggestion that the power contained by this section should be exercisable by Appellate and Revisional Courts when the Lower Court had refrained from exercising it, but on the whole we are of opinion that no provision should be made in this respect.”

4. Effect of the Amendment.—The addition of the words “subject to the Indian Evidence Act, 1872” by the Criminal Procedure Amendment Act, 1923 to S. 288 of the Code of 1898. does not mean that evidence duly taken before a committing Magistrate can only be utilised at a trial in cases where the Evidence Act specifically authorises its use. The amendment really means that evidence duly taken before the committing Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Evidence Act, that is to say, depositions recorded

⁴¹, *Misser Sheikh*, (1870) 14 WR (Cr) 9.

by the Committing Magistrate can be utilised in a trial Court under S. 288, only if the matter contained therein is, according to the rules of evidence laid down in the Evidence Act, of evidential value.⁴²

Under the old Code there was some conflict of opinion. In the earlier cases namely *Dhan Saha's*⁴³ and *Nirmal Das's*⁴⁴, it was suggested that such statements could not be used as substantive evidence. But in the case of *Dwarka Kurmi*⁴⁵ it was held that statements made before a committing Magistrate could be admitted as evidence. The section has been amended since then.

5. Object of the amendment.—Under S. 288 as amended statements made before a Committing Magistrate, when admissible under the Indian Evidence Act, can be admitted “for all purposes” and not only for the purpose of corroboration or contradiction. The use of the expression “for all purposes” was clearly intended to set at rest the previous conflict. The words “subject to the provisions of the Indian Evidence Act, 1872” mean nothing more than that such statements which would be either irrelevant or inadmissible under that Act.⁴⁶ *Arjun Megha's* case⁴⁷ was referred to in the case of *Behari*.⁴⁸

Object.—The object of the section is to confer a power on the Judge to treat the evidence given by a witness as substantive evidence, if he is satisfied that the evidence given before the Magistrate is true and that given before him is not true.⁴⁸ The object of the section is to reduce the danger of witnesses being tampered with between the commitment and trial.^{48a}

6. Scope.—A statement by a witness regarded by a Magistrate under S. 164 is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate and from which statement he resiles in the Sessions Court.⁴⁹

Section 288 has no application to the evidence of a witness not produced and examined in a Court of Sessions.⁵⁰

Section 288 no doubt confers powers on the Sessions Judge to treat the evidence of a prosecution witness taken before the Committing Magistrate as substantive evidence in the trial before him. It is wrong to apply S. 288 merely because the prosecution requires it. Before the evidence of the Committing Court is brought on record, the prosecution or defence must be given notice for an opportunity to test the evidence by further cross-examination. When depositions are sought to be admitted under S. 288, S. 145 of the Evidence Act, governs the situation and they cannot be admitted unless contradictory portions are put to the witness by the opposite party or by the Judge.⁵¹ Having admitted the statement of a witness made before the Committing Magistrate under S. 288, the Sessions Judge is not justified in discard-

42. *Jehal Teli*, (1924) 3 P 781 approving of *Amanullah*, (1874) 21 WR (Cr) 49; *Abdul Gani Bhunya*, (1925) 42 CLJ 205.

43. (1885) 7 A 862.

44. (1906) 22 A 445.

45. (1906) 28 A 683.

46. *Behari*, (1926) 25 ALJ 126.

47. (1874) 11 Bom HCR Cr 281.

48. *In re Gourbanonokanda Chinnabba*, A 1958 AP 443 : 1958 Cr LJ 850.

48a. *Piara Singh*, A 1963 A 19 : 1963 (1) Cr LJ 30.

49. *Velliah Kone*, (1922) 45 M 766 : 43 MLJ 222 : (1922) MWN 506 : 24 Cr LJ 417 : 72 IC 529 : AIR (1923) M 20.

50. *Ajodhi*, (1919) 16 NLR 30 : 21 Cr LJ 486 : 56 IC 582.

51. *State v. Holey Khan*, 1960 Cr LJ 1167 : A 1960 A 521 where *Tara Singh*, A 1951 SC 441 : 52 Cr LJ 149 and *Bhagwan Singh v. State of Punjab*, A 1952 S C 244 : 1952 Cr LJ 113 : *In re Gurwar Mkunda Chinnabba*, A 1958 AP 443 (445).

ing it on the ground that it is not a true and correct statement.⁵² The Supreme Court in *Bhagwan Singh's* case⁵³ lucidates and clarifies their earlier decision⁵⁴ and pointed out the distinction between the different ways in which a witness' testimony can be sifted and examined and held that the chief examination of a witness may be corroborated by an earlier statement made by the witness before the committing Magistrate in which case the evidence put in under S. 288 would be treated as substantive evidence.

7. Duly recorded in the presence of the accused under Chapter XVIII.—These words have been substituted in place of "duly recorded in the presence of the committing Magistrate" so as to cover the case of evidence recorded by a Magistrate other than a committing Magistrate under S. 219. This amendment is intended to cover cases where evidence may be recorded by the committing Magistrate but not for the purpose of commitment as under S. 219.⁵⁵

The Patna High Court held in *Gansa Oraon*^{55a} and the Bombay High Court in *Maruti Joti*^{55b} that a deposition recorded by the committing Magistrate and admitted in evidence at the subsequent trial in the Sessions Court may be treated as substantive evidence in the case, and distinguished *Mahant Narain Das*.⁵⁶

Even before amendment the Madras High Court held the same view.^{56a}

Deposition not admissible in the absence of the accused.—Previous statements if they have been made in the absence of the accused cannot be treated as independent evidence. S. 288 will not avail.^{56b}

Where such evidence was taken without cross-examination *held* it had not been "duly taken" in the presence of the accused and as such it was not proper evidence.⁵⁷

8. Admissibility of Approver's evidence recorded in preliminary inquiry.—The statement of an accomplice before the committing Magistrate though retracted in the Sessions Court, can be treated as substantive evidence on the same footing as any other evidence on the record.⁵⁸ Field, J., observed in *Joyadee Pramanik*,⁵⁹ that there is a grave doubt whether the deposition of an approver taken before the committing Magistrate, may be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon having been withdrawn.

9. Statement if retracted whether evidence.—A conviction based

52. *Gopi*, A 1955 ALJ 201; *Salar Saheb*, 1955 Andh LT (Cr) 253; *Ghasi Ram*, A 1952 Bhopal 25. *In re Maruga Goundan*, A 1949 M 628. *In re Chinna Papia*, A 1940 M 136; *Gopal Khaitan*, A 1949 G 597; *Amallesh Chandra*, A 1952 C 481; *In re Baluga*, A 1960 AP 315; 1960 Cr LJ 788.

53. *Bhagwan Singh v. State of Punjab*, 1952 SCR 812; A 1952 SC 214.

54. *Tara Singh*, 1951 SCJ 518; A 1951 SC 441.

55. *Abdul Gani Bhuya*, (1925) 53 G 181 (186); 42 CLJ 205.

55a. (1923 March) 2 P 517; 24 Cr LJ 641; AIR (1923) P 550, following *Dwarka Kurmi*, (1899) 28 A 683; *Doraswami Aiyar*, (1901) 24 M 414.

55b. (1921) 46 B 97; 23 Bom LR 820; 22

Cr LJ 636.

56. (1922) 3 L 144; 4 LLJ 91; 23 Cr LJ 513; AIR (1922) L 1.

56a. *Bachala Pada Somadu v. Nethipudi Appigadu*, (1923 August) 47 M 232; 45 MLJ 602; 33 MLT 159; AIR (1924) M 379.

56b. *Alimuddin*, (1895) 23 C 361; *Gulab*, 35 A 260; 11 ALJ 286; 19 IC 307.

57. *Sagal Samba Sajao*, (1893) 21 C 642.

58. *Punhu*, (1924) 16 Cr LJ 223, following *Dwarka Kurmi*, 28 A 683; 3 ALJ 852; *Bhikari Pati*, A 1930 P 545; 32 Cr LJ 66; *Bholanath*, A 1939 A 507; 40 Cr LJ 856.

59. (1880) 7 CLR 66; see *Nanha Malla*, (1883) 13 CLR 326. *Bhagarathar*, *In re*. A 1946 M 271; 47 Cr LJ 785

solely on the evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable.⁶⁰

10. Statements to Police and committing Magistrate—Retraction—if evidence under this section.—Statements of witnesses, made to the police and the committing Magistrate, if retracted, are evidence in the case, substantive evidence of the facts deposed to but there should be some reason why it should be preferred, under this section,⁶¹ if the Court is convinced that the statements made in it are true.⁶²

It is open to the Sessions Judge to hold that the statement of the approver before the Magistrate was a correct statement and that it should be relied upon.⁶³

11. Conviction upon such statement if retracted whether right.—“According to the rulings of this Court a retracted confession must be supported by independent reliable evidence corroborating it in material particulars,⁶⁴ but we do not think deposition read under S. 288 and retracted at the trial are by themselves material corroboration”.⁶⁵

Where the Sessions Judge used as evidence under this section the statement which a witness made before the committing Magistrate but which he repudiated at the Sessions and attributed to improper influence in the course of the investigation, *held* the Sessions Judge did not exercise proper discretion in allowing the former statement to be treated as evidence.⁶⁶

12. ‘May, in the discretion of the presiding Judge, be treated as evidence in the case’.—The language in the section is ‘may, in the discretion’ and not ‘shall’. Hence it follows that it is not imperative that such evidence shall be treated as evidence. Under the section as it stood before the 1923 amendment it was well settled that it was a matter for the discretion of the Judge whether he thinks that such evidence should be used in the interests of justice.⁶⁷ A Sessions Judge should act with great caution in exercising the discretion.⁶⁸

The 1923 amendment adds “for all purposes subject to the provision of the Indian Evidence Act”. Sessions Judge is therefore justified in his discretion in using such statement.⁶⁹

No appeal lies against the exercise of this discretion.⁷⁰

To admit under S. 288 the evidence given before the committing Magistrate, the Sessions Judge must be satisfied, on judicial grounds, that the prior statement was true and that the evidence given before him was false.⁷¹

60. *Jerehi*, 21 A 111 and *Dwarka Kurmi*, 28 A 683 : 3 ALJ 852 followed in *Sher Dil*, (1918) 17 PR (Cr) 1919 : 20 Cr LJ 792 : 53 IC 696. *Bhagaratha, In re* A 1946 M 271 : 47 Cr LJ 785.

61. *Marumti Joti*, 46 B 97 : 23 Bom LR 820 : 22 Cr LJ 636 ; *Pirithi*, 37 PR 1917 (Cr) : 18 Cr LJ 703 : 40 IC 703.

62. *Bhagavatha, In re*, A 1946 M 271 : 47 Cr LJ 785.

63. *Bholanath*, A 1939 A 567 : 40 Cr LJ 856.

64. *Rangi*, (1886) 10 M 295 ; see *Bhawani* (1878) 1-A 664 ; *Nga Po Kauk*, (1926) 4 R 45.

65. *Bharamappa*, (1888) 12 M 123 see also *Amanulla*, 21 WR (Cr) 49 : 12 BLR App. 15 (very important judgment)

followed in *Jadav Das*, 27 C 295 : 4 CWN 129.

66. *Bhut Nath Ghose*, (1902) 7 CWN 345.

67. *Gansaoraon*, (1923 March) 2 P 517 : 4 PLT 462 : 24 Cr LJ 641 : 73 IC 561 : AIR (1923) P 550.

68. *Bajrangi Lall*, (1899) 4 CWN 49 (55). *Ajit Kumar Ghose*, A 1945 C 1591 : 46 Cr LJ 692 relied on in *Gapal Khaitan*, A 1949 C 597 : 51 Cr LJ 136.

69. *Basappa*, (1924) 27 Bom LR 113 (118, 119).

70. *Arjun Megha and Mana Jusa*, (1874) 11 Bom HCR 281.

71. *Bachala Peda Somadu v. Nethipudi Appigadu*, (1923 August) 47 M 232 : 45 MLJ 602 : 33 MLT 159 : AIR (1924) M 379.

For using the previous statement under S. 145, Evidence Act, the evidence before the Committing Magistrate duly recorded must be formally proved and marked but if such prior statement has to be used as substantive evidence the procedure laid down by S. 288 has to be strictly complied with.⁷² This section empowers a Sessions Judge to use as substantive evidence the evidence given by a witness in the Committing Magistrate's Court if true. He cannot do so unless the present evidence is contradicted.⁷³

13. If such witness is produced and examined.—This section does not provide that the Judge may treat the evidence before the Magistrate of *all* the witnesses for the prosecution as evidence, but that such evidence before the Magistrate may be treated as evidence in the case if the witness is *examined*; that is examined as a witness, not if he is cross-examined or tendered for cross-examination.⁷⁴

14. Deposition of witness can be put on record of Sessions Court only when his attention has been drawn to it.—In a trial before a Court of Session, Counsel for the prisoner is not entitled to refer to the deposition given before the Committing Magistrate for the purpose of contradicting the witnesses before the Sessions Court, without drawing attention to the alleged contradiction in their previous depositions and giving them an opportunity of explaining the same.⁷⁵

A Judge should compare the statements recorded by the Magistrates at the preliminary investigation, with the evidence of the same witnesses at the Sessions.⁷⁶

Where a prosecution witness has been tampered with by the defence and that accounts for his change of frame and the denial of even obvious facts, the presiding Judge is justified in bringing on record the witness's statement in the Committing Court.⁷⁷

It was held in *Nirmal Kumar Shinhji's* case⁷⁷ that the evidence transferred in the record under S. 288 is on the same footing with all other evidence in the case for all purposes and as a matter of law no corroboration is necessary, though as a matter of caution corroboration should be sought from other evidence.⁷⁸

There is no reason why S. 145 Evidence Act should be excluded when S. 288 states that the previous statements are to be subject to the provisions of the Evidence Act. The witness has to be confronted with his previous statement.⁷⁹ It is but proper that the trial Judge should indicate that he was going to treat the evidence which had been recorded in the Committing Magistrate's Court as evidence at the trial in order to enable the accused to meet that evidence.⁸⁰

Where a witness makes two contradictory statements one before the Committing Magistrate and the other before the Sessions Court, it is unsafe

72. *Thammon*, A 1958 Kar 74 : 1957 Cr LJ 729.

73. *Gourankonda Chinnabba*, A 1958 A P 443 : 1958 Cr LJ 850.

74. *Subba*, (1885) 9 M 83 (86) ; *Rudhy*, 1 WR (Cr) 14 ; *Saudagar Singh*, A 1944 L 377.

75. *Zawar Rahaman*, (1902) 31 C 142 (FB) over-ruling *Haran Chandra Mitter*, (1880) 6 CLR 390 ; *Lachmi Lal*, 3 Pat LT 398 : (1922) Pat Supp. CWN 159 : 23 Cr LJ 218 : 65 IC 1002.

76. *Bindaban Bowree*, (1866) 5 WR (Cr)

54.

77. *K. S. Nirmal Kumar Shinhji*, A 1954 Sau 55.

78. *Paramanand*, A 1940 N 349 ; *Harman Prasad*, A 1949 N 254 ; *Tara Singh*, A 1951 S C 441 ; see also *Jaggar Singh*, A 1952 Pepsu 23.

79. *Tara Singh*, (1952) SCA 458 : A 1951 SC 441 followed in *Inder Deo*, A 1959 A 238 but distinguished in *Bhagwan Singh*, (1952) SCA 543 : A 1952 SC 214.

80. *Inder Deo*, 1959 A 238 : 1959 Cr LJ 415.

for the Court to convict the accused on the evidence of such witness alone in absence of some independent evidence.⁸¹

For transfer of previous testimony to the contrary and for its use as substantive evidence see case.⁸² If the evidence before the Committing Magistrate has not been put in under S. 145, Evidence Act or if the contradictions have not been put to the witness in the Sessions Court, the Sessions Judge is wrong in holding the verdict of the Jury unreasonable on this ground alone.⁸³

15. For all purposes.....the Indian Evidence Act, 1872.—The words “for all purposes subject to the provisions of the Indian Evidence Act, 1872” have been added by Act XVIII of 1923 after the words “be treated as evidence in the case.” Although the decision of the Patna High Court in *Jehan Teli*⁸⁴ is in 1924, their Lordships did not consider the effect of the addition of the words “for all purposes” yet, as observed by Suhrawardy, J., in *Abdul Gani Bhuiya*⁸⁵ it rightly decided the point “subject to the provisions of the Indian Evidence Act” holding that such deposition can be used for all purposes if it is admissible under the Indian Evidence Act. The decision in *Jehan’s case*⁸⁴ as was pointed out in *Abdul Gani Bhuiya*⁸⁵ was of no help in the consideration of the expressions “for all purposes” which must have been added with a set design and for the purpose of attaining a definite object. “It seems to me that those words have been added to remove the limitation to the value of that evidence as fixed by the cases referred to in Amanullah and other cases.⁸⁶ Under the present section it must be held that the evidence recorded by the Committing Magistrate, if admitted under S. 288, must be treated as evidence for all purposes even as the basis of the finding or verdict and on a par with any other evidence before the Sessions Court or as substantive evidence on which the verdict of the jury or judgment of the Judge can be based.” It was held in the following cases⁸⁷ that statements under S. 288 were to be treated as substantive evidence. Prior to the amendment it was held in *Malaya Goundan*⁸⁸ and *Somadu’s case*⁸⁹ that statements made under this section could not be treated as substantive evidence, which view can no longer be treated as good law after the amendment. The use of the expression “for all purposes” was clearly intended to remove the previous conflict of opinion and the words “subject to the provisions of the Indian Evidence Act 1872” mean nothing more than that “such statement should not contain matters which would be irrelevant or inadmissible.⁹⁰

“Subject to the provisions of the Evidence Act.”—There is no reason why S. 145, Evidence Act is to be excluded when S. 288 states that the previous statements are “subject to the provisions of the Evidence Act.”

81. *Hardial Singh*, A 1953 Pepsu 66 : 1953 Cr LJ 884.

82. *Jagar Singh*, A 1954 Pepsu 6 : 1953 Cr LJ 1870 ; *Radhanath Dhara*, 58 CWN 243 : 1953 Cr LJ 1377.

83. *Anil Ranjan Dutta*, A 1952 C 534 : 1952 Cr LJ 1154.

84. (1924) 3 P 781.

85. (1925) 53 C 181 (189). *Amalesh Chandra*, A 1952 A 481 ; *Tikaram*, A 1957 A 755 : 1957 Cr LJ 1200.

86. *Amanullah*. (1874) 21 WR (Cr) 49 followed in *Jadav Das*, (1899) 27 C 295 ; *Nirmal Das*, (1900) 22 A 445.

87. *Dwarka Kurmi*, (1906) 28 A 683 ; *Dorasami Ayer*, (1901) 24 M 414

followed in *Maruti Joti Shindo*, (1921) 46 B 97 : 23 Bom LR 820 ; see *Velliah Kone*, (1922) 45 M 766 followed in *Mani Chand*, (1924) 5 L 324 ; *Gansao-raon*, (1923 March) 2 P 517 ; *Abdul Gani Bhuiya*, 53 C 181 ; *Fakira*, 648 A, 148 : 1 CWN 741 : A 1937 PC 119 ; *Amalesh*, A 1952 C 481.

88. 42 MLJ 278 : (1921) MWN 872 : 23 Cr LJ 262.

89. (1923 August) 47 M 232 : 45 MLJ 602 : AIR (1924) M 379.

90. *Behari*, (1926) 25 ALJ 126. *Rano*, A 1944 S 178 : 46 Cr LJ 348 ; *Tafiz*, A 1930 C 228 ; *Sham Bahara*, A 1953 N 308 ; *Zila*, A 1954 E P 182.

If the prosecution wishes to use the previous testimony to the contrary as substantive evidence, then it must confront the witness with those parts of it which are to be used for contradicting him.⁹¹

When the deposition of a witness before the Committing Magistrate is admitted, it is wrong to say that it can only be used for the purpose of cross-examination under S. 145, Evidence Act, it is to be treated as evidence for all purposes 'subject to the provisions of the Evidence Act'.⁹²

The deposition under S. 288 is to be treated as evidence for all purposes and it is therefore also evidence which can be corroborated under S. 157 Evidence Act.⁹³

Corroboration is not always necessary as a matter of law.⁹⁴

It was held in⁹⁵ that the prosecution or defence must be given notice for an opportunity to test the evidence put in under S. 288 by further cross examination.⁹⁶

289. Procedure after examination of witnesses for prosecution :—(1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried by the Judge himself, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried by the Judge himself, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

91. *Tara Singh*, 1952 SCA 458 : A 1951 S C 441 ; *Jhommen*, A 1958 Ker 74 : 1958 Cr LJ 589.

92. *Fakira*, 64 IA 148 : 41 CWN 741 : A 1937 PC 119 : 38 Cr LJ 498.

93. *Narayan*, A 1959 B 552 (553) ; *Holey Khan*, A 1960 A 521 : (1960) ALJ 642 ; *Tika Ram*, A 1957 A 785 1957 Cr LJ 1200.

94. *Banshi Nayek*, A 1954 N 162 ; *Dholu*, A 1956 M B 94.

95. *Banshi Nayak*, A 1954 N 162 ; *Dhula*, A 1956 MB 94 ; *Paramanandarup*, A 1940 N 340, *Raja Ram*, A 1935 A 691 : 36 Cr LJ 823.

96. *Holey Khan*, A 1960 A 521 : (1960) ALJ 642 ; *In re Gurrantkandi Chintabba*, A 1958 A P 443.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | after close of defence case is objectionable. |
| 2. Duty of prosecution to examine witnesses. | 6. Prejudging defence witnesses. |
| 3. Examination of the accused imperative.—Examination of accused. | 7. Reply by Prosecutor. |
| —Examination of accused respecting a letter not proved. | 8. Sub-section (2). |
| —Opportunity must be given to the Accused to make a Statement. | 9. Procedure when there is no evidence that the accused committed the offence. |
| 4. Parties can cross-examine Court witnesses. | 10. Misdirection. |
| 5. Examination of Prosecution witnesses | 11. Sub-section (3). |
| | 12. Sub-section (4)—Accused shall be asked whether he means to adduce evidence. |

1. Corresponding sections in former Codes.—This section corresponds to S. 372 of the Code of 1861, paragraphs 1 and 2 of S. 251 of the Code of 1872, S. 62 of Act X of 1875 and is the same as that of the Code of 1882.

2. Duty of prosecution to examine witnesses.—See notes under S. 208 *supra*.

3. Examination of the accused imperative.—See notes under S. 342 *infra*. Having regard to the recent rulings holding S. 342 to be mandatory, the following ruling which held that it is not imperative for a Sessions Judge to examine an accused person under S. 342 especially when the accused admits his guilt⁹⁷ is no longer good law.

Examination of accused.—The gap in the evidence for the prosecution cannot be filled up by any statement made by the accused under S. 342.⁹⁸ The practice of filing written statement in Sessions trial has been deprecated.⁹⁹ Written Statement filed in the Court of the Committing Magistrate should not be taken into consideration at all.¹

Examination of the accused respecting a letter not proved.—Where a letter is to be used as genuine which is not proved, the Court should ask the accused about it and put to him questions respecting its significance otherwise it ought to be ignored or a favourable construction put upon it.^{1a}

Opportunity must be given to the Accused to make a Statement.—Where an accused in a preliminary enquiry pleaded not guilty and said he would make a statement later on, *held* he ought to be given an opportunity to make it in the trial Court.²

4. Parties can cross-examine Court witnesses.—There is nothing in S. 165 of the Evidence Act debarring or disqualifying a party to a proceeding from cross-examining any witness called by the Court.³

5. Examination of Prosecution witnesses after close of Defence case is Objectionable.—The examination of prosecution witnesses after the defence is closed is objectionable.⁴

97. *Khudiram Bose*, (1908) 9 CLJ 55 : 10 Cr LJ 325.

98. *Basanta Kumar Ghatak*, (1898) 26 C 49 followed in *Mohideen Abdul Kodir*, (1903) 27 M 238.

99. *Taraknath Baidya*, 139 CWN 1319 : 37 Cr LJ 30 ; *Jamuna*, A 1947 P 300.

1. *Samarendra Singh*, A 1944 Oudh 99 : 49 Cr LJ 116.

1a. *In re Venkata Row*, (1911) 36 M 159 : 22 MLJ 270 : (1912) MWN 125 : 13 Cr LJ 226 : 14 IC 418.

2. *Gangadhar Goala v. Reed*, (1921) 25 CWN 609 : 33 CLJ 503 : 23 Cr LJ 41 : 64 IC 665.

3. *Gopal Lal Seal*, (1897) 24 C 288.

4. *Radha Madhab Pakra*, 15 CWN 414 : 12 Cr LJ 7 : 9 IC 46.

6. Prejudging defence witnesses.—Where the Court, without having first heard the evidence for the prosecution, examines the witnesses for the defence, he commits an irregularity but if the prisoners are not materially prejudiced thereby, the conviction will not be set aside.⁵

7. Reply by prosecutor.—See S. 292 *infra*.

8. Sub-section (2)—‘If he says he does not, the prosecution may sum up his case.’—Where one of several accused persons tried jointly calls witnesses at the trial but the other accused call no witnesses, they must all follow in their defence, and the prosecution has the right of reply on the whole case.⁶

9. Procedure when there is no evidence that the accused committed the offence.—In such cases where the trial is with the aid of Assessors the Judge should record a finding or in a case tried by a jury the Judge should direct a verdict of not guilty.

Where ‘there is no evidence’ in the case such as might legitimately lead to an inference of guilt on the part of the accused, *held* the learned Sessions Judge in view of the provisions of sub-section (2) should have in his charge to the Jury definitely put it to them and in the absence of such a direction the verdict of the Jury is vitiated by misdirection. It is not correct to say that a matter can be left to the Jury, if, and only if, the evidence relating to it is satisfactory, trustworthy and conclusive.⁷

A Sessions Judge has no right to pronounce in his own judgment on the credibility of the evidence and to withdraw the consideration of the due weight to be given to the evidence from the Jury.⁸ The Sessions Judge should confine himself to summing up the evidence.⁹

No evidence.—The words “there is no evidence” do not mean ‘no satisfactory, trustworthy or conclusive evidence’.¹⁰ Where the evidence, if believed, does not amount to proof, the case should not be put to the jury, as a verdict of guilty cannot be sustained¹¹, and the Judge should charge the jury for acquittal.¹² But when it is a question as to the credibility of the evidence, it must be left to the Jury, though the Judge may himself disbelieve the evidence.¹³

No evidence worth the name is under the law different from no evidence.¹⁴ In case of there being some evidence the matter should be left to the jury to Judge about the effect of such evidence¹⁵, although a mere scintilla of evidence clearly would not justify the judge in leaving the case to the jury, at the same time it is not necessary that the evidence must be satisfactory, trust-worthy and conclusive before the jury can be asked to arrive at their verdict.¹⁶

10. Misdirection.—Where the evidence against the accused is insufficient, the omission of the Judge to tell the Jury that there was no evidence

5. *Turibullah*, (1879) 4 CLR 336.

6. *Sadanand Narayan*, (1894) 18 B 364.

7. *Ram Chariter Singh*, (1927) 7 P 15 : 28 Cr LJ 692 : 103 IC 548, relying on *Upendra Nath Das*, (1914) 19 CWN 653 (663).

8. *Huroo Shahu*, (1871) 16 WR (Cr) 20.

9. *Shadulla*, (1883) 9 G 875.

10. *Munna*, 10 A 414 ; *Vajiram*, (1892)

16 B 414.

11. *Rutton Dass*, 16 WR (Cr) 19.

12. *Greedhary*, 7 WR (Cr) 39.

13. *Huroo Sahu*, 19 WR (Cr) 20.

14. *Rahamali*, A 1925 C 1055.

15. *Ram Dayal*, A 1954 Ass 157 ; *Ram Chariter Singh*, A 1927 P 370 : 28 Cr LJ 692.

16. *Nawal Kishore Misir*, A 1929 P 121 ;

against the accused amounts to a misdirection which entitled the accused to an acquittal.¹⁷

“The more usual procedure where a Court considers there is no evidence to lay before the assessors is for the Court itself to record a finding under S. 289 to that effect. But it should be observed that this section applies only where there is no evidence, and would not cover a case when the Court considers that the charge was in itself improper”.¹⁸

“**Not proven**”.—The Code does not provide for a finding of “Not proven.” The proper course is to record a finding of “not guilty”.¹⁹

11. Sub-section (3).—An accused under this sub-section should not be convicted upon the evidence given against him by the witness called by the co-accused, when there is no evidence on the prosecution side proving the offence as against him.²⁰ It has been held that a Sessions Judge cannot withhold a case from the Jury, excepting in cases where there is no evidence when he can exercise such powers under sub-section (2).²¹

12. Sub-section (4).—See *Imam Ali's case*²² and the contrary view²³ noted under sub-sec. (1).

“**Accused shall be asked whether he means to adduce evidence**”.—It is essential that the Sessions Judge should ask the accused whether he means to adduce evidence as provided in sub-sec. (1). Omission so to ask is an irregularity and is covered by S. 537.²⁴ Cl. (4) does not mean anything else except that if the accused calls no witness he or his pleader is to make his final address to Court.²⁵ No adverse inference can be drawn against the accused who had stated that he means to adduce evidence, but does not do so.²⁶

Where there is nothing on the record to show that the appellants were questioned in the Sessions Court the statements made by the accused before the committing Magistrate had been (as it is presumed) read out, with reference to their retraction of each and every statement incriminating themselves and one another and as to whether they had any evidence in support of their allegations that their confessions had been improperly obtained, *held* the requirements of Ss. 287 and 289 have not been complied with.²⁷

The formality of calling upon an accused person to enter on his defence under the provisions of S. 289 is not a mere formality, *but is an essential part of a criminal trial*. Omission to do so occasions a failure of justice and is *not cured* by S. 537.²⁸ The Allahabad High Court has *held* a contrary view.²⁹

Upendra, 19 CWN 653 (FB).

17. *Asinuddin Sarder*, 32 GLJ 89 : 22 Cr LJ 60 : 59 IC 204.

18. *Dwaraka Lal v. Mahadeo Rai*, (1890) 12 A 551 (552).

19. *Nalli*, Weir 11 : 381.

20. *In re Raghavaraju*, (1908) 5 MLT 75 : 10 Cr LJ 68 : 2 IC 525.

21. *Nawal Kishore Missir*, (1929) PLT 101.

22. *Imam Ali Khan*, (1895) 23 C 252.

23. *Premgir*, 16 ALJ 41.

24. *Ram Singh*, ILR (1952) 2 Raj 93.

25. *Sheonath Ram*, A 1948 P 291 : 49 Cr LJ 401 ; *Thoppa*, A 1936 M 82 ; 37 Cr LJ 45.

26. *Sheonath Ram*, A 1948 P 291.

27. *Viran*, (1886) 9 M 224.

28. *Imam Ali Khan*, (1895) 23 C 252.

29. *Premgir*, (1917) 16 ALJ 41 : 19 Cr LJ 209 : 43 IC 786.

290. Defence.—The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 4. Right of accused to cross-examine the witnesses of co-accused. |
| 2. Burden of proof. | |
| 3. Duty of Defence Counsel. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 251 paragraph 3 of the Code of 1872, S. 62 of Act X of 1875 and is similarly worded as that of the Code of 1882.

2. Burden of proof—is on the prosecution. That onus never changes.³⁰ When the accused pleads self-defence, the onus is on the accused to establish the plea.³¹ Accused can make out a case of private defence from circumstances of the case without producing defence witnesses³¹ but the burden of proof is not the same as that required from prosecution.³²

3. Duty of Defence Counsel.—The duty of the defence Counsel is to act as an advocate and not to any extent as a Judge. He has before him as his object the acquittal of the accused and is not under any obligations which the accused would be under. Thus he is not bound to disclose facts unfavourable to the accused.³³ See the *Davis Murder* case³⁴ where the duty of an Advocate charged with the defence of a person accused of a very serious crime is discussed.

If the accused makes any statement in his defence it should be recorded. If he does not voluntarily make any statement, and declines to answer any question put to him by the Court, the fact should be noted.

The record is not complete unless it shows the nature of the defence set up.³⁵

Where there are more accused than one, their Counsel should all be heard after the conclusion of the whole of the defence evidence.³⁶ The accused are entitled to put forward any defence open to them, technical or otherwise.³⁷ In *Nagendra Chandra Dhar's* case³⁸ it was held that the Sessions Judge erred in holding that the accused could not set up an alternative defence which was inconsistent with his first defence.

4. Right of accused to cross-examine the witnesses of co-accused.—One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.³⁹

30. *Major Wanchoppa*, 38 CWN 187 ; *Binoyendra Panda*, 40 CWN 442 ; *Waugh*, 54 CWN 503 PC ; *Woolmington*, (1935) AC 462.

31. *In re Nagappa*, A 1960 Mys 294.

32. *Bala Prasad*, A 1961 M P 241 following *Woolmington*, (1935) AC 462 (see cases referred to).

33. *Haris Principle of Cr Law* p 419.

34. *Kazi Bazler Rahman*, (1928) 33 CWN 136 (143) ; *Barendra Kumar Ghose*, 28

CWN 170.

35. *Gopal Hajjam*, 15 WR (Cr) 16.

36. *Mohinder Singh*, A 1932 L 108 : 33 Cr LJ 97.

37. *Ramesh Chandra Banerjee*, A 1914 C 456.

38. 27 CWN 820 : 25 Cr LJ 190 ; *Yusuf Hussain*, A 1918 A 189 : 19 Cr LJ 371.

39. *Ram Chand Chatterjee v. Hanif Sheikh*, (1893) 21 G 401.

291. Right of accused as to examination and summoning of witnesses.—The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance ; but he shall not, except as provided in Sections 207-A, 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 6. 'Be entitled as of right'. |
| 2. Legislative changes. | 7. Adjournment for producing Defence Witnesses. |
| 3. Scope. | 8. New witnesses for defence. |
| 4. When Court is bound to summon defence witnesses. | 9. Court witness in a previous trial—Duty of prosecution to call. |
| 5. 'If such witness is in attendance'. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 375 of the Code of 1861, S. 363 of the Code of 1872, S. 85 of Act X of 1875, S. 91 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—'207-A' has been added after the words 'in sections' by S. 47 of Act 26 of 1955.

3. Scope.—The accused has a right to examine witnesses not named in the list of defence witnesses submitted by him under S. 211 (and now under S. 207-A), if they are present in Court, but he is not entitled as of right to have them summoned,⁴⁰ but it has been held in⁴⁰ that such witness can be examined.⁴¹ In a Sessions case, while the accused files before the Magistrate a list of witnesses to be examined at the trial, the witness must be summoned.⁴²

4. When Court is bound to summon Defence Witnesses.—A prisoner on trial is entitled to have his witnesses examined⁴³ and the Sessions Judge is bound to postpone the trial in which a witness summoned for the defence is absent.⁴⁴ The Magistrate is not justified in refusing to summon any of the witnesses because there is a large number of witnesses mentioned in the list furnished by the accused.⁴⁵ It is for the accused person and not for the Judge to say what amount of evidence it was proper to place before the jury in order to establish the case for the defence.⁴⁶

5. 'If such witness is in attendance'.—If the accused insists on the examination of a witness who had been discharged before, the Court may in the interests of justice, allow the accused any opportunity for his production.⁴⁷ On the question of insanity of accused the witness who knew his state of mind eight months previous to occurrence is not a material witness and refusal to adjourn case to examine him is justified.⁴⁸

40. *Bhuplal*, A 1946 PC 43.

41. *Chiman Singh*, A 1960 MP 394 following *Raja of Kantil*, 8 A 668 ; *Misrilal*, A 1934 A 372 ; 35 Cr LJ 591.

42. *Ramnand Sarkar*, 34 CWN 1014 ; 32 Cr LJ 316 ; *Bhagwan*, A 1925 A 318 ; 26 Cr LJ 723.

43. *Bhoobun Isher Gossamee*, (1865) 2 WR (Cr) 6 ; *Abdul Settari*, (1865) 3 WR

(Cr) 36.

44. *Ishan Dutt*, 15 WR (Cr) 34.

45. *Harendra*, 11 C 762 ; *Prosunno*, 23 WR (Cr) 56.

46. *Brojendra*, 7 CWN 188.

47. *Nageshwar*, 24 Cr LJ 518 ; 73 IC 54.

48. *Vaghmal Kherajmal*, A 1955 Sau 13 ; 1955 Cr LJ 63.

6. 'Be entitled as of right'.—Though the accused is not entitled as of right to have his witnesses not named by him before the Magistrate summoned at the trial before the Sessions⁴⁹ yet the Judge has an inherent power, if he thinks proper to examine it, to summon other witnesses not mentioned in the list delivered to the committing Magistrate.⁵⁰

7. Adjournment for producing Defence Witnesses.—An application, before the conclusion of the trial to procure the attendance of a witness not properly served should be granted,⁵¹ particularly when he is a material witness.⁵²

Where, in a Sessions trial, a witness summoned for the defence does not attend and a postponement is consequently asked for by the defence, the Sessions Judge is not authorised to discharge, on that account, the jury in the middle of the trial, and to transfer the case from one sessions to another, to be tried by a fresh jury.⁵³

If an accused has not his witnesses present, the Judge should, under S. 251 of the Code of 1872, if he sees grounds for proceeding first call upon him for his defence, and then postpone the case.⁵⁴

8. New witnesses for defence.—An accused person cannot ask as of right that newly named witnesses shall be summoned for his defence but his prayer should not ordinarily be refused if there is time to secure the attendance of the witness before the conclusion of the trial.⁵⁵

9. Court witness in a previous trial—Duty of prosecution to call.—It cannot be the duty of a Public Prosecutor to call or put into witness box for cross-examination a witness who in former trial was called by the Court and whom he believes to be false or unnecessary witness.^{55a} Although the accused cannot claim as of right to examine new defence witnesses not mentioned in the list under S. 211 (or S. 207-A) the accused can apply under S. 540.⁵⁶ Where the Sessions Judge refused to enforce the attendance of some witnesses who have been summoned by the committing Magistrate, *held*, the trial was vitiated.⁵⁷

292. Prosecutor's right of reply.—The prosecutor shall be entitled to reply—

- (a) if the accused or any of the accused adduces any oral evidence ; or
- (b) with the permission of the Court, on a point of law ; or
- (c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence :

49. *Boidnath*, 3 WR (Cr) 29.

50. *Raja Kantik*, 8 A 668.

51. *Weir* II 383.

52. *Ishn Dutt*, 15 WR (Cr) 34 ; *Rajnarain Myto*, (1872) 18 WR (Cr) 20.

53. *In re Putaswamy*, (1902) 4 Bom LR 939.

54. *Jumisuddin*, (1875) 23 WR (Cr) 58.

55. *Ram Suvak Sahu*, A 1933 P 550 : 1933

Cr LJ 1259.

55a. *Gangedhar Sowale v. Reed*, (1921) 49 C 277 : 23 Cr LJ 742 : 69 IC 630 : AIR (1922) C 461, following *Durga*, (1893) 16 A 84.

56. *Faizuddin*, 47 C 758 : 21 Cr LJ 842.

57. *Bhuplal*, A 1946 P 43 ; *Shorumka*, 50 CWN 657 (PC).

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

SYNOPSIS

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| 1. Earlier Law. | 4. Clause (a). |
| —Select Committee Report (1898). | 5. Clause (b). |
| 2. Legislative Changes. | 6. Clause (c). |
| 3. Effect of the Amendment. | 7. Reply—right of prosecution. |

1. Earlier Law.—The Code of 1882 read “has stated, when asked under S. 289, that he *means* to adduce evidence”. The Code of 1898 having substituted for those words “adduces any evidence” the decisions under the Code of 1882⁵⁸ can no longer be treated as good law.

“We have restored this clause substantially to the form which it had in the Code of 1872 and in the High Courts Criminal Procedure Act X of 1875. We think that the right to reply should depend on the fact whether the accused does or does not produce evidence.”—*Select Committee Report*, (1898) Code.

Beaman, J., in *Abdul Ali Sherufali's* case⁵⁹ held that the effect of the amendment was that the mere statement of the accused's intention to adduce evidence whether he did so or not, gave the prosecution the last word.

2. Legislative Changes.—The Code of 1898 was similarly worded as that of the Code of 1882 except that it substituted “adduces any evidence” for the words “has stated when asked under S. 289 that he means to adduce evidence” occurring in the Code of 1882. The present section was substituted by S. 79 of Act XVIII of 1923.

3. Effect of the Amendment.—See notes in course of commentary on the section.

4. Clause (a)—‘If the accused or any of the accused adduces any oral evidence’.—The language in the old Code was ‘any evidence’. The amendment restricts Prosecutor's right of reply when the accused adduces ‘oral’ evidence only. See *Sreenath Mahapatra*.⁶⁰

“The object of the law evidently is to let each side have an opportunity of commenting on the evidence of the other and not to give additional advantage to the prosecutor simply because the pleaders for a prisoner may, after consultation during an adjournment have had an opportunity of considering what was best for the interests of the client”⁶¹ This view was followed in the case of *Bhaskar*⁶² but Beaman, J., in the case of *Abdul Ali Sherufali*⁶³ dissented from *Bhaskar's* case⁶² and held that the difficulty was created for the “old standing distinction drawn in England between documents put in by the accused through prosecution witnesses and statements elicited in cross-examination from prosecution witnesses, both of which the accused means to use for his defence. The illogicality of this distinction seems later to have given rise to a new principle. . . . English judges now appear to make this test, if the documents put in by the accused through a witness for the prosecution can fairly be said to take the prosecution by surprise” then the prosecution has the right to *reply*.

58. *Hurrychurn*, 10 C 140 ; *Venkatapathi*, 11 M 339 and *Hurryfield*, 14 A 212.

59. (1909) 11 Bom LR 177 (181).

60. 43 C 426 : 20 GWN 976 : 17 Cr LJ 423 : 35 IC 983.

61. *Hurry Chern*, 10 C 140 : 13 GLR 358.

62. *Bhaskar Balwant Bhopatkar*, (1906) 30 B 421.

63. (1909) 11 Bom LR 177 : 9 Cr LJ 284 ; *Sreenath Mahapatra*, 20 GWN 976.

Prior to 1898 the Calcutta and Bombay High Courts held diverse views to the Madras and Allahabad High Courts as to how the production of documentary evidence for the defence during the cross-examination of the prosecution witnesses affected the right of reply of the prosecutor, and the change of the law in 1898 was meant finally to lay down the law—that if the accused produced documentary evidence at any stage of the trial, the prosecutor should be entitled to reply.⁶⁴

Meaning of 'any evidence' under the old Code.—By the substitution of 'oral evidence' in place of 'any evidence' the following rulings are no longer good law.⁶⁵

5. Clause (b).—This clause is new. It deals with the permission of the Court on a point of law.

6. Clause (c).—Under the old Code 'any evidence' included documentary and oral evidence. The present Code by substituting 'oral evidence' in Cl. (a) by implication debars the prosecutor from having a right to reply when the defence adduces documentary evidence. But the insertion of Cl. (a) together with the proviso makes it clear that the Prosecutor may reply with the permission of the Court, when during cross-examination of the prosecution witness the defence tenders some documentary evidence admitted by the Court with this restriction that the reply must be limited to comments on the documents so produced.

Under the old Code as soon as the defence adduced 'any evidence' *i.e.* documentary or oral, the prosecutor had the right to reply and in many cases a large portion of legitimate cross-examination was excluded *vide Bhuro*.⁶⁶

7. Reply—right of prosecution.—'Reply' means reply on the whole case,⁶⁷ but the proviso to Cl. (3) restricts the reply in cases covered by Cl. (3) to commenting on the document so produced.

The term 'document' in this section cannot be extended so as to mean and include a statement of a witness made by him in another Court.⁶⁸

Under the present Code the right of the prosecution to reply depends on the accused adducing oral evidence in defence after the close of the prosecution case and the mere fact of their having proved certain documents through a prosecution witness in cross-examination does not deprive the defence of their right of reply.⁶⁹ The prosecution cannot reply if the accused confines himself to getting facts on documents by cross-examining the prosecution witnesses.⁷⁰

293. View by jury.—(1) Whenever the Court thinks that the jury should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the

64. *J. S. Birch*, (1910) 7 LBR 84 : 15 Cr LJ 241.

65. *Steward*, 31 C 1050 ; *Hurry Charan*, 10 C 1024 approved of in *Bhaskar*, 30 B 421 ; *Kali*, 14 C 245 ; *Solomon*, 17 C 930 ; *Krishnaji*, 14 B 436 ; *Venkatapathi*, 11 M 339 ; *Harryfield*, 14 A 212 ; *Moss*, 16 A 88 ; *Tekur*, 2 CWN cci : 6

CWN cciii : 8 CWN ccix.

66. (1908) 1 SLR 91 : 8 Cr LJ 215.

67. *Sadanand*, 18 B 364.

68. A 1952 B 335 : 1952 Cr LJ 1341.

69. *Kundan Singh*, 13 L 172 : A 1931 L 534.

70. *Sreenath Mahapatra*, 20 CWN 976 : 17 Cr LJ 423.

jury shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Scope. |
| 2. Legislative Changes. | 5. View by the jury. |
| 3. Effect of Amendment. | 6. Notice necessary to parties. |

1. Corresponding sections in former Codes.—This section corresponds to S. 348 of the Code of 1861, S. 253 of the Code of 1872, S. 64 of Act X of 1875, and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—In sub-sec. (1) and sub-sec. (2) after the words 'and the jury', the words 'or assessors' were omitted by S. 48 of Act 26 of 1955.

3. Effect of Amendment.—It is a consequential amendment with the abolition of trial with assessors.

4. Scope.—"Section 293 provides that jurors or assessors in a sessions trial may be asked to view a place of occurrence or connected place, provided they are accompanied by an officer of the Court and hold no sort of communication with any party; they are to be conducted back to the Court, and they must not talk with anybody".⁷¹

In cases of view by assessors of the scene of the alleged offence, it was held that the Judge could not delegate his own function of examining witnesses on the spot to the assessors.⁷²

5. View by the jury.—Counsel for the prosecution and the investigating officer should never be allowed to go with a jury to inspect the spot of the alleged crime unless of course counsel for the defence is present to see that neither of them says anything which they should not say in the presence of the jury.⁷³ Where a person in anticipation that he would have to serve as an assessor in a murder trial accompanied investigating officer, approver and Crown witnesses during investigation and acquainted himself with facts as regards physical features of the case, *held*, his subsequent participation in the trial as an assessor is highly irregular.⁷⁴ Where the Judge alone inspects the spot under S. 539 B, the inspection note must be ruled out.⁷⁵

6. Notice necessary to parties.—If a Sessions Judge finds it necessary to visit the place of an offence under trial, he should give notice of his intention to the parties and assessors. He should not go after the trial is complete on delivery of the assessors' opinion.⁷⁶

71. *per* Chatterjee, J., in *Babon Sheikh*, (1910) 37 C 340 (353); 14 CWN 422; 11 Cr LJ 121; 5 IC 365.

72. *Chutterdharee Singh*, (1866) 5 WR (Cr) 59.

73. *Md. Illias*, A 1951 C 212; 51 Cr LJ 1581.

74. *Turnabole Burong*, A 1949 PG 172; 50 Cr LJ 642.

75. *Raj Bahadur*, A 1934 Oudh 499; 35 Cr LJ 1496.

76. *Deiya*, 9 Bur LT 133; 17 Cr LJ 500; 36 IC 468; *Oudh Behari Narain Singh*; (1877) 1 CLR 143.

294. When juror may be examined.—If a juror is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. Legislative Changes. | 4. Examined, etc. |

1. Corresponding sections in former Codes.—This section corresponds to S. 258 of the Code of 1872, S. 69 of Act X of 1875 and is the same as that of the Code of 1882.

2. Legislative Changes.—The words 'or assessors' after the opening words 'If a juror' were omitted by S. 49 of Act 26 of 1955.

3. Scope.—"Section 294 provides that if a juror or assessor is personally acquainted with any relevant fact, he must be examined and cross-examined as a witness".⁷⁷

4. Examined, etc.—It is undoubtedly a well-established rule that a juryman may be sworn and examined as a witness and is not disqualified by reason of his having given evidence from continuing to sit as a juryman or taking part in delivering the verdict.⁷⁸

295. Jury to attend at adjourned sitting.—If a trial is adjourned, the jury shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Trial to be adjourned—when. |
| 2. Legislative Changes. | 4. Taking evidence in absence of jury—Reference to High Court. |

1. Corresponding sections in former Codes.—This section corresponds to S. 378 of the Code of 1861, S. 260 of the Code of 1872, S. 67 of Act X of 1875 and is the same as that of the Code of 1882.

2. Legislative Changes.—The words 'or assessors' were omitted by S. 49 of Act 26 of 1955.

3. Trial to be adjourned—when.—If an accused has not his witness present, the Judge should, under S. 251 of the Code of 1872 if he sees grounds for proceedings, first call upon him for his defence and then postpone the case.⁷⁹ But the Judge in such circumstances would not be authorised to discharge the jury in the midst of a trial and adjourn it to the next session.⁸⁰

4. Taking evidence in absence of jury.—Reference to High Court.—It is not competent to a Sessions Judge to examine witnesses in a jury trial after the Jury has gone and in the absence of the accused, and then to act on the evidence in determining whether he should refer the matter

77. *per* Chatterjee, J., in *Babon Sheikh*, (1910) 37 C 340 (353) : 14 CWN 422 : 11 Cr LJ 121 : 5 IG 365.

78. *Mookta Singh*, (1870) 13 WR (Cr)

60 : 4 BLR App Cr 15.

79. *Jumiruddin*, (1875) 23 WR (Cr) 58.

80. *In re Puttaswamy*, (1912) 4 Bom LR 939.

to the High Court.⁸¹ See S. 318 failure of jurors to attend, and S. 332 for penalty for non-attendance of juror, S. 282 for procedure when juror ceases to attend.

296. Locking up jury.—The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and, subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

SYNOPSIS

1. Corresponding sections in former Codes. —Bombay.
—Madras.
2. State Amendments.

1. Corresponding sections in former Codes.—This section corresponds to S. 65 of Act X of 1875 and is the same as under the Code of 1882.

2. State Amendments.

Bombay.—After the words 'such Court' the words 'or the Court of Session for Greater Bombay' were inserted by Bombay Act 32 of 1948.

Madras.—The words 'before such Court' have been omitted by Madras Act 34 of 1955.

F.—Conclusion of Trial in Cases tried by Jury

297 Charge to jury.—In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided and the charge to the jury shall, wherever practicable, be taken down in shorthand in the language in which it is delivered and a transcript thereof signed by the Judge shall form part of the record.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | hand. |
| 2. Legislative Changes. | 16. Charge neither to be elaborate nor meagre. |
| 3. Effect of Amendment. | 17. Cases of Individual accused. |
| 4. Jury trial except High Court abolished in— | 18. Hostile witness. |
| —West Bengal. | 19. Benefit of doubt. |
| —Greater Bombay. | 20. Cases of Circumstantial Evidence. |
| 5. Charge to the Jury when to be made. | 21. First Information Report. |
| 6. Charge. | 22. Dying declaration. |
| 7. Object of Summing up. | 23. Jury supplied with a copy of the Penal Code. |
| 8. How to sum up the evidence. | 24. No summing up of entire case. |
| 9. Evidence not summed up. | 25. What is a proper Summing up. |
| 10. Charge should be accurate. | 26. Duty of the Judge. |
| 11. Omission to direct jury when there is no evidence-Misdirection. | 27. Judge not absolved from his duty because pleaders on both sides argued at length. |
| 12. Language of the Charge. | 28. Absence of proper charge. |
| 13. Court not knowing vernacular. | 29. Jury, sole judges of facts. |
| 14. Translation of the charge. | 30. Jury must form their own opinion. |
| 15. Charge to be taken down in short- | |

81. *Ningappa Sayadappa*, (1905) 7 Bom LR 979.

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| 31. Directing Jury to neglect evidence. | (9) Receiving or retaining Stolen Property. |
| 32. Omission of points in favour of defence. | (10) Criminal Breach of Trust. |
| 33. Reception of inadmissible evidence. | (11) Cheating. |
| 34. Approver—Evidence—Corroboration. | (12) Forgery. |
| 35. Confession. | (13) Kidnapping or Abduction. |
| 36. Retracted Confession. | (14) Unnatural Offence. |
| 37. Absconding. | 40. Misdirection—Instances |
| 38. Omission to ask jury to draw adverse inference from non-examination of material witnesses. | —Reference to former trial. |
| 39. Misdirection in explaining law. | —Previous proceedings referred to. |
| —Instances. | 41. Cases of no Misdirection. |
| (1) Murder. | 42. Non-direction. |
| (2) Culpable homicide not amounting to murder. | 43. Non-direction when amounts to Misdirection. |
| (3) Grievous hurt. | —Instances. |
| (4) Rioting. | 44. Omission when amounts to Misdirection. |
| —Right of Private Defence. | —Instances. |
| (5) Robbery. | 45. Jury when can be questioned about their verdict. |
| (6) Dacoity. | 46. Recharge after verdict. |
| (7) Rape. | 47. Effect of Misdirection. |
| (8) Theft. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 379 of the Code of 1861, S. 256 Paragraph 1 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The 2nd paragraph, has been added by S. 51 of Act 26 of 1955.

3. Effect of Amendment.—The amendment has been made to meet the criticism by the Bar that the summing up does not correctly represent the misdirections or non-directions made by the Sessions Judge while he orally delivered the charge.

4. Jury trial except High Court abolished in—

West Bengal.—Except in the High Court Sessions or before the City Sessions Court jury trial has been abolished since 11th November, 1961 (*vide* Notification No. 6661—J, dated 6th October, 1961, published in Calcutta Gazette, dated November 9, 1961).

Bombay.—Except Trials before the High Court in certain cases by jury, Jury Trial in Greater Bombay has been abolished by Maharashtra Act XXIII of 1961 published in Maha. Gazette Extraordinary, Part V, dated January 18, 1961.

5. Charge to the Jury when to be made.—Section 297 specifically enacts that the Judge shall only charge the jury “when the case for the defence and the prosecutor’s reply are concluded.” Where therefore the Judge heard arguments and took verdicts as regards certain accused and subsequently went on to hear arguments and take verdicts as regards other accused ; *held* that the procedure adopted was irregular.⁸²

Contents of Charge to Jury.—Walmsley, J., held that it is true that the law requires only to record the heads of charge but this record should be sufficient to enable the High Court to ascertain what was actually said

82. *Public Prosecutor v. Abdul Hamid*, (1912) 36 M 585 : 15 Cr LJ 197 : 22 IC 981.

to the Jury and set aside the verdict.⁸³ It was argued in *Chotan Singh*,⁸⁴ on reference to the following cases⁸⁵ that the failure to record in his charge what actually the explanation of the law by the Judge was, amounted to a misdirection which would vitiate the trial as having occasioned a failure of justice. It was held that a consideration of the cases⁸⁵ and⁸⁶ shows that such an omission did not necessarily involve the setting aside of the conviction.

Heads of charge must convey sufficient information as to explanation of law and important questions of fact.⁸⁷ A charge must be read as a whole. Salient propositions of law should be separately analysed.⁸⁸ A charge should be clear and precise.⁸⁹ The evidence should be placed fairly before the jury with proper direction about the law.⁹⁰ The charge should not indulge in generalisations or in matters on conjecture or speculative reasoning.⁹¹ On a point whether the general summing up was a special pleading on behalf of the prosecution the entire summing up is to be taken into account.⁹² The trial Judge should present the evidence to the jury in a dispassionate and impartial manner without expressing his personal opinion on question of fact of which the jury are the judges.⁹³

6. Charge.—The charge should contain not only the heads of the charge but also the law as explained to the Jury.⁹⁴

Heads of Charge to the Jury.—In trials by Jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury *vide*, S. 367 (5) proviso, in sufficient fulness to enable the Appellate Court to judge whether all points of law were properly explained to the jury.⁹⁵

The Judge is not relieved of his duty in explaining the law *because the Advocates on both sides have addressed the jury in full*.⁹⁶

It is the duty of the Judge to call the attention of the Jury to the different elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable; and failure to do so amounts to *misdirection*.⁹⁷

7. Object of Summing up.—“The object of a summing up is to enable the judge to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help them in arriving at a right decision upon the points which arise for consideration”.⁹⁸ The

83. *Abdul Gafur Khan*, (1922) 26 GWN 996 : 35 CLJ 437 : 24 Cr LJ 8 : 71 IC 56 : AIR (1922) G 192 following *Kasim Sheikh*, (1875) 23 WR (Cr) 32 ; see *Panchu*, 34 C 698 : Weir 11 385.

84. (1927) 7 P 361 (363).

85. *Rupan Singh*, (1925) 4 P 626 ; *Rahamali Howaldar*, (1925) 88 IC 463 ; *Abdul Rahim*, (1925) 41 CLJ 474 ; *Moss*, (1927) 100 IC 358 ; *Durga Charan Bepari*, (1922) 26 GWN 1022.

86. *Kasimuddin Nasya*, (1920) 47 C 795.

87. *Supdt. and Remembrancer of Legal Affairs v. G. C. Wilson*, (1926) 30 GWN 693.

88. *Channing Arnold*, 41 IA 149 : A 1914 P C 116 : 15 Cr LJ 309.

89. *Shankar Rao*, A 1958 Mys 1 : 1958 Cr LJ 54.

90. *Bijoy Kumar Basu v. Kalipada Ghosh*, A 1955 C 590 : 1955 Cr LJ 1483.

91. *Sitaram Dhaku*, A 1958 B 439 : 1958 Cr LJ 1380.

92. *Purna Chandra Khanna*, A 1959 C 306 : 1959 Cr LJ 584.

93. *Anjani*, A 1958 Mys 34 : 1958 Cr LJ 395.

94. *Abdul Gafur*, (1922) 26 GWN 996 : AIR (1922) G 192.

95. *Panchu*, 34 C 698 ; *Abdul Gafur Khan*, (1922) 26 GWN 996.

96. *Mangan Das*, 29 C 379 ; *Upendra*, 19 CWN 653 ; *Fatteh Chand*, 27 B 654 ; *Marivalayan*, (1906) 30 M 44.

97. *Taju*, 25 C 711 ; see *Chotan Singh*, (1927) 7 P 361.

98. *Bolakee*, 6 WR (Cr) 72 : *Khijiruddin*, (1925) 42 CLJ 504 (509) : 50 C 372. *Pattan Hassan*, A 1936 B 52 : 37 Cr LJ 356 (FB) (Judge ought to refer to the salient parts of the evidence).

summing up contemplated by this section (S. 379 of the Code of 1861) cannot mean any statement of the evidence, which a Judge may, in his caprice think proper to make to the jury, but a 'proper' summing up, by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest".⁹⁹

8. How to sum up the evidence.—"The more convenient mode of summing up for him to adopt is, in my judgment, to present to the jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence as they bear both on negative and affirmative sides of each of these issues. It is impossible of course for any Judge to state every item of evidence or to draw the attention of the Jury to every fact which has been deposed to, but he can without difficulty give them a summary of the leading points of the evidence and considerations as inferences to be drawn from it on the one side and on the other. He may if he thinks fit under the last clause of S. 256, at the same time express to the jury his own opinion as to the facts. . . . The judge has not, . . . simply expressed his opinion, and then left all the evidence fairly before the jury on the one side and on the other for them to judge of it by the aid of his opinion if they chose to avail themselves of it".¹

9. Evidence not summed up.—Under S. 297 it is the duty of the Judge to sum up the evidence for the prosecution and the defence. After explaining to the jury the issues of fact, the more convenient mode of summing up, is to present to the jury, as materially and impartially as he can, a summary of the evidence as they appear both on the negative and affirmative sides of the case.^{1a}

In *Enayat Hossein*^{1a} and *Suranath Bhaduri*² the heads of the charge did not give a summary of the evidence nor did it show whether the learned Judge, did or did not do anything and more than say to the jury that there were material discrepancies and it was *held* that the summing up was defective. The important thing is that the review of the evidence made by the learned Judge should be placed before the jury in a manner which they can understand.² "It is impossible for a judge in summing up to go into every particular of the evidence. It is necessary to direct attention of the jury to salient and important points".³ The accused is entitled as of right to a proper summing up of the evidence to the jury after the examination and cross-examination of the witnesses are finished. It is not enough to merely read out the evidence to the jury; it is incumbent on the Judge to analyse that evidence and to present before the jury such points as would legitimately arise in favour of the accused.⁴ The Privy Council in the case of *Stephen Seneviratne*⁵ discussed the nature of charge to jury regarding medical evidence.

It is a most *material misdirection* for the judge to put before the jury matters which are not on the record and matters prejudicial, at all events, on a certain view to the accused.⁶

99. *per* Sargeant, J., in *Fatteh Chand*, 5 Bom HGR 85 (94).

1. *per* Phear, J., in *Rajcoomar Bose*, (1873) 10 Beng LR 36 (38, 39).

1a. (1920) 25 ALJ 33 : 49 A 209.

2. (1927) 50 A 365 (367).

3. *Rochia*, 7 C 42.

4. *Rajab Ali Fakir*, (1927) 31 CWN 881

(884) : 46 CLJ 31 ; *Elahee Buksh*, 5 WR (Cr) 80 FB ; *Rahmat Ali*, 4 GWN 196.

5. *Stephen Seneviratne* : 41 CWN 65 : A 1936 PQ 289.

6. *Isu Sheikh*, (1926) 31 CWN 171 ; 45 GLJ 584 : 99 IC 937 : AIR (1927) C 200.

10. Charge should be accurate.—It is essential that in the general observations which a Judge makes in the course of his charge to the jury he should be accurate and within the limits of what has always been allowed from time to time in Criminal trials.⁷

11. Only witness relied on by Prosecution—declared hostile—failure to direct no evidence to go to the Jury—Misdirection.—Where the only witness on whom the prosecution relied was cross-examined as a hostile witness, *held* that there was no evidence to go to the jury and the Judge should have directed them accordingly and his omission to do so was a serious misdirection.⁸

12. Language of the Charge.—The charge must be in the plainest and simplest language and all attempt at pedantism should be discouraged.⁹ Even genuine legal terms should be used as sparingly as possible, especially when the jurors do not know English.¹⁰ The proviso to S. 367 (5) shows that the charge may be delivered in English, but where some jurors did not understand English and the charge delivered in English was not translated to them in full, *held* that the verdict of the jury was vitiated.¹¹ When the question was whether the deceased died by accident or murder it is not proper to use the expressions as “the crime which was in fact committed”.¹² Use of expression assuming the guilt of the accused and slang and colloquial phrases in charging the jury is improper.¹³ Intemperate language used about witnesses and the accused has been deprecated.¹⁴

13. Court not knowing vernacular.—A Sessions Judge having a rather complicated charge to deliver to a jury, and not feeling quite sure that he had sufficient knowledge in order to be able to make himself perfectly intelligible to them wrote out the charge in English and then got the Government Pleader to translate it and read it out to the jury; *held* that this procedure was not illegal.¹⁵

14. One of the jurymen not versed in English—Translation of the Charge.—It is desirable that Peshkars or the Judges themselves should explain the charge to the jurymen who did not know English, nor the Public Prosecutor but in the particular case the learned Judges did not interfere as there was no prejudice.¹⁶

*Suranath's*¹⁵ and *Dwijapada's*¹⁶ cases are cases of irregularity of procedure which is a point of law as mentioned in S. 419.

15. Charge to be taken down in shorthand.—After the amendment of the Code in 1955 the charge to the jury shall, wherever practicable, be taken in shorthand and a transcript thereof signed by the Judge shall form part of the record.

16. Charge neither to be elaborate nor meagre.—In a simple case of murder, hurt and trespass, the public prosecutor addressed the jury

7. *Ambar Ali*, (1928) 48 CLJ 473.

8. *Makbul Khan*, 32 CWN 872 : AIR (1928) C 69 following *Khijiruddin*, (1925) 53 C 372: AIR (1926) C 139.

9. *Anwarul Hussain*, A 1953 A 142 : 1953 Cr LJ 385 ; *Manohar Mandal*, A 1930 C 430 : 31 Cr LJ 1115.

10. *Abdul Gahar*, A 1938 C 658 : 40 Cr LJ 118.

11. *Michal v. State of M P.*, A 1960 MP

118 ; *Kapil Das Shukla*, A 1958 SC 121.

12. *Joseph Connell*, 52 CWN 31 : A 1947 PC 186.

13. *Amiruddin*, 22 CWN 213 : A 1919 Cr LJ 315.

14. *Khijiruddin*, 53 C 372 : 27 Cr LJ 266

15. *Suranath Bhaduri*, (1927) 50 A 365 : IR (1927) A 721.

16. *wijapada Halder*, (1928) 47 CLJ 449.

for four days, defence addressed for five days and the Judge took four days for the charge, *held*, it was practically impossible for the Judge to charge Jury for such a long time without misdirecting the jury.¹⁷ The duty of the Judge is to fairly and candidly point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively.¹⁸ It is impracticable to set forth evidence to the minutest detail¹⁹ or to repeat to the jury every argument of the defence.²⁰ Similarly where the explanation of the law is drastically meagre and the summing up is a skeleton of the evidence, the charge is bad.²¹

17. Cases of Individual accused.—The Judge should put to the jury the case of each of the accused separately with reference to each separate offence.²² Where all the accused persons were defended together and there was no separate defence for each of these accused, failure to tabulate evidence against each accused at the end of the charge did not amount to a misdirection,²³ but where in tabulating the evidence against each accused the Judge made the following observation “Do you think that he has been falsely implicated” *held*, the Judge misdirected the jury.²⁴

18. Hostile witness.—Jury must be cautioned as to how to evaluate a hostile witness.²⁵ It is the duty of the Judge to tell the jury in what respects its favour goes against the case of the accused.²⁶

19. Benefit of doubt.—The omission on the part of the Judge to give direction to the jury as to onus of proof or that the accused is entitled to the benefit of a reasonable doubt is material non-direction which vitiates the verdict.²⁷ The Judge should caution the jury that the totality of facts must be viewed in relation to the offence charged, and the benefit resulting in acquittal could be given only if they felt that when all was seen and considered there was doubt as to whether the accused had committed the crime or not.²⁸ The majority view in *Nagendra Bala's* case²⁸ was in favour of acquittal of the accused.

20. Case of Circumstantial Evidence.—Where the guilt of the accused is sought to be established by direct evidence, failure to direct the jury on circumstantial evidence is not misdirection,²⁹ but circumstantial evidence should point inevitably to the conclusion that it was the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.³⁰ The Judge should clearly state that in order to justify an inference of guilt the circumstances must be

17. *Amalesh Chandra*, A 1952 C 481 : 1952 CLJ 1013.

18. *Randu Singh*, A 1942 P 481 ; 43 Cr LJ 817.

19. *James Dowdell*, A 1936 N 105.

20. *Manwar Ali*, 37 CWN 1056 : 35 Cr LJ 567.

21. *Dwaraka Das*, 33 CWN 51 : 50 Cr LJ 921.

22. *Subramaniya Aiyar*, A 1941 M 658, *Sheikh Meher*, 59 C 8 : A 1931 C 414 ; *Kalu Mondal*, A 1950 C 412 ; 51 Cr LJ 1507 ; *Jagannath*, A 1942 Oudh 221. *Lakhone Sahu*, A 1943 P 163 : 44 Cr LJ 507.

23. *Ayub Ali*, 1942 C 277 ; 43 Cr LJ 693 ; *Akan Chandra*, A 1954 Ass 145.

24. *Mujaffar Sheikh*, 44 CWN 840 : 42 Cr LJ 385 ; *Rezak*, 43 CWN 870 ; *Kalu*, A 1950 C 412.

25. *Lalu*, 64 CWN 671 : A 1960 C 776.

26. *Brijlal Goala*, A 1952 Ass 158 : 1952 Cr LJ 1280. See *Prafulla Kumar Sarkar*, 35 CWN 731 (FB) : 58 C 1404.

27. *Basir Rangar Lawren*, A 1933 P C 218.

28. *per* Hidayatulla, J., in *Nagendrabala v. Sunil Chandra*, A 1960 S C 706 ; (1960) Cr LJ 1020 ; *Hasnu*, A 1949 A 138 : 50 Cr LJ 150.

29. *Makbul Ahmed v. Abdul Rahman*, A 1952 C 494 ; 1952 Cr LJ 944 ; *Naibulla*, 46 CWN 108 : 43 Cr LJ 860.

30. *Mangal Singh*, 64 I A 134 : A 1961 Ker 258 : 41 CWN 805 ; *Jahara Bibi*, 35 CWN 169 ; *Upendra Nath Das*, 19 CWN 653 (F B) ; *Hujri Mull*, 8 CWN 278 (F B) ; *Naibulla*, 46 CWN 108 : 43 Cr LJ 860.

incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of his guilt.³¹ Where the evidence is purely circumstantial and the Judge nowhere stated how the circumstantial evidence had to be appreciated, *held*, non-direction is a mis-direction³².

21. First Information Report.—The Supreme Court has held in *Nisar Ali's* case³³ that F. I. R. is not substantive evidence and can only be used to corroborate the statement of the maker under S. 157, Evidence Act or to contradict it under S. 145, Evidence Act.³⁴ It cannot be used for contradicting or corroborating witnesses other than the informant.³⁴ The Judge should tell the jury that the F. I. R. can be used as a check on the statements made in the depositions in the sense that a jury will examine carefully what case is set up before the police and whether a different case is set up before them.³⁵ F. I. R. is not substantive evidence, it can be used for the purpose of corroboration or contradicting the maker of it, the informant only, and to treat it so in a charge to the jury is a serious mis-direction.³⁶

22. Dying Declaration.—Section 32 (1), Evidence Act does not require corroboration by other evidence before a conviction can be based thereon. The Court has to make sure as to what the statement of the dead man actually was. In the second place the Court has to be certain about the identity of the person named in the dying declaration.³⁷ Dying declaration need not be corroborated but caution should be made.³⁸ Omission to place before the jury the dying declaration of the deceased who had named the assailant and failure to explain the law regarding such declaration must be regarded as a serious misdirection.³⁹ Omission to place before the jury that the dying declaration is not made on oath and is not also subject to cross-examination is a mis-direction.⁴⁰

23. Jury supplied with a copy of the Penal Code.—It is the duty of the Judge to explain the law properly and the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. The Judge cannot place before them the Code or any legal treatise for the purpose of finding out the law; if he does so he fails in his duty,⁴¹ but the Rangoon High Court by a full bench decision has held that a reading of passages from judgments for the guidance of the jury is not a misdirection.⁴² A Sessions Judge in charging a jury should not merely read out the sections of the Code which

31. *Gahar Sheikh*, A 1947 C 345; *Muzaffar Sheikh*, 44 C W N 840.

32. *Bir Bahadur*, A 1956 Ass 15; 1956 Cr L J 41. *Eradu v. State of Hyderabad*, A 1956 S C 316; *Dinendra*, (1955) S C R 571; A 1955 S C 801; *Mahender*, (1956) S C A 12; A 1955 S C 712.

33. A 1957 S C 366; *Rubu Misir*, A 1961 S C 391; *Ram Krishna*, A 1954 M 442; *State v. Shiv Singh*, A 1962 Raj 3.

34. *Rahenuddin*, A 1944 C 323; *Abdul Latif*, 45 C W N 763; *Jasem Sheikh*, 50 C W N 799; 47 Cr L J 737; *Badrudin* 50 C W N 531. *Kalu Mondal*, A 1950 C 412; 51 Cr L J 1517; *Pondlik*, A 1951 Madh B 72; *Anil Ranjan Datta*, A 1952 C 534; *Shankar*, (1953) Raj L W 441.

35. *Radhakanta Biswas*, 81 C L J 415; *Tirtha Bahadur*, A 1955 Ass 107; 1955 Cr L J 782,

36. *Chotka*, A 1958 C 482; (1958) Cr L J 1170; *Sagal Chandra*, 65 C W N 808; A 1962 C 185; *Radhanath Das*, A 1953 C 618; *Dhirendra Nath*, A 1952 C 621; *Jasim Sheikh*, A 1946 C 537; *Gunadhar*, A 1952 C 618; *Gajadharlal*, 7 Luck 552; *In re K. Mulliga*, A 1958 A P 255; *Satya Vir*, A 1958 A 746.

37. *Khushi Ram*, followed in *Tarachand v. The State of Bihar*, A 1962 S C 130; (1958) S C R 552 (564) *Harban Singh* A 1958 S C 22; A 1962 S C 439; *Bhagwan Das v. State of Rajasthan*, A 1957 S C 589.

38. *Balkrishna Singh*, (1958) S C A 409.

39. *Bijoy Kumar Basu v. Kalipada Ghosh*, A 1955 C 590; 1955 Cr L J 1483.

40. *Waugh*, 54 C W N 503 P C 1, *Rased*, A 1948 C 502.

41. *G. C. Wilson*, (1926) 30 C W N 693.

42. *Nga Tin Gyi*, (1926) 4 R 488 (F B); A I R (1927) R 68.

he considers applicable to the case but should also explain them.⁴³ It is improper for the Judge who is charging the jury to invite their attention to the decisions of cases reported in law reports.⁴⁴ But where the question before the jury is whether the injury caused to the deceased is suicidal or homicidal, it is competent for the Judge to refer to a standard book on *Medical Jurisprudence*.⁴⁵

24. No summing up of entire case.—Where the Judge without summing up the entire case and without charging the jury on all the issues involved drew their attention only to the evidence relating to the time of occurrence and asked them to return a verdict on that point proposing to charge them in the circumstances of the case in case they accepted the prosecution version; the jury returned a verdict of not guilty, *held* on appeal under S. 417 that the verdict was vitiated by illegality of procedure.⁴⁶ Their Lordships of the Judicial Committee have held that a charge to a jury must be read as a whole. If there are salient propositions of law in it these will of course be the subject of separate analysis.⁴⁷

25. What is a proper Summing up.—In delivering a charge care should be taken to *place the defence set-up fairly* before the jury and to ensure that the jury appreciate the issue or issues which they have to try. The charge should include the usual warning as to the duty of the jury to the prosecution on the one hand and the prisoner on the other,⁴⁸ but it is no part of the business of a Sessions Judge in charging a jury to assume the part of the defence counsel,⁴⁹ but he should fairly put the case for both sides.⁵⁰

Where the Judge while charging the jury *omitted to explain the law* by which they were to be guided, *held* that the omission amounted to a misdirection vitiating the verdict.⁵¹ A Judge should not discuss points of law in summing up to the jury, and he should avoid all extraneous and unnecessary argument by merely summing up the evidence and showing how the law applies to it.⁵² Where the Judge in his summing up did really leave no one question of fact for the jury to decide, and did not sum up the evidence at all, a new trial was directed.⁵³

The summing up contemplated by this section (S. 379 of this Code of 1861) cannot mean any 'statement of the evidence which a Judge may, in his caprice think proper to make to the jury but a (proper) summing up by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest.'⁵⁴

43. *Sri Prosad Missir*, (1899) 4 C W N 193; *Moss*, (1926) 28 Cr L J 278; 100 I C 358; A I R (1927) C 460.

44. *Janek Singh*, A 1942 P 444.

45. *Abu Pramanik*, A 1942 C 239.

46. *Supdt. and Remembrancer v. Nasar Darzi*, (1928) 33 C W N 451.

47. *Channing Arnold*, (1914) 41 I A 149; 41 C 1023; 20 C L J 161; 18 C W N 785; 26 M L J 621; (1914) M W N 506; 16 M L T 79; 12 A L J 1042; 16 Bom L R 544; 7 Bur L T 167; 8 L B R 16; 15 Cr L J 309; 23 I C 661.

48. *Afiruddi Choukidar*, (1919) 23 C W N 833; 29 C L J 571; 20 Cr L J 661;

52 I C 485; *Palavesa Tevan*, (1911) 1 M W N 190; 9 M L T 345; 12 Cr L J 140; 9 I C 788.

49. *Samiuddin*, (1928) 32 C W N 616; *see contra Panchu Das*, (1907) 34 C 698.

50. *Hari Charan Das*, (1921) 34 C L J 512; 23 Cr L J 342; 66 I C 998.

51. *Biru Mundal*, (1897) 25 C 561 (563) following *Wafadar Khan*, (1894) 21 C 955.

52. *Nobokisto Ghose*, (1867) 8 W R (Cr) 87.

53. *Shumshere Beg*, (1868) 9 W R (Cr) 51.

54. *Fatteh Chand Vasta Chand*, (1868) 5 Bom H G R Cr C 85 (94).

What the Judge is required to do is to dissect the whole prosecution case into its component parts and concentrate on each part the evidence bearing upon it and having done so he has to draw the attention of the jury to the relevant evidence regarding each part of the case and point out to them the effect of the evidence,⁵⁵ but too lengthy a charge is liable to confuse the jury,⁵⁶ essentials should be placed and the jury should not be overwhelmed by a mass of details⁵⁷ and the Judge must further warn the jury that in case of doubt, the accused must be given the benefit of doubt.⁵⁸ Where a charge under S. 304 I. P. C. includes different offences of murdering two different persons, there should be separate treatment by the Judge of the evidence affecting the killing of each of the two persons.⁵⁹

26. Duty of the Judge.—The Judge has a duty to call the attention of the jury to the facts and then to say that it was for them to consider whether from those facts, they concluded that the offence was brought home to the accused persons,⁶⁰ although he may tell the jury the impression which the evidence has made upon his mind.⁶¹ It is the duty of a Judge in charging the jury to give a narrative and history of the case, and to place facts and evidence in a clear manner before the jury so as to enable them to group the details and come to a right decision. The facts of prime importance and evidence in favour of the accused should be placed before the jury,⁶² but the Judge need not in his charge go into the minutest details.⁶³

It is the duty of the Judge to analyse, to sift and to weigh the evidence, to marshall the facts properly, to discover and arrange in some sort of order before the jury the facts which are material. He must point out the kind of weight which ought to be given to this or other set of facts in order to show to the jury some light and shades in the submission of the facts to them.⁶⁴ The Supreme Court in⁶⁵ has held that the Judge lays down the law and directs the jury on questions of law and tells the jury that so far as the facts are concerned they are within the exclusive province of the jury, but even there, the Judge has to sum up the evidence for the prosecution and the defence.⁶⁵

Reference to part of the headnote of decisions of the Supreme Court without reference to the context is misdirection.⁶⁶

It is not only desirable but necessary that the charge should be recorded in an intelligible form with sufficient fulness to satisfy the Appellate Court that all points of law arising in the case were clearly and correctly explained to the jury.⁶⁷ See the observations of Stephen, J., at Page 667 of the same

55. *Dhirendra Nath*, A 1952 C 621 : 1952 Cr L J 1427.

56. *Jabunullah*, 57 C 1162.

57. *Amalendra*, A 1952 C 461.

58. *Hasnu*, A 1949 A 135 : 50 Cr L J 150.

59. *Kirtibash Das*, 64 C W N 289 : A 1960 C 269 ; *Kanailal Pulshi*, A 1948 C 274.

60. *Siv Prosad Misser*, (1899) 4 C W N 193 (196).

61. *Dwarakanath Sen*, (1870) 13 W R (Cr) 34.

62. *Mira Gajbir*, (1903) 6 Bom L R 31.

63. *Samiruddin*, 40 C 367 : 13 Cr L J 821 : 17 I C 565.

64. *Akbar*, 35 C W N 904 : 33 Cr L J 408
Nagendrabala v. Sunil Chandra, A 1960 S C 326 : 1960 Cr L J 1027, following

Ramkrishna Mithanlal, A 1955 S C 104 ;
Nagendra, 34 C W N 169 *Mohesh-nathatun*, A 1939 C 610 ; *Ilu*, 52 C 337 : A 1934 C 837 ; *Md. Zaphyr v. Shibraj Singh*, A 1960 C 142 ; *Asanullah*, 39 C W N 924 : 36 Cr L J 1246 ; *Netikhan*, A 1936 C 186 : 37 Cr L J 673 ; *Galake Bihari*, 42 C W N 129 : A 1938 C 51 : *Hari Bag*, A 1858 C 118 : 1958 Cr L J 362.

65. *Ram Krishna Mithan Lal v. State of Bombay*, 1958 S C R 903 : A 1955 S C 104 : 1955 Cr L J 196.

66. *Wasu Pillai*, A 1961 B 114.

67. *per Jenkins, C J.*, in *Upendra Nath Das*, 19 C W N 653 (663).

case. The charge is *defective* if it does not set out all the questions that are required for decision.⁶⁸

27. The Judge is not absolved from his duty because Pleaders on both sides argued at length.—“We accept the view that a Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused merely because they have been discussed by the advocate.”⁶⁹

28. Absence of proper Charge.—Where the record of the heads of the charge begun thus “Matters of law laid down for the guidance of the jury, the definition of hurt and grievous hurt and the applicability of sections concerning right of private defence”, then followed a statement of the case for the prosecution and that for the defence and the charge concluded:—“You will have to consider whether the absurdities, contradictions and discrepancies in the prosecution evidence are such as would arise naturally or are due to the fact that the story is a fabrication;” *held* that there was no proper charge to the jury.⁷⁰

Omission to place the Defence Evidence.—The failure of the Judge to sum up the defence evidence to the jury must be regarded as a substantial misdirection.⁷¹

Where the Judge omitted to state the defence case and also did not draw the attention of the jury to the conduct of the complainant and the accused, the trial was vitiated.⁷² In a criminal trial, the accused is entitled to have evidence in his favour submitted to the jury. Where in the summing up, there is not a word of the accused’s denials in the witness box or the evidence of his defence it amounts to a contravention of the elementary principles of fair trial and due administration of justice.⁷³

29. Jury sole judges of facts—Judge not to express his views too prominently.—The duty of a Judge charging a jury is to present the facts in their natural aspect and not to suggest far-fetched explanations of points that tell in favour of or against either party.⁷⁴

Where the Judge expressed his own opinion in terms too dogmatic and unqualified, and it did not appear that the learned Judge before using the Chemical Examiner’s report warned the jury that they must be satisfied on the evidence that the substances examined were in fact what they were said to be; *held* that the charge of the jury was vitiated by a misdirection.⁷⁵ In charging a jury, a Judge is not bound to do more than lay carefully and plainly before them the evidence as recorded by him, noting discrepancies

68. *Abdul Gohur Sikdar*, 50 C 94 : 26 G W N 972 : 36 C L J 152 : 24 Cr L J 76.

69. *Malgowda*, (1902) 27 B 644 (651) : (1902) 4 Bom L R 683 ; *Mongan Das*, (1902) 29 C 379 : 6 C W N 292 ; *per* Woodroffe, J., in *Peary*, (1919) 23 C W N 426 : 20 Cr L J 300 : 50 I C 348 (F B) ; *Ram Bhugwan*, 19 Cr L J 886.

70. *Gangadhar Goala v. Reed*, (1921) 25 C W N 609 : 33 C L J 503 : 23 Cr L J 41 : 64 I C 665.

71. *Fakir Appaya*, (1915) 40 B 220 ; *In re*

Singan, (1915) 17 Cr L J 19 : 32 I C 147 ; *Connell*, 52 C W N 31 : A 1947 P C 186 : 48 Cr L J 31 ; *Khijiruddin*, 53 C 372.

72. *Ramcharitar Dubey*, 34 C W N 954 : 32 Cr L J 186 ; *Abdul Gaffur*, A 1920 C 527 ; *Amallesh Chandra*, A 1952 C 481.

73. *Joseph Connell*, 52 C W N 31 : A 1947 P C 186 : 48 Cr L J 877.

74. *Kizhakedath Unniram*, (1899) Weir 11 386.

75. *Ofel Molla*, (1913) 18 C W N 180 : 15 Cr L J 147 : 22 I C 723.

and inconsistencies and pointing out generally the way in which it is favourable or unfavourable to the accused,⁷⁶ and he is to lay down the law only in so far as it bears upon the evidence adduced in the particular case.⁷⁷

A Sessions Judge should not take away the decision on facts out of the hands of a jury.⁷⁸ It is a misdirection on the part of a Judge to explain away a fact without leaving it to the jury.⁷⁹

30. Jury must form their own opinion.—It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence, but he should always be careful to add that it is for the jury to form their own opinion.⁸⁰ *It is no misdirection to ask the jury to take a broad view of the evidence.*⁸¹ A summing up in which the Judge goes on dictating his own opinion on questions of fact, which ought to be left to the decision of the jury is no summing up at all.⁸²

31. Directing Jury to neglect evidence.—It is not the duty of the Judge to say that the jury may neglect any portion of the evidence; that is clearly against the provisions of the law which says that the jury are to give their verdict upon the whole of the evidence recorded.⁸³

32. Omission of Points in favour of Defence.—An omission to point out matters favourable to the accused and the nature of the defence is a misdirection.⁸⁴ Where a Sessions Judge failed to bring to the notice of the jury a fact of great importance elicited in cross-examination *viz.*, the only witness who identified another accused, was terrified and not in her proper senses on the night of the dacoity; *held* that the failure to do so amounted to a misdirection.⁸⁵ The Judge should not place the prosecution case too strongly and fail to place the defence case properly.⁸⁶ The Judge is bound to put before the jury a point favouring the defence which arises on the prosecution evidence, though the defence counsel has not raised it.⁸⁷

33. Reception of inadmissible evidence.—If the Judge receives evidence which ought not to have been allowed and fails to warn the jury against considering such evidence it amounts to a misdirection which vitiates the verdict.⁸⁸ In cases tried by jury it is the duty of the Judge to prevent the production of inadmissible evidence whether it is or is not objected to by the parties.⁸⁹ The verdict of a jury was set aside on the ground of misreception of evidence in *Ramesh Chandra Das*.⁹⁰ If certain items of inadmissible

76. *Chandra Kumar Mazoomder*, (1876) 25 W R (Cr) 54.

77. *per* Mukherji, J., in *Upendra Nath Das*, (1914) 19 C W N 653 : 21 C L J 377 : 16 Cr L J 561 : 30 I C 113 (F B).

78. *In re Shivappa Higde*, (1909) 7 M L T 191 : 11 Cr L J 334.

79. *In re Subbu Tevan*, 14 M L T 442 : 14 Cr L J 623 : 21 I C 671.

80. *Bepin Biswas*, (1884) 10 C 970 ; *Sri Prosad Missir*, (1899) 4 C W N 193 (196) ; *Sadhu Sheikh*, (1900) 4 C W N 576 ; *Natahar Ghose*, 35 C 531 ; *Ali Fakir*, (1897) 25 C 230 ; *Hughes*, (1891) 14 A 25 ; *Harilal*, 14 P 225 : 36 Cr L J 1025 ; *Kamiraddin Sheikh*, 37 C W N 1102 ; A 1934 C 77 ; *Naibulla Sheikh*, A 1926 C 998.

81. *Bajinath Mahton*, (1919) 1 Pat L T 708 : 22 Cr L J 125 : 59 I C 557.

82. *Sumera*, A 1934 A 326 : 35 Cr L J 681.

83. *Mira Gajbar*, (1903) 6 Bom L R 31.

84. *Rahmat Ali*, 4 C W N 196 ; *Elahee Buksh*, 5 W R (Cr) 80 (F B) ; *see Fakira Appaya*, 40 B 220 : 17 Cr L J 133.

85. *Venkattan*, (1912) M W N 100 : 13 Cr L J 271 : 14 I C 655.

86. *Ashraf Ali*, 37 C W N 596 (F B).

87. *Upendra Nath*, 19 C W N 653 (F B) ; 16 Cr L J 561 ; *Kailash Nath Shaw*, A 1950 C 510.

88. *Anavi Mutheriya*, 39 M 449 : 28 M L J 329 : (1915) M W N 229 : 16 Cr L J 294 ; *Sumeshwar Jha*, (1921) 23 Cr L J 91 : 65 I C 443.

89. *Abbas Pande*, (1898) 25 C 736 (741) : 2 C W N 484.

90. (1919) 46 C 895 : 29 C L J 513 : 23 C W N 661 : 20 Cr L J 324.

evidence have affected the verdict of the jury by reason of the failure of the Judge to give suitable directions to the jury disclosing their minds of the effect of such evidence, this amounted to a misdirection.⁹¹

34. Approver—Evidence—Corroboration.—At the opening of a Sessions trial the name of an approver, who had already been granted pardon, was still in the category of the accused by mistake; at the trial as soon as the mistake was found he was removed from the dock, *held* on the facts that he was competent to give evidence.⁹²

The law in this country as expressed in Ss. 133 and 114 of the Evidence Act, is in no respect different from the law of England. A conviction based on the uncorroborated testimony of an accomplice is not illegal, but it is unsafe to rely upon such evidence unless it is corroborated.⁹³

The Sessions Judge should explain to the jury what an accomplice is and ask them to say whether X is an accomplice.⁹⁴

Where a statement of an accused person while in Police custody amounts to a confession of a limited kind there is no reason why it should not be taken into consideration against the co-accused under S. 30 of the Evidence Act.⁹⁵

A full bench of the Madras High Court has decided that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice.⁹⁶ But the Calcutta High Court has held a contrary view.⁹⁷

A jury must be warned expressly of the danger in accepting the uncorroborated evidence of an accomplice and if the warning is omitted a conviction based upon such uncorroborated evidence must be set aside.⁹⁸

35. Confession.—It was held on a consideration of S. 114 of the Evidence Act that the Legislature intended to lay down as a maxim or rule of evidence, that the testimony of an accomplice is unworthy of credit, so far as it implicates an accused person unless it is corroborated in material particulars in respect to the person.⁹⁹ A Sessions Judge *misdirects* the jury in speaking of the statements of the co-accused which were not self-incriminating as confession or confessional statements in asking the jury to take them into consideration against the accused.¹

Where the Judge placed before the jury a self-exculpatory statement and all through dealt it as a confession, although he explained what little value a statement of this kind, specially when retracted had, it was held to be a *serious misdirection*.^{1a}

Where the accused in making a confession replied to the Magistrate: "I want to make a clean breast of every thing for the reason that, if I serve the Government in any way, the Government may take pity on me"

91. *Chhotka*, A 1958 C 482 : 1958 Cr L J 1170.

92. *Haji Ayub Mandal*, (1927) 54 C 539.

93. *Per Straight, J.*, in *Ram Saran*, 8 A 306 (310).

94. *Surya Kanta Bhattacharjee*, 24 C W N 119 : 31 C L J 20 : 21 Cr L J 802.

95. *Shivabhai*, (1926) 56 B 683.

96. *Mathu Kumaraswami Pillai*, 35 M 397 (F B) see *Anon*, 4 M H C R App vii.

97. *Lalit Mohan Chakraverty*, (1911) 38 C

559 (579).

98. *Rattan Dhanuk*, A I R (1928) P 630.

99. *Sadhu Mundul*, (1874) 21 W R (Cr) 69 (71); *Rebati Mohan Chakravarty*, (1928) 32 C W N 945.

1. *Amiruddin*, 45 C 557 : 22 C W N 213 : 27 C L J 149 : 19 Cr L J 305 : 44 I C 321.

1a. *Bhadeswar Sarder*, (1928) 32 C W N 731 : 47 C L J 526 : 107 I C 751 : A I R (1928) G 416 (2).

held that this itself was not sufficient to render the confession inadmissible.² The Sessions Judge *misdirected* the jury in placing before them a confession when there appeared to have been a direct inducement from the president and members of a *salish* that if she confessed they would compromise the matter.³

Mears, C. J., in the full bench decision of *Ruggha*⁴, held that a man of sound mind and full age who makes a confession and has not been the victim of malpractice, threat or inducement in making such statement must be bound by the language of such statement. Mukherji, J., slightly differed from the majority and observed that a confession in its normal state was an entirely suspicious article and relying on *Panchkauri Dutt*, (1924) 52 C 67 held that a retracted confession was worse.

36. Retracted Confession.—It is unsafe for a Court to rely on and act upon a confession which has been retracted unless after consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true, that is to say usually, unless the confession is corroborated by credible independent evidence.⁵ Where a Judge does not properly explain to the jury the law and practice as to the effect of the uncorroborated testimony of the approver, the verdict cannot be sustained.⁶ If the Court fails to set out clearly the nature of the defence of the several accused and fails to warn the jury in dealing with the retracted confession of one of the accused that if they found that they could not act upon it as against the accused they must wholly disregard it, *held* the trial was vitiated.⁷ Omission to explain to the jury the attitude to be taken towards a retracted confession as evidence against a co-accused is a most serious defect.⁸ It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence.⁹ The same view was expressed in *Maiku Lal*.¹⁰

Where two persons were tried for the offence of abduction and rape, respectively and the Judge admitted the confession of the former, though retracted against the latter, he had warned the jury not to rely on this confession. *Held*, that he should have told the jury not to take the confession at all into consideration.¹¹

The Supreme Court in the case of *Puran v. State of Punjab*¹² held that it is a settled rule of evidence that unless a retracted confession is corroborated in material particulars it is not prudent to base a conviction in a Criminal case on its strength alone. The Supreme Court in the case of *Ram Prakash v. State of Punjab*¹³ has held that although a retracted confession has only little value as the basis of conviction and the confession of one accused is not evidence against a co-accused tried jointly for the same offence but can be taken into consideration against him, i. e., it can lend assurance to the other evidence.

2. *Samiuddin*, (1928) 32 C W N 646.

3. *Aushi Bibi*, (1915) 20 C W N 512.

4. (1925) 23 A L J 821 (F B).

5. *Mahabir*, (1895) 18 A 78 : (1895) A W N 227.

6. *Makbul Ahmed*, 12 Cr L J 537 : 12 I C 513 (A).

7. *Harendra Pal*, (1910) 11 Cr L J 538 : 7 I C 915.

8. *Hemanta Kumar Pathak*,* (1919) 47 C

46 : 30 C L J 29 : 21 Cr L J 775 : 85 I C 455.

9. *Raman*, (1897) 21 M 83 following *Rangi*, 10 M 295 : 23 B 316.

10. 20 A 133.

11. *Naresh Chandra*, 47 C W N 814 : A 1938 C 479.

12. A 1953 S C 459 ; *Haripada*, 49 C W N 729 : A 1946 C 139.

13. A 1959 S C 1 : 1959 Cr L J 90.

37. Absconding.—A Sessions Judge should tell the jury that even if they believed that the accused did abscond, 'absconding' is not necessarily or invariably incompatible with innocence.¹⁴

38. Omission to ask the Jury to draw adverse inference against the Prosecution from Non-examination of Material Witnesses.—Where a Judge did not tell the jury that they could draw an inference unfavourable to the prosecution from its omission to examine material witnesses, *held* it amounted to material misdirection and vitiated the trial.¹⁵

39. Misdirection in explaining law—Instances.

(1) **Murder.**—Their Lordships of the Judicial Committee held that the direction by Page, J., in his charge on the point under S. 34 I. P. C. was a proper direction.¹⁶ Where blood-stained ornaments were found in the room occupied by the accused and the evidence established that those articles belonged to the accused, and there was no direction in the Judge's charge to the jury pointing out that the possession in this case was a fact from which the Court might presume not merely theft or receipt of stolen property but also murder, *held* that this was a serious misdirection.¹⁷ "Where a trial for culpable homicide is proceeding before a jury, it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated crime; to do so is, I think, calculated to confuse the jury and possibly to direct their deliberation into channels that have nothing to do with the case".¹⁸

It is necessary for the Judge to read the very words of the section itself to the jury, and then if necessary explain what is the meaning of the section.¹⁹ The omission of the Judge to direct the jury that if they believed the confessional statement by the wife, charged with abetment of murder, she could not, having regard to S. 94 I. P. C. be convicted of abetment of murder, was held to be a misdirection vitiating the conviction.²⁰ In a trial by a jury on the charges of murder and rioting with deadly weapons, if it is found that the person whose death was caused was suffering from disease which accelerated his death and that the injuries described in the medical evidence are in themselves not sufficient to cause immediate death, the Judge ought to point out those facts to the jury. An omission to do so has been held to amount to a misdirection resulting in the miscarriage of justice.²¹ Where the prosecution case was that there was no right of private defence, *held* it was a serious misdirection when the Judge told the jury that the case fell within Exception 2; the proper direction was to put clearly before the jury that the question they had to decide was whether or not the right of Private Defence came into existence and not how far it extended.²² Before a Judge leaves a case to the Jury for a finding as to whether the accused's case comes within one of

14. *Ofel Molla*, (1913) 18 C W N 180 : 15 Cr L J 147 ; *Asfar Sheikh*, (1910) 15 C W N 198 (200).

15. *Tenaram Mandal*, (1920) 25 C W N 142 : 33 C L J 180 : 22 Cr L J 475 : 61 I C 1003 ; *see also Ram Ranjan Roy*, (1914) 42 C 422 : 19 C W N 28 ; *Dhannu Kazee*, 8 C 121.

16. *Barendra Kumar Ghose*, (1924) 52 I A 40 : 52 C 197 P C : 29 C W N 181 : 41 C L J 240 : (1925) M W N 26 : 26 P L R 50 : 27 Bom L R 148 : A I R (1925) P C 1.

17. *Sheikh Neamatulla*, (1913) 17 C W N

1077 : 14 Cr L J 556 : 21 I C 156.

18. *Per Jenkins, C. J.*, in *Upendra Nath Das*, (1914) 19 C W N 653 : 21 C L J 379 : 16 Cr L J 561 : 30 I C 113 (F B).

19. *Durga Charan Bepari*, (1922) 26 C W N 1002 (1007) : 36 C L J 171 (174) : 23 Cr L J 567 : A I R (1922) C 124.

20. *Umadasi Dasi*, (1924) 52 C 112 : 28 C W N 1046.

21. *Ainuddi Chowkidar*, (1921) 34 C L J 515 : 23 Cr L J 344 : 66 I C 1000.

22. *Muhammad Yunus*, (1922) 50 C 318 (325) : *Nawabali*, A 1952 Ass 148 : 1952 Cr L J 1267.

the Exceptions to S. 300 I. P. C. there must be evidence, at least on allegation by the accused on which they might reasonably and properly conclude the facts to be established.²³ The omission by the Judge to lay specifically before the jury in a case of culpable homicide, the question whether in causing death the accused had the intention to cause death or such injuries as were likely to cause death, or the knowledge that he was likely to do so, though in the earlier part of the charge he had explained generally the terms "murder" and "culpable homicide" and had pointed out the distinction, is a material misdirection.²⁴ Where the Sessions Judge said in his charge to the jury that those of the accused who had pleaded *alibi* were bound to prove the plea and if the jury were of opinion that they had failed to establish the plea there would arise a presumption against them as to their complicity in the crime, *held* that the Judge was clearly wrong and there was no authority for the statement that such a presumption would arise in the event mentioned.²⁵ It is the duty of the Judge to explain the distinction between 'murder' and 'culpable homicide' and then the jury as judges of the facts have to decide the issue about provocation.²⁶ Where the distinction between 'murder' and 'culpable homicide' was not pointed out and the Judge did not sum up the evidence at all, a new trial was ordered.²⁷

Where the case was clearly one of murder and no one suggested that the crime was culpable homicide not amounting to murder, the omission to explain to jury the difference between them is not misdirection²⁸, and in such cases the inability of the prosecution to prove motive is immaterial.²⁹ Where the trial judge charged the jury to come to a finding either under S. 302 or 304 Part I and failing that under S. 304, Part II, *held*, the trial Judge was in error in omitting to charge the jury and the correct direction was that the accused was guilty under S. 326, if the jury did not find that accused had the knowledge or intention requisite for a conviction under S. 302 or 304.³⁰ Omission to mention S. 34 I. P. C. will not render the conviction invalid unless the accused could show that he was prejudiced.³¹ Omission to refer to statutory presumption under S. 105 Evidence Act and to explain S. 80 I. P. C. vitiates the verdict of the jury.³² Where the prosecution relies upon the evidence of motive as a circumstance against the accused it is the duty of the Judge to place before the jury the absence of circumstances bearing upon the evidence of motive.³³

The mere fact that the accused persons do not admit their presence at the occurrence and raise a case of provocation or of that of passion or something of that sort does not render it unnecessary to give the jury a proper direction as to *exceptions* in S. 300 I. P. C.³⁴

23. *Nga Mya*, (1915) 8 L B R 306 : 8 Bur L T 220 : 17 Cr L J 49 : 32 I C 641. *Hasan Abdul Karim*, A 1944 B 274 (F B) (Judge not bound to explain exceptions which are not applicable).
24. *Natabar Ghose*, (1908) 35 C 531 ; *Jhuboon Mehton*, 8 C 739 ; *Jaspath*, (1886) 14 C 164 ; *Reazuddin Sheikh*, (1910) 11 Cr L J 295 : 6 I C 251 (Cal).
25. *Taribulla Sheikh*, (1920) 25 C W N 682 : 23 Cr L J 244 : 66 I C 186.
26. *Dadubhai*, (1895) Rat unrep Cr Ca 766.
27. *Shumsere Beg*, (1868) 9 W R (Cr) 51.

28. *In re Bhagavathi*, A 1946 M 271 : 47 Cr L J 785.
29. *Bhajan Lal*, A 1951 A 504 : 52 Cr L J 189.
30. *Asgar Ali Mondal*, A 1945 A 467.
31. *B. V. Sreekantiah v. State of Mysore*, A 1958 S C 672.
32. *Sitaram Dhaku Chawan*, A 1958 B 439 : 1958 Cr L J 1380.
33. *K. M. Nanavati v. State of Maharashtra*, A 1962 S C 605.
34. *Jahur Sheikh*, (1926) 30 C W N 912 ; see *Ganesh Luskar*, (1868) 9 W R (Cr) 72.

Where the Sessions Judge did not place before the jury the special circumstances which in his view brought the offence within the definition of 'murder' nor did he explain to the jury the *exceptions* 1, 2 and 4, but directed that if the offence of rioting were established they were to find the accused guilty of murder, *held* this was a misdirection.³⁵

In all cases of murder by poisoning, the Judge should make a minute analysis of the whole of the evidence³⁶ wherein a case under Ss. 302 and 304 I. P. C. the Judge in effect withdrew the determination of facts. Telling them that no reasonable man would have any doubt as to the guilt of the accused, *held* that the charge was bad.³⁷

(2) Culpable homicide not amounting to murder.—In charging a jury in cases of culpable homicide not amounting to murder, a Judge should call upon them to state which description of culpable homicide they consider the accused persons to have committed.^{37a} The summing up on a charge under Ss. 302 and 304 I. P. C. is defective in law where the Judge does not properly direct the jury to consider the *intention* of the accused.³⁸

Where a jury returns a verdict of not-guilty of culpable homicide, it is the duty of the Sessions Judge to require them to find expressly whether or not the accused is guilty of any minor offence.³⁹

The Judge should leave it to the jury to find whether the offence was one of murder or of culpable homicide or any lesser offence after pointing out to them the legal definition of each offence.⁴⁰

Culpable homicide.—In a case under S. 304 I. P. C., it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated topic of crime.⁴¹ The Privy Council held in the case of *Benjamin Knowles*⁴² that if the case had been before a jury and the Judge had not explained to them the possibility of a verdict of manslaughter but had said if not accident the only alternative is murder, that could have been an erroneous summing up. Where the accused on a charge under Ss. 302 and 304 pleaded that the occurrence was the result of pure accident, the Judge explained S. 80 I. P. C. to the jury but did not explain Ss. 337 and 338 I. P. C., *held*, it was a non-direction amounting to misdirection affecting the verdict.⁴³ Where the judge explained S. 304 I. P. C., used the word 'possible' instead of the word 'likely' consequence of the act of the accused, *held*, he misdirected the jury.⁴⁴ It would be difficult as a matter of law to hold that whereas in a murder case tried by a jury, the accused makes a plea under S. 80 I. P. C. the presiding judge must inevitably refer to Ss. 304-A and 338. The Supreme Court set aside the order of the High Court reversing acquittal and directing a retrial.⁴⁵

35. *Mahummud Khan Sultan Khan*, (1907) 9 Bom L R 153.

36. *Ekkabbar Mondal*, A 1937 C 758 : 39 Cr L J 182.

37. *Rajabali Fakir*, 31 C W N 881 : A 1927 C 531.

37a. *Ameer Khan*, (1869) 12 W R (Cr) 35 ; *Kalicharan Das*, (1871) 15 W R (Cr) 17.

38. *Kya Nun*, (1913) 8 L B R 125 : 33 I C 634.

39. *Pandu Kal Patil*, (1900) 2 Bom L R 334.

40. *Babya* (1899) 1 Bom L R 784.

41. *Upendra Nath Das*, 19 C W N 658 : 16 Cr L J 561 (F B).

42. 34 C W N 599 (P C) : A 1930 P C 201.

43. *Natabar Halder*, 34 C W N 223 : 31 Cr L J 572.

44. *Md. Zaphyr v. Shibraj Singh*, A 1960 C 142. See *Mohan v. State of U. P.* (1960) S C J 1011.

45. *Shibraj Singh v. State of West Bengal*, A 1959 S C 1173 (1176) : 1959 Cr L J 1488.

(3) **Grievous hurt.**—Where the only issue in the case of a trial for causing grievous hurt is whether the right of private defence exists or not, it is a misdirection for the Judge to refer to S. 300 Exception 2. Where the Judge in a charge under S. 326 I. P. C. omits to refer to S. 101 I. P. C., *held* that the charge was vitiated by misdirection.⁴⁶

(4) **Rioting.**—Where the common object alleged in the charge as framed was to take forcible possession of the complainant's land and hut, to assault him and others named, and the prosecution and the defence each asserted exclusive possession and attack by the opposite party, *held* that the Judge was not wrong in asking the jury to consider the third alternative.⁴⁷

Where a Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge and which the accused had no opportunity of meeting, the conviction was set aside.⁴⁸ Although the common object of the unlawful assembly is stated in the charge, the Session Judge ought, in commenting upon the provisions of S. 149 of the Penal Code, to draw the attention of the Jury expressly to the common object.⁴⁹ If any member of an unlawful assembly causes death with the intention specified in S. 300 I. P. C. it does not necessarily follow that every member will be guilty of murder by operation of S. 149 I. P. C.⁵⁰

Title to land.—Where the learned Judge said: "If the actual possession of the land" by 'C' is established then quite irrespective of the question whether 'C' "acquired a valid title to the land by the kabala from 'A' or of the question whether the title of the land rested with 'B' the accused persons must be held to have formed members of an unlawful assembly if they had assembled with the common object of enforcing the right or supposed right of 'B' to the land in question by means of criminal force or show of criminal force, *held* this was a material misdirection which occasioned a failure of justice".⁵¹

Right of Private Defence.—If there is evidence on either side as to the exercise of the right of private defence then the Judge must put the case of private defence to the jury. The accused may plead that they were not at the place of occurrence and at the same time plead that they acted in private defence.⁵²

The omission to place carefully before the jury the law as to the right of private defence of the person as bearing on the facts set up, and to direct their attentions to the point, whether and how far, the accused was justified in attacking the deceased, in order to prevent injury to himself, was held to be a serious misdirection vitiating the trial.⁵³

Where the law as to the right of private defence bearing on facts was not properly explained, *held* the Judge misdirected the jury.⁵⁴ A Judge should tell the jury that if the complainant's party had committed criminal

46. *Mahomed Yunus*, (1922) 50 C 318 : A I R (1923) C 517.

47. *Samaruddin*, (1912) 40 C 367 : 13 Cr L J 821 : 17 I C 685 followed in *Nathuni Monia*, (1927) 6 P 572.

48. *Sri Prasad*, 4 C W N 193 ; *Sabir*, (1894) 22 C 276.

49. *Mangan Das*, (1902) 29 C 379.

50. *Mahmadkhan Sultan Khan*, (1907) 9 Bom L R 153 : 5 Cr L J 168.

51. *Ahed Fakir*, (1924) 43 C L J 245.

52. *Ajgar Sheikh*, (1928) 32 C W N 839 : 48 C L J 138 ; *Kuti*, A 1930 C 442 : 31 Cr L J 1205.

53. *Aseruddin*, (1926) 53 C 980.

54. *Radhanath Dhara*, 58 GWN 243 : 1953 Cr L J 1377 ; *Sagar Chandra*, 65 GWN 808 ; A 1962 SC 85 following *Supdt. and L. R. v. Bhupati*, 60 GWN 114. See also *Abdul Baset v. Derastulla*, A 1957 C 18 ; 1957 Cr L J 51.

trespass in the land of the accused, the accused would have a right of private defence.⁵⁵ He should also put, where no question of private defence arises, the question of right of private defence in the alternative when the defence is that the accused is not responsible for the killing.⁵⁶

(5) **Robbery.**—“It is not sufficient for the Judge merely to read to the jury the definition of dacoity, and to leave it to them to find out whether the evidence produced for the prosecution made out a case under S. 395 against the accused. It was the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it was proposed to make the accused liable under the section. His failure to do so in our judgment amounts to a clear misdirection”.⁵⁷ It is for the prosecution to establish that an offence of robbery is committed by committing extortion by putting the complainant in fear of injury or wrongful restraint. If the defence suggestion that the money had been paid voluntarily was placed by the Judge before the jury, it can not be said that the charge was vitiated by misdirection.⁵⁸ Omission to point out the difference between vandalism and dacoity or theft amounts to misdirection.⁵⁹ A Judge should tell the jury in a case under S. 365 I. P. C., what is necessary to constitute the offence of robbery as defined in S. 390 I. P. C.⁶⁰

(6) **Dacoity.**—Where the heads of the charge were so condensed that it was difficult to understand what the learned Judge really said and where the manner in which the evidence of identification was dealt with was criticised as incomplete and unlikely to help the jury in arriving at a right conclusion, *held* that the charge was vitiated by misdirection.⁶¹ It is a matter of *mere non-direction* on the part of the Judge who did not draw the attention of the jury to the argument of the defence that the approver's evidence should not be believed because he might have been tutored by the police to make a statement which fitted in with the evidence of witnesses who had been previously examined.⁶² Where in a case of dacoity the Judge pointed out the main defects and contradictions in their evidence and stated that the witnesses were all definite that there were five or more men concerned in the dacoity and they conjointly committed the dacoity then S. 395 would apply, *held* that there was no misdirection.⁶³ Where the Sessions Judge dealt with the defence criticism of identification of the accused by the prosecution witnesses and left it to the jury, *held*, the direction was proper.⁶⁴

Where on a charge under Ss. 392 and 397 the Judge while directing the jury that there was no evidence that the accused caused grievous hurt or used deadly weapons directed them to convict under S. 397 I. P. C. because grievous hurt was caused by some of the robbers, *held* that this amounted to a misdirection.⁶⁵

55. *Radhanath Dhara*, A 1953 C 602 : 58 CWN 243.

56. *Md. Illias*, A 1951 C 212 : 51 Gr LJ 1581.

57. *Taju Pramanik*, 25 C 711 referred to in *Mari Valayan*, 30 M 44 (46).

58. *Basappa Chalappa*, A 1956 B 341 : 1956 Cr LJ 605.

59. *Balam Pateyya*, *In re*; 1941 M 339 : 42 Cr LJ 414.

60. *Nawab Ali*, A 1924 Oudh 411; *Naicken*, A 1931 M 481 : 32 Cr LJ 973.

61. *Abdul Gafur*, (1922) 26 CWN 996 : 35 CLJ 437 : 24 Cr LJ 8 : AIR (1922) C 192.

62. *Ibrahim*, (1925) 42 CLJ 496 (499).

63. *Ram Krishnan Mithan Lal Sarma v. State of Bombay*, 1955 SCR 903 : A 1955 SC 104; 1955 Cr LJ 196.

64. *Nabi Rasool*, A 1943 C 32 : 44 Cr LJ 386.

65. *In re Arunachalla Thevan*, (1912) MWN 186 : 11 MLJ 186 : 13 Cr LJ 42 : 13 IC 282.

In an appeal by the Crown against an order of acquittal of eleven persons of whom all were charged with having conspired to commit dacoity and all but one with having committed a dacoity, although there was a serious defect in the charge where it referred to the conduct of the police that no distinction had been made between the suggestions put in cross-examination that were supported by the evidence and those that were not and where the attention of the jury had not been drawn to the direct evidence rebutting those suggestions, the High Court did not direct a retrial as the case for the prosecution depended on accomplice evidence which was not corroborated.^{65a} The Judge should point out to the jury the evidence against each of the accused and the circumstances which distinguish the cases of some of the accused from that of the others.⁶⁶ Where three known and named persons were charged with dacoity along with two unknown men and the jury acquitted one of the three and convicted the other two of the offence, *held* that it was open to the jury to find that the total number was five; although there were misdirections, yet no retrial was ordered as the appellant's remaining in jail for several months for what appeared to be a drunken brawl was considered sufficient.⁶⁷

(7) **Rape.**—It is a misdirection to direct the Jury that the character of the prosecutrix is not relevant.⁶⁸ On a charge of 'rape' the Judge in his charge to the jury said "you will observe that in the case the sexual intercourse was against the girl's will and without her consent, or at any rate, with only such consent as she gave under fear of the accused's threat of violence to her" instead of saying, as he ought to have done "you will have to determine upon the evidence in this case whether the sexual intercourse was against the girl's will etc." the charge went on in the same style instead of leaving it to them to decide what, in their opinion is proved, *held* this amounted to clear misdirection.⁶⁹ In the following cases⁷⁰ it was held that the proper and necessary direction to the jury is that it is unsafe to convict an accused on the evidence of the prosecutrix unless it is corroborated in material particulars by some independent evidence but the Judge ought to tell the jury that if in spite of his warning they came to the conclusion that they believe the girl and think the accused to be guilty, then they had a right to convict him on her uncorroborated evidence. *Noor Ahmed Gazi's case*⁷⁰ was not followed in.⁷¹ The view in⁷⁰ and⁷¹ was not followed in.⁷² The Supreme Court has held in *Rameshwar v. State of Punjab*⁷³ that the woman who has been raped is not an accomplice, that in sexual offences corroboration of the testimony of the prosecutrix is not essential but the true rule is that in every case of this type the rule about corroboration should be present in the mind of the Judge, as a matter of prudence. In view of the decision of the Supreme Court in *Rameshwar's case*,⁷³ the decisions⁷⁰ seem to have been modified. The view of the Privy Council⁷⁴ that as a matter of prudence conviction should not ordinarily be based on the uncorroborated testimony of a child witness also seems to be modified by.⁷³ In a charge for rape, the burden was on the prosecu-

65-a. *Supdt. & Remembrancee of Legal Affairs v. Shyama Sundar Bhumi*, (1921) 26 CWN 558.

66. *Mari Valayan*, 30 M 44.

67. *Abbas Ali Sahib*, (1927) MWN 853 : 53 MLJ 732 : AIR (1928) M 144; see *Mookakandi Manigram*, (1903) : Weir 446.

68. *Keramat Mandal*, (1925) 42 CLJ 524 (527).

69. *Ali Fakir*, (1897) 25 C 230.

70. *Surendra Nath Das*, 62 C 534; A 1933 C 833; A 1934 C 7; *Nur Ahmad Gazi*,

62 C 527 following *R. v. Whitehead* (1929) KB 99 and *Baskurilla*, (1916) 2 KB 658; *Sekandar Mea*, 41 CWN 641; *Baldeo Mahato*, A 1946 P 426.

71. *Harendra Prasad*, 44 CWN 830 See also *Bishwan*, ILR (1945) N 523.

72. *Boya*; A 1951 M 760.

73. (1952) SCR 377; A 1952 SC 54; *Bhourri*, ILR (1952) 2 Raj 817; *Parbati Devi*, A 1952 C 831; 1952 Cr LJ 1657; *Jamal Mohamed*, A 1954 TC 1080.

74. *Md. Sagal Esa*, A 1946 PC 3.

tion to prove in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed that act against her will or with her consent.⁷⁵

(8) **Theft.**—Where the Sessions Judge did not explain in what the offence of theft with which the accused was charged consisted, *held* there was no want of direction where no question as to whether there was a legal possession or as to whether dishonest intention, was established.⁷⁶

Where the Judge in his charge to the Jury said “the accused may be presumed to be the thief if there is no evidence to the contrary” instead of the words “unless he can account for his possession.” *held* that the passage quoted was no misdirection as the Judge in other passages gave the proper direction.⁷⁷ The Madras High Court in *Gorle Kandangadu*⁷⁸ held that it was a misdirection on the part of the Judge where he had asked the jury to draw the presumption under S. 114 of the Evidence Act.

(9) **Receiving or Retaining Stolen Property.**—Where the Judge charged the jury saying “when it is proved or it may be reasonably presumed that the property in question is stolen property, *the burden of proof is shifted* and the possessor is bound to show that he came by it honestly, and if he fails to do so, the presumption is that he is a thief or receiver according to circumstances, and that if the jury find that the accused have failed to account for their possession, that they may presume that they have come dishonestly by stolen property,” *held* the charge was vitiated by misdirection.⁷⁹

The Jury ought to be told the circumstances that are deposed to by witnesses—whether such omission is a misdirection depends upon circumstances.⁸⁰

The Sessions Judge should tell the jury after summing up the evidence in the case that before they could find the accused guilty, it was necessary for them to find (1) that the property was stolen (2) that it was dishonestly retained and (3) that the accused knew or had reason to believe the same to be stolen property.⁸¹ The attention of the jury should be directed to the necessity of their being satisfied that the possession of the stolen property was clearly traced to the accused.⁸² Where the Judge omitted to tell the jury that unless the accused was found to be in exclusive possession of stolen property he could not be convicted under S. 412, I. P. C., *held*, charge is bad.⁸³ Where there is no other evidence but the prosecution on a charge under S. 412, I. P. C., is based upon the presumption under S. 114, illustration (a) Evidence Act, if the accused gives an explanation which is reasonably true or possibly true, the accused is entitled to an acquittal.⁸⁴

English case.—Under the English law it is a presumption of fact, and not an implication of law, for evidence of recent possession of stolen property

75. *Abdul Khaleque*, 37 CWN 484 : A 1933 C 605.

76. *In re Rangare Ramudu*, AIR (1923) M 329.

77. *In re Chinnu*, (1915) 16 Cr LJ 618 : 30 IC 442.

78. (1912) MWN 97 : 13 Cr LJ 140 : 13 IC 828.

79. *Satya Charan Manna*, (1924) 52 C 223 following *Hathem Mandal*, (1920) 24

CWN 619; *Kabatulla*, (1925) 42 CLJ 212.

80. *Sreemunt Adup*, (1865) 2 WR (Cr) 63.

81. *Balaya Samaya*, (1890) 15 B 369.

82. *Malhari*, (1882) 6 B 731 (732).

83. *Sheikh Pinju*, A 1952 C 491 : 1952 Cr LJ 1027 ; *Adeluddin* 49 CWN 537 : 47 Cr LJ 302.

84. *Daud Shaikh*, 40 GWN 159 : 37 Cr LJ 976.

unaccounted for, whether the offence of stealing, or of feloniously receiving, has been committed.⁸⁵

(10) Criminal Breach of Trust.—The question of dishonest intention is a question of fact and should be left to the jury.⁸⁶

Where the Judge did not tell the jury expressly that the test they were to apply was whether the circumstances relied on by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss' nor did he tell them what those terms meant, *held* the verdict could not stand.⁸⁷ Where the trial Judge in a case under S. 409, I. P. C., told the jury that the evidence about payment of Rs. 4,000/- is proved to be utterly useless but omitted to tell them that if they rejected this part of the prosecution case, because officers in the position of the accused did not commit illegal acts unless they are prompted by some strong motive, *held*, theft was misdirection.⁸⁸

(11) Cheating.—Where a Judge did not draw the attention of the jury to the question as to whether the ingredients required by S. 415, I. P. C., were present on the facts alleged by the prosecution, *held* the charge was vitiated by misdirection.⁸⁹ It is necessary for the Judge to explain what amounts to 'cheating' or 'dishonest inducement' or 'delivery of property.'⁹⁰ It is the duty of the Judge to explain the difference between a promise which is not intended to be kept at the time it is made, and a promise which is intended to be kept at the time it is made but is subsequently broken.⁹¹

(12) Forgery.—The charge in a trial of 'Forgery' was held to be defective where it did not show what the facts of the case were, what the evidence adduced was, or what the case was for the accused.⁹²

Where it was argued that the Sessions Judge omitted to explain to the jury what "fraudulently or dishonestly" meant, *held* that this was not a misdirection which vitiated the trial as it was cured by S. 537.⁹³

In the case of *Asimoddi*⁹⁴ the Judge misdirected the jury in not having left it to them to say whether on the evidence they found that the intention of the accused was dishonest or fraudulent.

Where the Judge told the jury that the only issue was whether the forged documents were in possession of the accused, and whether the nature of one of the documents was such as to connect them with the accused being the kind of document he would be likely to have in his house and if they found this issue in the alternative they must return a verdict of guilty, *held*, that the judge misdirected the jury.⁹⁵ It was also held in⁹⁵ that a charge of forgery does not lie against a person who is not the writer of a forged document or who does not sign the forged note.

(13) Kidnapping and Abduction.—A notice of a charge of kidnapping under S. 366, I. P. C., is not a fair, proper or sufficient notice of a charge of

85. *Langmead*, (1864) 9 Cox 464; *Macmahon*, (1875) 13 Cox 275; *Director of Public Prosecution v. Niara*, (1959) 1 QB 254.

86. *Drewett*, (1905) 69 JP 37.

87. *C. H. Browne*, (1913) 7 Bur LT 20 : 15 Cr LJ 257.

88. *Sreekantia Ramayya v. State of Bombay*, (1955) 1 SCR 1177 : A 1955 SG 287 : 1955 Cr LJ 857.

89. *Charu Chandra Ghose*, (1923) 28 CWN

414 : 39 CLJ 122.

90. *In re : Subbaraya Aiyar*, A 1841 M 658.

91. *Mathews*, AM A 1940 L 87 : 41 Cr LJ 482.

92. *Birendra Lal Bhaduri*, (1903) 30 C 822.

93. *Sadhu Sheikh*, (1900) 4 CWN 576.

94. (1918) 22 CWN 572 : 19 Cr LJ 649 : 45 IC 841.

95. *Panchanan Maity*, 57 CWN 890 : A 1958 C 798.

abduction.⁹⁶ "In any case the question for the jury was not whether the defence suggestions were true in all their details but whether the prosecution case of a forcible abduction had been made out".⁹⁷ Where in a case under S. 366, I. P. C., the learned Judge's heads of charge read more like a judgment or a speech of a prosecution counsel than a summing up of the case as required under the law, it was held to be a serious misdirection.⁹⁸ Where the Judge directed the jury to infer from the fact that a young girl was carried off at night that the presumption was that she was kidnapped in order that she might be forced or seduced to illicit intercourse, *held* that this was a misdirection upon the facts of the case.⁹⁹ Where the learned Judge stated thus : "You shall have to see if the woman Benodini was by force compelled to leave her house and to go to various places," *held* that it is not necessary for the prosecution to establish that she was by force compelled to leave not only her house but also compelled to go to various places.¹ Where the Judge had not properly dealt with the question of minority and the Judge did not direct that the burden of proof was on the prosecution the conviction was set aside.^{1a}

Where the Judge stated in his charge that the onus as regards establishing the age of the girl was on the accused and did not indicate, while explaining the elements of the offence, the effect of the girl's leaving the protection of the guardian before she was taken away by the accused, the charge is bad for misdirection.² Failure of the Judge to warn jury of danger of convicting upon uncorroborated testimony of girl and what amounts to corroboration in such cases amounts to serious non-direction.³ In view of the Supreme Court decision in *Rameshwar v. State of Rajasthan*,⁴ the decision³ has been modified.

(14) Unnatural Offence.—It is a misdirection to tell the jury : "If you are morally convinced your verdict should be that of guilty."⁵

40. Misdirection Instances.—Charge must set out all questions required for decision.⁶ Where the record of the heads of charge to the Jury stated that the Judge referred to and explained certain sections of the Indian Penal Code, *held* that this was not a sufficient record of the charge on the question of law.⁷ It is a misdirection on the part of a Judge to lay before the jury the purport of a statement which is neither on the record nor proved.⁸ We would expect the general trend of the charge to be in favour of acquittal, the charge, whether so intended or not, in fact reads as one in favour of conviction."⁹

Where evidence of a witness before a committing Court was not admitted under S. 288 but the Judge directed the jury to treat it as substantive evidence, *held*, the Judge misdirected the jury.¹⁰ An omission to point out discrepancy between F. I. R. and petition of complaint must be treated as a

96. *Fedu Sheikh*, (1928) 32 CWN 1245 following *Isu Sheikh*, (1926) 31 CWN 171.

97. *Ismail Sarker*, (1918) 23 CWN 747 (750).

98. *Khijiruddin*, (1925) 53 C 475 : 42 CLJ 504 (509).

99. *Hughes*, 14 A 25 (27).

1. *Keramat Mandal*, (1925) 42 CLJ 524 (526).

1a. *Abdul Gohur Sikder*, (1922) 50 C 94 : 26 CWN 972.

2. *Debaprosad Bose*, 54 CWN 329 : A 1950 C 406.

3. *Ramadhar*, A 1948 P 79 : 48 Cr LJ

391 ; *Baldeo*, A 1945 P 426.

4. A 1953 SC 54.

5. *Enayet Hussain*, (1926) 49 A 209 : 25 ALJ 33.

6. *Abdul Gohur Sikder*, (1922) 50 C 94 : 26 CWN 972 : 36 CLJ 152 : 24 Cr LJ 76 : AIR (1922) C 505.

7. *Chotan Singh*, (1927) 7 P 361.

8. *Dasarath Singh*, (1922) 23 Cr LJ 406 : 67 IC 502 : AIR (1923) P 158.

9. *Ismail Sarker*, (1918) 23 CWN 747 (749) : 19 Cr LJ 830 : 46 IC 846.

10. *Nidhan Misra*, A 1962 C 173 : 1962 (1) Cr LJ 315.

material misdirection.¹¹ The Judge misdirects the jury when he asked it to solve problem by resorting to speculative reasoning.¹² Where the Sessions Judge emphasised the fact that it will be unsafe to rely on the identification evidence of a solitary witness, although in the opening part of the charge he stated that there was a good deal of material in the statement of the witnesses, *held*, there was misdirection in the charge.¹³ Admission of inadmissible evidence would amount to a misdirection in the Judge's charge to the jury.¹⁴ Omission to place before the jury the dying declaration of the deceased who named the assailant and failure to explain the law regarding such declaration must be regarded as a serious misdirection.¹⁵ A Judge telling the jury that eye-witnesses must be straight forward and respectable misdirects the jury.¹⁶ So also where on a charge of robbery, the summing up of the evidence makes out a case of theft, whereas the verdict is that it is a case of extortion.¹⁷ It was putting the case much too strongly if after putting the first information report, the Judge told the jury that they would find from the F. I. R. that it gave a death blow to the prosecution case.¹⁸

It is wrong to say that the medical evidence is merely expert opinion evidence only ; it is often direct evidence of the facts found upon the victim's person.¹⁹ A Judge directing as to facts in such a way as to leave the jury to suppose that if anything was unexplained by the accused, who according to them could explain, they not only might but must find the accused guilty, misdirects the jury.²⁰ A Judge should present a complete picture of the evidence displaying the lights and shades so that the jury may do their duty.²¹ Repeated reference in summing up that the accused are rogues and goondas is misdirection.²²

Reference to former trial.—Where there are two trials—one original and the other supplementary—the duty of the Judge at the supplementary trial is to warn the Jury that the accused must have a perfectly fair trial and that they are not to be biased by the result arrived at in the previous trial.²³

Previous Proceedings—reference to—Misdirection.—A Judge should not in charging the Jury refer to a previous case against some other persons tried for the same offence, except to warn the jury that they were not to be influenced in any way by the result of such previous trial. It is misdirection for him to tell the jury that the High Court had come to a certain finding in the previous case and they were to consider if they had any reason for coming to a different conclusion.²⁴

41. Cases of no Misdirection.—See the case of *Chinnu*²⁵ noted under 'Theft'.

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| 11. <i>Kasem Sardar</i> , A 1953 C 425 : 1953 Cr LJ 940. | 19. <i>per</i> Hedayatulla J., in <i>Nagendrabala Mitra v. Sunil Chandra Roy</i> , A 1960 SC 706 (721). |
| 12. <i>Mushtak Husain v. State of Bombay</i> , A 1953 SC 282 : 1953 Cr LJ 1127. | 20. <i>Seneviratne</i> , 41 CWN 68 : A 1938 PC 289. |
| 13. <i>Budul</i> , 1957 ALJ 963. | 21. <i>Hari Singh</i> , A 1958 C 118 : 1958 Cr LJ 362 ; <i>Bejoy Kumar Basu v. Kalipada Ghosh</i> , A 1955 C 580 : 1955 Cr LJ 1483. |
| 14. <i>Ram Kishan Mithulal Sarma v. State of Bombay</i> , 1955 SCR 903 : A 1955 SC 104. | 22. <i>Babulal Bajpai</i> , A 1959 C 693. |
| 15. <i>Bijoy Kumar Basu v. Kalipada Ghosh</i> , A 1955 C 590 : 1955 Cr LJ 1483. | 23. <i>Mafejuddi</i> , (1922) 24 Cr LJ 305 : 72 IC 65 (C). |
| 16. <i>Dagdro Shivram Mandans Kar</i> , A 1956 B 277 : 1956 Cr LJ 882. | 24. <i>Keshab Pal</i> , (1909) 9 CLJ 380 : 10 Cr LJ 498 : 4 IC 120. |
| 17. <i>Manglu Sahu</i> , A 1958 Or 239 : 1958 Cr LJ 1332. | 25. 16 Cr LJ 618 : 30 IC 442 (M). |
| 18. <i>Abdul Basad v. Derestulla Mondal</i> , A 1957 C 18. | |

It is no misdirection to ask the jury to take a broad view of the evidence.²⁶

Where the verdict showed that the jury understood the law, *held* the failure of the Judge to record in his charge what actually his explanation of the law was did not necessarily involve the setting aside of the conviction.²⁷

Identity of thumb-mark.—The question of identity of a thumb-mark is a question of fact to be decided on any other question of fact. There is no objection in law to a Judge taking the thumb-mark of an accused person, if the Judge thinks it relevant ; and a conviction based on a comparison of the thumb-mark of an accused person with the thumb-mark on the document in question is not improper.²⁸

Where the Judge told the jury that whatever view they might take of the defence version they could not convict the accused unless they were satisfied about the truth of the prosecution case version as to the place of occurrence, there is no misdirection.²⁹ Where the Judge states his opinion from the materials on record that the attitude taken by the accused in a previous trial was inconsistent with his attitude in a subsequent trial, it cannot be said that he misdirected the jury.³⁰

Where the jury were not warned that the prosecution improved the case to meet the situation as it developed and to fit in the other evidence to meet the grounds of defence with the result that damaging evidence was left out, but as the judge dealt with each of the incidents separately, his failure to warn the jury did not make the charge open to criticism.³¹ Omission to tell the jury that the order under S. 144, Cr. P. Code was not evidence of possession, *held*, no misdirection as the Judge gave them no reason to suppose that S. 144 order was evidence of possession.³²

42. Non-direction.—Non-direction amounts to misdirection only when it is such that there are grounds for thinking that the jury by reason of it, may have been put on the wrong track and made to arrive at a wrong conclusion.³³ Where the law was not properly explained, particularly the omission of any explanation with regard to the charge of abetment constituted a misdirection.³⁴ The charge must be read as a whole and it is not necessary to repeat the direction as to the necessity of corroboration of an accomplice every time any reference is made to his evidence.³⁵ Every non-direction in a charge to the Jury does not necessarily amount to misdirection.³⁶ Where the only witness on whom the prosecution relied was cross-examined and declared hostile but the Judge omitted to tell the jury that they should return a verdict of not guilty as there was no evidence, *held* the omission was a serious misdirection.³⁷

26. *Bajinath Mahton*, 1 Pat LT 708 : 22 Cr LJ 125 : 59 IC 557.

27. *Chotan Singh*, (1927) 7 P 361 : AIR (1928) P 420.

28. *Kandasami Thevan*, (1923 Oct) 50 M 462.

29. *Naimuddin Biswas*, 40 CWN 1377 : 38 Cr LJ 273.

30. *Ayab Ali*, A 1942 C 277 : 43 Cr LJ 693.

31. *Amalesh Chandra*, A 1952 C 481 : 1952 CLJ 1013.

32. *Banwari Singh*, A 1951 P 473 : 52 Cr

LJ 676 ; *Trailokya Nath Das*, 59 C 136 : 33 Cr LJ 441.

33. *Bajit Mian*, (1927) 6 P 817.

34. *Hemanta Kumar Pattak*, 47 C 46 : 30 CLJ 29 : 21 Cr LJ 755 : 58 IC 455.

35. *Abdul Salim*, (1921) 49 G 573 : 26 CWN 680 : 34 CLJ 279 : 23 Cr LJ 657 : 69 IC 145 : AIR (1922) C 107.

36. *Peary*, (1919) 23 GWN 426 : 20 Cr LJ 300 : 50 IC 348 (FB).

37. *Makbul Khan*, (1928) 32 CWN 872 : AIR (1928) 690, following *Khijiruddin*, (1926) 53 C 372 : AIR (1926) C 139.

Failure on the part of the judge to bring important evidence to the notice of the jury amounts to misdirection or non-direction involving a substantial miscarriage of justice.³⁸ In³⁸ the Judge emphasised that it is unsafe to rely on identification evidence of a solitary witness. Non-direction on facts if it turns the scale is sufficient for the High Court to set aside the verdict.³⁹

The omission to warn the jury that the statements of the witnesses made to the police in the course of investigation were not to be regarded as substantive evidence is a material non-direction amounting to misdirection.⁴⁰ Omission to tell jurors that an adverse inference should be drawn against the prosecution for not examining witnesses examined at the committal stage would amount to misdirection if the prosecution had intentionally withheld the evidence.⁴¹ Where the counsel for the accused in his address had asked the jury to draw an inference adverse to the prosecution, omission of the judge to do so is not likely to cause any prejudice.⁴² Failure to tell the jury that the statements used merely for the purpose of contradictions were not substantive evidence, cannot be regarded as a non-direction amounting to misdirection affecting the verdict.⁴³ Failure to direct on material particulars is misdirection.⁴⁴

43. Whether Non-direction amounts to Misdirection.—On a *fiat* by the Advocate-General under Cl. 26 of the Letters Patent in a case under S. 234 I. P. C. tried at the Sessions on the Original Side by Chaudhuri, J., a full bench decided that there was misdirection in the charge and Sanderson, C.J., pointed out the non-direction amounting to misdirection.⁴⁵

Mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood.⁴⁶

A misdirection is material only if it causes an erroneous verdict but even an erroneous verdict cannot entitle the Appellate Court to interfere with the verdict unless the error has caused a failure of justice in fact.⁴⁷ Failure to warn jury about record of statements contrary to S. 161 (3) vitiates trial.⁴⁸ Failure to treat evidence of eye-witnesses admitted under S. 288 as substantive evidence does not render the trial bad, if in spite of it the judge treats the case as entirely depending on circumstantial evidence.⁴⁹ Non-direction regarding first information Report (that it should not be treated as subs-

38. *Bondal*, (1957) ALJ 963.

39. *Khetrabashi Panda v. Lalit Kumar Sen Gupta*, A 1959 C 595 : 1959 Gr LJ 1158 ; *Mangulu*, A 1958 Or 239 : 1958 Gr LJ 1332.

40. *Iman Ali Khan*, A 1956 C 268 : 1956 Cr LJ 883.

41. *Jiban Krishna Das*, A 1951 C 31 ; *Lalua Dom*, A 1955 C 461 : 1955 Cr LJ 1174 ; *Iman Ali Khan*, A 1956 C 368 ; *Hachani Khan*, A 1930 C 481 ; *Kameshwar Lal*, A 1933 P 481 ; *Ambaran Haloi*, A 1952 Ass 129 ; *Quasim Ali*, 1950 A LJ 650 ; *Narahari Borkar*, A 1946 B 446 : 47 Cr LJ 962 ; *Sk. Nabab Ali*, 34 CWN 1151 : A 1930 C 708.

42. *Sardul Singh v. State of Bombay*, A 1957 SC 747 ; *Radhanath Dhar*, 58 CWN

243 ; *Tajem Ali*, 58 C 1095 (SB).

43. *Basappa*, A 1956 B 941.

44. *Kailash Nath Shaw*, A 1950 C 310 : 51 Cr LJ 1212.

45. *Fatteh Chand Agrawalla*, 44 C 477 : 24 CLJ 400 : 21 CWN 33 : 18 Cr LJ 385 : 38 IC 945 (FB).

46. *Eknath Sahay*, (1916) 1 PLJ 317 : 17 Cr LJ 353 : 35 IC 657.

47. *Khan*, A 1955 C 146 ; 1955 Cr LJ 485 ; *Bapwas Marti*, A 1940 N 221 : 41 Cr LJ 894 ; *Champa Pasia*, A 1928 P 326 ; *Fatteh Chand Agrawalla*, 44 C 477 FB : 18 Cr LJ 385.

48. *Bejoy Chand Patra*, 54 CWN 447 : 31 Cr LJ 1307.

49. *Gahar Sheikh*, A 1947 C 345 : 47 Cr LJ 951.

tantive evidence) is a technical omission and it could by no means be said that the resultant misdirection caused an erroneous verdict.⁵⁰ In a mutual fight resulting in a murderous attack on some persons who were charged under S. 304/34 I. P. C., omission by the Judge to tell the jury to consider whether the accused had the common intention to cause grievous hurt or simple hurt must be regarded as a non-direction amounting to misdirection.⁵¹

44. Omission when amounts to Misdirection—Instances.—(i) *to state the facts.*—The charge to the jury was held to be defective inasmuch as it did not show what the facts of the case were, what the evidence adduced was or what the case was for the accused.⁵² Where a Sessions Judge failed to bring to the notice of the jury a fact of great importance elicited in cross-examination *viz.*, that the only witness who identified another accused was terrified and not in her proper senses on the night of the dacoity ; *held* that the failure to do so amounted to a misdirection.⁵³

(ii) *to explain the law on the point.*—The omission to explain the law as to abetment has been held to be a misdirection.⁵⁴

See Commentary *supra* under the heading 'Summing up'.

(iii) *to warn a Jury not to be influenced by previous proceedings.*—An omission by a learned Judge to warn the jury to pay no attention to the result of the previous proceedings amounts to a misdirection.⁵⁵ See *Mofeuddi's* case noted *supra* under this heading.⁵⁶

(iv) *to consider points in favour of defence.*—See Commentary *supra*.

(v) *to explain weight due to retracted confession.*—See Commentary *supra*.

(vi) *to draw the attention of the jury to the non-examination of material witnesses by the prosecution.*—See Commentary *supra*.

(vii) *to warn that statements of one accused is not evidence against the other.*—It is a misdirection not to warn the jury that in dealing with the evidence against the appellants they were to omit entirely from consideration the statements made by co-accused.^{56a}

Where there was more than one accused the jury should be warned to take, and deal with, the case of each accused separately, and a confession of one involving himself alone cannot be used against the others.⁵⁷

(viii) *to draw the attention of the jury that it is unsafe to act upon confession of a co-accused or accomplice evidence unless corroborated in material particulars.*—See Commentary *supra*.

45. Jury when can be questioned about their verdict.—S. 297 specifically enacts that the Judge shall charge the jury only "when the case for the defence and the prosecution reply are concluded." A jury having delivered a verdict may not be again asked to consider that verdict. It may only be questioned to find out what in fact the verdict is.⁵⁸

50. *Khan*, 58 CWN 1055 : 1955 Cr LJ 485 ; *Sital Chandra*, A 1956 C 62 : 1956 Cr LJ 509.

51. *Bijoy Kumar Basu v. Kalipada Ghosh*, A 1955 C 590.

52. *Birendra Lal Bhaduri*, (1903) 30 G 822—case under S. 471 IPC.

53. *Venkattan*, (1912) MWN 100 : 13 Cr LJ 271 ; 14 IC 655.

54. *Hemanta Kumar Pathack*, 47 C 46 : 30

CLJ 29 : 21 Cr LJ 775 : 58 IC 455.

55. *Mir Mouza Ali*, (1920) 31 CLJ 305 : 21 Gr LJ 554 : 56 IC 858.

56. *Mofejuddi*, (1922) 24 Cr LJ 305 : 72 IC 65 (G).

56a. *Taju Pramanik*, (1898) 25 C 711 (714).

57. *Acchabba Balori*, (1908) 18 MLJ 250 : 7 Cr LJ 358.

58. *Public Prosecutor v. Abdul Hamed*, (1912) 36 M 585 : 15 Cr LJ 197 : 22 IC 91.

A judge is justified in putting further questions to the jury to ascertain precisely their verdict.⁵⁹

46. Recharge after verdict.—The Calcutta High Court has held in ⁶⁰ that it is open to the Sessions Judge to recharge the jury on specific points in the absence of anything in the Code which prevents him from doing so. This view has been followed by the Patna High Court.⁶¹ The Bombay High Court dissented from this view.⁶² The Madras High Court in *Sundaram Aiyar's* case⁶³ has held the same view as in *Rodrigues*⁶² and has held that the Judge in such a case should refer the matter under S. 307 to the High Court. The Lahore High Court⁶⁴ also is of the same view as taken by the full bench of Bombay in *Rodrigues* case.⁶² Where the Judge directed the jury to reconsider their verdict of not guilty after administering a further summing up but failed to make a record of the supplementary charge to the jury, *held*, the defect is vital and vitiates the verdict.⁶⁵

47. Effect of Misdirection.—The High Court will set aside the verdict of a Jury only in such cases where by a misdirection to the Jury, the accused has been prejudiced or where there has been a failure of justice⁶⁶ In an appeal against acquittal although the High Court held that there was misdirection in the Judge's summing up it was not obligatory on the High Court to order further enquiry or retrial where after considering the evidence it formed the opinion that the evidence could not support a conviction.⁶⁷ Where the Judge did not leave it to the Jury, as he should have done, to say whether on the evidence they found that the intention of the accused was dishonest and fraudulent, *held* the Judge misdirected the Jury but as the verdict was not erroneous and was perfectly correct on the evidence, it was not set aside.⁶⁸ Where there is a misdirection the Appeal Court has no option but to set aside the verdict and direct a retrial.⁶⁹ The case of *Wafder Khan*⁶⁹ was not followed in a later decision of the Calcutta High Court in *Ali Fakir*⁷⁰ which has *held* that where the verdict is set aside on any of the grounds mentioned in Cl. (d) of S. 423 there is no restriction on the powers of the Appellate Court to deal with a case of which it has complete *seisin* in any of the manners provided in that section. The law nowhere lays down that when the verdict of the jury is set aside, the Court must necessarily direct a retrial.⁷¹ It has

59. *Eran Khan*, (1923) 50 C 658 : 24 Cr LJ 838 : 74 IC 950 : AIR (1924) C 47 : 1955 Cr LJ 1483.

60. *Hamid Ali*, 57 C 61 : 31 Cr LJ 751 ; *Rajat Sheikh*, 60 C 729 ; *Sadak Mondal*, 61 C 256 : 38 CWN 254 (cases under S. 304).

61. *Janak Singh*, A 1942 P 446.

62. *Bastav Victory Rodrigues*, 61 Bom LR 670 (FB) : A 1959 B 434 : 1959 Cr LJ 1150 See also *Haitulla*, 35 CWN 456 : 32 Cr LJ 598.

63. 55 M 256 ; A 1931 M 775.

64. *Lyme*, 4 L 382 : 25 Cr LJ 377.

65. *Mani*, A 1960 C 179.

66. *Rajcoomar Bose*, (1873) 19 WR (Cr) 71 (72) : 10 BLR App 36.

67. *Edward William Smither*, (1902) 26 M 1, approving of *Magan Lal*, 14 B 115 and not following *Wafader Khan*, 25

C 230 and *Ali Fakir*, 21 C 955 and following *Elahee Buksh's* case 5 WR (Cr) 80 FB ; see *The Public Prosecutor v. Bonigiri Polligadu*, (1908) 32 M 179 (180) : 9 Cr LJ 567 : 2 IC 307.

68. *Asimoddi*, (1917) 22 CWN 572 : 19 Cr LJ 649 : 45 IC 841.

69. *Wafder Khan*, (1894) 21 C 955 (979).

70. *Ali Fakir*, (1897) 25 C 230 not followed in *Edward William Smither*, (1902) 26 M 1.

71. *Taju Pramanik*, (1898) 25 C 711 dissenting from *Wafder Khan*, (1894) 21 C 955 and following the course adopted in *O'Hara*, (1890) 17 C 642, *Moroji Dadhabhai*, (1872) 9 Bom HC 358 and *Haribole Chunder Ghose*, (1875) 1 C 207 ; *Edward William Smither*, (1902) 26 M 1 ; *Ramchandra Govind Harsha*, (1895) 19 B 749.

been held that the whole of the case must go back to the jury if the verdict was obtained by misdirection.⁷²

Prior to the decision of the Privy Council in *Abdul Rahim's* case⁷³ it was held that the whole case must go back to the jury if the verdict was obtained by misdirection.⁷⁴ The Supreme Court in⁷⁵ followed *Abdul Rahim's* case⁷³ where the view taken was that the combined effect of S. 423 (2) and S. 537 read with S. 147 Evidence Act is that the accused has no right to have the case retried by the jury, the High Court can go into evidence and decide whether it justifies the verdict in spite of the misdirection. The High Court may acquit or convict or direct a retrial. In *Nidhan Misra's* case⁷⁶ this view was followed and it was held that when misdirection is established the High Court can go into evidence and decide whether it justifies the verdict in spite of the misdirection that has occurred. The Supreme Court in the case of *K. Das v. State of West Bengal*⁷⁷ held in an appeal against acquittal when the High Court found that there was a misdirection which was in favour of the prosecution, the appeal was by the State, the High Court had no jurisdiction to enter into evidence⁷⁷—S. C. A. No. 8 of 60 decided on 26. 4. 62.

298. Duty of Judge.—(1) In such cases it is the duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

72. *Jamiruddi Biswas*, (1912) 16 CWN 909 : 13 Cr LJ 715.

73. 73 IA 77 : 50 CWN 692 : A 1946 PC 82.

74. *Jamiruddin Biswas*, 16 CWN 909 : 13 Cr LJ 715.

75. *Mustaq*, 1953 SCR 809 A 1953 SC

282 ; *Ram Kishan Mohanlal Sarma v. Mushtak Hossain*, A 1955 SC 104.

76. A 1962 C 173 : 1962 (1) Cr LJ 315 ; *Abdul Baset v. Dvasaulla Mondal*, A 1957 C 18 : 1957 Cr LJ 51.

77. *Gaffur*, A 1959 MP 132.

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Clause (c). |
| 2. Sub-section (1). Clause (a). | 5. Clause (d). |
| 3. Clause (b). | 6. Sub-section (2).
—Expression of Judge's own opinion. |

1. Corresponding sections in former Codes.—This section corresponds to S. 256 of the Code of 1872, S. 91 of Act X of 1875 and is the same as that of the Code of 1882.

2. Sub-section (1)—

Clause (a)—Duty of a Judge is to explain the law.—Where the Jury were apparently not able to follow the summing up of the Judge as regards the law bearing on the charges, *held* it was clearly the duty of the Judge to explain the law to them again.⁷⁸

See Commentary on the last section.

Even where the defence did not object to the admissibility of a confession at the trial, the Madras High Court held that the Judge misdirected the jury in not drawing their attention to its irrelevancy under S. 24 of the Evidence Act.⁷⁹ Where the confession had not been recorded according to law, *held* that the duty of the Judge was to rule it out as inadmissible.⁸⁰

After the Judge decides the question of voluntariness of the confession there is no reason why the jury should not consider the question of voluntariness on its bearing as to the truth of the confession.⁸¹ Jenkins, C. J., held: "It would therefore come within the duty of the Judge to determine whether any evidence had been given on which the jury could properly find the question for the party on whom the *onus* of proof lies, for that it a question of law".^{81a} It is a misdirection on the part of a Judge to lay before the Jury the purport of a statement which is neither on record nor proved.⁸²

3. Clause (b)—'To decide upon the meaning and construction of all documents given in evidence at the trial.'—The Judge ought to explain to the Jury the legal construction to be put upon a document relied on by the prosecution.⁸³

78. *Palavesa Thevan*, (1911) MWN 190 : 12 Cr LJ 140 : 9 IC 788.

79. *Thandaraya Mudaly*, (1902) 26 M 38. *Nayed Sahana*, 51 C 636 : A 1934 C 636 (FB) ; *Baldeo Bin*, A 1933 C 187 : 34 Cr LJ 369 (2) ; *S. K. Abdul*, A 1925 C 887.

80. *Damodar Ram*, 3 PLT 52 : 23 Cr LJ 141 ; *Panchkauri Dutt*, (1924) 52 C 67 ; *Giddigadu*, (1909) 33 M 46. *Nayed Sahana*, 38 CWN 629 : 35 Cr LJ 1479

(FB).

81. *Kasimuddin*, 62 C 312 : 36 Cr LJ 485 ; *Kishore Misra*, 30 GWN 985 : 36 Cr LJ 921.

81a. *Upendra Nath Das*, 19 CWN 653 (663, 667) : 21 CLJ 377 : 16 Cr LJ 561 : 30 IG 113 (FB).

82. *Dasarath Singh*, (1922) 23 Cr LJ 406 : 67 IC 502 : AIR (1923) P 158.

83. *Setul Chunder Bagchee*, (1861) 3 WR (Cr) 69.

Where the admissibility of certain documents depends on the decision of the question of fact whether they were procured by compulsion or threats, *held*, that the question of fact had to be decided by the jury and the learned Judge was justified in admitting the evidence and in thus asking the jury to consider whether the writings had been procured by compulsion or threats.⁸⁴

4. Clause (c).—*See* Commentary on the last section on the point that the Judge should direct the attention of the Jury corroborating the accomplice.

The Judge ought to tell the jury that the evidence of the approver is tainted and is not entitled to the same weight as that of an independent witness.⁸⁵ Competency of child witness is for the Judge to decide.⁸⁶

See also Illustrations to the section.

5. Clause (d).—**Judge to decide whether a confession is voluntary or not.**—The question of the admissibility of a confession is for the Judge, and that of its truth or falsity for the Jury.⁸⁷ It is a misdirection which must have misled the Jury, to instruct them to take into consideration statements not amounting to confession by an accused as against the co-accused.⁸⁸ The question whether a confession was voluntarily made or not is to be decided by the Judge himself.⁸⁹

6. Sub-section (2).—**Expression of Judge's own opinion.**—This sub-section allows a Judge to express to the jury his own opinion on any question of fact, provided he leaves the decision upon the questions of fact entirely to the jury.⁹⁰ A Sessions Judge in summing up is bound to advise a jury on questions of fact, and may tell the Jury the impression which the evidence has made upon his own mind,⁹¹ but he should be careful to add that it was for the jury to form their own opinion on the evidence.⁹² A Judge in directing a jury should confine himself to a general commentary on the evidence and a statement of the legal offence proved, should such evidence be credited. He should not give a positive opinion as to the guilt or innocence of the accused person.⁹³ A Judge should not in his charge to jury put together the presumption of innocence in favour of an accused and the presumption in favour of the veracity of the testimony adduced in a Court of justice. The two propositions are in their nature different.⁹⁴ An expression of opinion by the Judge on the facts without telling the Jury that they are at liberty to form their own opinion in regard thereto and also without cautioning them to give the accused the benefit of a reasonable doubt amounts to a misdirection.⁹⁵ The Judge may express his opinion upon any question of fact, or upon any question of mixed fact and law but he must warn the jury that they are not bound by his opinion and are final judges of

84. *Abu Ismail Merchant*, A 1959 B 408 : 1959 Cr LJ 1067.

85. *Bepin Biswas*, (1884) 10 C 970, followed in *Ali Fakir*, (1897) 25 C 230 (232) referred to in *Baji Krishna*, (1904) 6 Bom LR 481 (484), but distinguished in *Nilakanta*, 35 M 247 (271).

86. *Purnachandra*, A 1959 C 306.

87. *Panch Kauri Dutt*, (1924) 52 C 67 : 29 CWN 300.

88. *Amiruddin*, (1917) 45 C 557 : 22 CWN 213 : 27 CLJ 148 : 19 Cr LJ 305 : 44 IC 321.

89. *Kesrai Dayal*, (1909) 11 Bom LR 332 : 19 Cr LJ 65 : 2 IC 517.

90. *Rahamat Ali*, (1900) 4 CWN 196 ; per Phear J., in *Rajcoomar Bose*, 19 Wr (Gr) 41 : 10 Beng LR 36 App.

91. *Dwarkanath Sen*, (1870) 13 WR (Cr) 34.

92. *Bepin Biswas*, (1884) 10 C 870 ; *Natabar Ghose*, (1908) 35 C 531 ; *Sant Deo*, A 1936 Oudh 104 ; *Bapurao Maroti*, A 1940 N 221 ; 41 Cr LJ 894.

93. *Bharat Chunder Christian*, 1 WR (Cr) 2.

94. *Ambar Ali*, (1928) 48 CLJ 473.

95. *Panchu Das*, 34 C 698 : 11 CWN 666 : 5 Cr LJ 427 ; *P. Rathanasabapathy Goundan*, 59 M 904 : A 1936 M 516.

fact,⁹⁶ but a Judge expressing his opinion in too dogmatic language is calculated to prejudice the jury.⁹⁷ Where the Judge does not properly warn the jury when he expresses his opinion on the facts in issue, it is misdirection to the jury.⁹⁸ It is sufficient if the Judge gives the warning at the end of the charge.⁹⁹ Where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury or in other words direct them to return a verdict of not guilty.¹

299. Duty of jury.—It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;
- (c) to decide all questions which according to law are to be deemed questions of fact ;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Judge. |
| 2. Jury sole judges of facts. | 'To return the verdict according to the direction of the Judge.' |
| 3. Duty of Jury to take the law from the | —Direction of the judge. |

96. *R. R. Chari*, A 1959 A 149, 1959 Cr LJ 268 ; *Panchu*, 34 CWN 1158 (FB) ; *Hadi Hussain*, A 1934 Oudh 122 (2) ; *Hossain Ali*, A 1934 C 757 : 35 Cr LJ 1487 ; *Bansidhar*, A 1935 A 1032 : 36 Cr LJ 322 ; *Eusuf Ali*, A 1933 G 190.
97. *Ofel Molla*, 18 CWN 196 ; *Taribulla*,

25 CWN 682.
98. *Mangal*, A 1949 A 24 : 50 Cr LJ 47 ; *Kheyal*, A 1948 A 430 : 40 Cr LJ 706.
99. *Srikishen*, A 1935 A 928 : 37 Cr LJ 173 ; *Purnachander*, A 1959 C 306.
1. *Dawood Hassan*, A 1941 B 123 : 42 Cr LJ 470.

1. Corresponding sections in former Codes.—This section corresponds to S. 257 of the Code of 1872, S. 93 of Act X of 1875 and is the same as that of the Code of 1882.

2. Jury sole judges of facts.—It is the duty of the Jury to find which view of the facts is true, whether on the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt or the view which is set up on his behalf and which would make him innocent.^{1a}

A jury is not bound to accept the opinion of an expert upon thumb-impressions without corroboration of their own intelligence as to the reasons which guided him to his conclusion.²

Whether the possession of stolen property was recent enough to warrant a conviction for the substantive offence of dacoity was a matter entirely for the jury and should not have been put to them in a positive way.³

The jury are the only persons who can pronounce a definite opinion on the guilt or otherwise of the accused who are tried before them.⁴ It is for the jury to decide whether the prisoner when he committed the offence was incapable of distinguishing right from wrong.⁵ The question of the admissibility of a confession is for the Judge and that of its truth or falsity is for the jury.⁶ The question of proof of *previous conviction* is one of fact which ought to go to the jury, and must be determined by a jury.⁷

Appreciation of evidence⁸ or reliability of evidence⁹ is for the jury to determine. It is not illegal for the jury to see and read a document submitted as evidence.¹⁰ Where some of the jurors were not conversant with English in which the proceedings were conducted, the verdict was set aside.¹¹

3. Duty of Jury to take the law from the Judge.—The Jury are not entitled to resort to a commentary on the law during their consultation about the verdict; they should take the law from the Judge.¹²

4. 'To return the verdict according to the direction of the Judge.'—The word 'verdict' means the entire verdict on all the charges and is not limited to a *verdict on a particular charge*.¹³ The law does not prescribe any specific form in which the jury are to return their finding.¹⁴

Where the Jury after retiring to consider their verdict saw the Judge in his chamber for direction on certain points of law and asked him one question on a point of law, and the Judge with the jury went into the Court room where in the presence of the pleaders certain questions were put by the jury and the answers given by the Judge were recorded, *held* that the fact that one

1a. *Mahomed Humayoon Shah*, 21 WR (Cr) 72 (86).

2. *Abdul Hamid*, 9 CWN 520. See *Panchu Mandal*, 1 CLJ 385.

3. *Guzzala Hanuman*, (1902) 26 M 467.

4. *Abdul Barik*, (1928) 48 CLJ 477.

5. *Kazi Bazlur Rahman*, (1928) 33 CWN 136.

6. *Panch Kauri Dutt*, 52 C 67; 29 CWN 300.

7. *Eshan Chunder*, 21 WR (Cr) 40.

8. *Gedang Seik*, A 1953 Ass 28; 1953 Cr LJ 326.

9. *Dawood Hashan*, A 1941 A 123; 42 Cr

LJ 470 (FB).

10. *Khan*, 58 CWN 1055; A 1955 C 146.

11. *Rash Behari Lal*, 38 CWN 11; A 1933 PG 208.

12. *Bharmia*, (1895) 6 Bom LR 358; *Jaspath Singh*, (1886) 14 C 164 followed in *Supdt. & Remembrancer of Legal Affairs Assam v. G. G. Wilson*, (1926) 30 CWN 693; see *Nga Tin Gyi*, (1926) 4 R 488 (FB).

13. *Krishnadhan Mandal*, (1894) 22 C 377.

14. *Hurry Prasad Ganguly*, (1871) 14 WR (Cr) 59.

question was put to the Judge not in open Court was no more than an irregularity and did not vitiate the trial.¹⁵

Where there are conflicting versions about the existence of the right of private defence, the Judge directed the jury to consider whether in the circumstances of the case the accused were entitled to a right of private defence, *held*, that is not a correct direction in law.¹⁶

When the accused is charged with murder and the Judge directs that they should bring in a verdict of a lesser offence, the jury are bound to return their verdict according to the direction of the Judge.¹⁷ It is for the jury to determine whether the case falls under one of the exceptions to S. 300 I. P. C.¹⁸

Direction of the judge.—What a Judge says to a Jury upon the law is an absolute and binding direction upon them. What he addresses to them upon the facts are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence which it is wholly in their province to deal with as they think proper.¹⁹

The Jury are not bound to find a simple verdict of “guilty” or “not guilty.” They may find a special verdict or findings on matters of fact to which the judge applies the law.²⁰

300. Retirement to consider.—In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with any member of such jury.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Communication by Jury to Judge in his Chamber—questions and answers not read out. |
| 2. Non-juror holding communication with any member of the Jury. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 352 of the Code of 1861, paragraph 1 of S. 263 of the Code of 1872, S. 92 of Act X of 1875 and is the same as that of the Code of 1882.

2. Non-juror holding communication with any member of the Jury.—The verdict of the Jury is vitiated by the mere fact of one of them having without the leave of the Court, and after retirement to consider the same, spoken to, or held any communication with a person not a juror. It is not necessary for the Court to enquire into the nature of the subject-matter of the conversation or communication.²¹ It is highly undesirable that a juror should have any communication with anybody who is not a juror upon the subject-matter of the trial. But the mere fact that one of them is addressed by a stranger to whom apparently the juror makes

15. *Bilas Chandra Banerjee*, 27 CWN 626 : AIR 1923 (C) 467.

16. *Janadar Singh*, A 1943 P 131 : 44 Cr LJ 356.

17. *Abdul Wahab*, A 1946 B 39 FB.

18. *Md. Adam Chohan*, A 1937 B 60 : 38 Cr LJ 327.

19. *Nim Chand Mookerjee*, 20 WR (Gr) 41 (42).

20. *Devji Gobindji*, 20 B 215.

21. *Benimadhab Kundu*, 46 C 207 : 27 CLJ 553 : 22 CWN 740 : 19 Cr LJ 737 : 46 IC 513.

no reply or whose remarks the juryman does not look upon as worthy of consideration cannot have the effect of invalidating the trial. A mere casual question (which evidently had nothing whatever to do with the case) by a juryman to a police officer in charge of the jury, it not even being alleged that the police officer spoke in reply to the juryman cannot be any ground for invalidating the trial,²² but where it appeared that the foreman had been talking with the Court Inspector and the Judge on that ground discharged him and took another man present, empanelled him and proceeded with the trial, *held*, that the procedure was not objectionable.²³ The fact that a juror has a conversation with a stranger during an adjournment of the Court before the Judge's charge is concluded is not a sufficient ground for interference by the High Court.²⁴

3. Communication by Jury to Judge in his Chamber—questions and answers not read out.—Where after the jury were enclosed they sent the Judge a communication which he received in his private room and then sent an answer to the jury in their room without coming and reading out in Court what were the questions and the answers, the Appellate Court quashed the conviction.²⁵ Where the questions by the Judge and the answers by the jury were not read out in open Court until after the discharge of the jury, *held*, the irregularity did not go to the root of the case and the conviction was good.²⁶

301. Delivery of verdict.—When the jury have considered their verdict the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority or that the jurors are equally divided in opinion.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Delivery of verdict. |
| 2. Legislative changes. | —where there are several accused. |
| 3. Effect of Amendment. | 5. Verdict after discharge |

1. Corresponding sections in former Codes.—This section corresponds to S. 352 of the Code of 1861, paragraph 1 of S. 263, S. 94 of Act X of 1875 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words “or that the jurors are equally divided in opinion” at the end of the section were added by S. 52 of Act 26 of 1955.

3. Effect of Amendment.—The amendment is consequential on the amendment of S. 282. *See also* S. 307 (1-A) which provides for a reference to the High Court under S. 307 in case the jurors are divided in their opinion on all or any of the charges.

4. Delivery of Verdict.—The law requires a juryman to exercise his own understanding on the case submitted to him and to decide on evidence, and not to follow blindly the opinion of his fellows. Where one out of the three (in a jury of five) depends on the inspection and inquiries of the other two, the verdict of the three is not that of a legal majority.²⁷ The evidence of a witness that he saw one of the jurors put some pieces of crumpled up paper in his *alwan*, shake them up and take

22. *In the matter of Bonomally Gupta*, 44 C 723 : 21 CWN 167 : 18 Cr LJ 331 : 38 IC 423.

23. *Rebati Mohan Chakraverty*, (1928) 32 CWN 945.

24. *In re Puli Subba Reddi*, 20 Cr LJ 790 : 53 IC 694 (M).

25. *R. V. Green*, 1950—1 All ER 38.

26. *R. V. Furlong*, 1950—1 All ER 686.

27. *Nasaruddi*, 25 WR (Cr) 4.

them out, is not sufficient to prove that the verdict was arrived at by casting lots.²⁸ By the word 'verdict' should be understood the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. In cases of disagreement the individual opinions of the jurors are never intended to be disclosed. The Judge is only entitled to question the jury as to their verdict, where it is ambiguous or incomplete.²⁹ The Judge should hear all that the foreman attempted to add to the verdict and it is undesirable to stop the jury at that stage.³⁰

Where there are several accused.—The jury have to give their verdict on the facts as against each man severally and they are not, like the Judge in charge of the entire case as a whole.³¹

Where one of the jurors did not understand English and follow the addresses of the pleaders and the Judge's charge, capital sentence was set aside and retrial ordered.³²

5. Verdict after discharge.—Where a jury gives a verdict after they are discharged, the verdict is not competent and a conviction based on such verdict is wrong and must be set aside.³³

In a trial for murder the fact that the jury found the other accused persons who were abettors guilty only of man-slaughter cannot affect the verdict of murder against the principal offender.³⁴

302. Procedure where jury differ.—If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous or the foreman may inform the Judge that the jurors are still equally divided in opinion.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Effect of Amendment. |
| 2. Legislative changes. | 4. Procedure where jury differ. |
| | 5. Fresh charge. |

1. Corresponding sections in former Codes.—This section corresponds to S. 352 of the Code of 1861, paragraph 3 of S. 263 of the Code of 1872 and S. 96 of Act X of 1875 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words "or the foreman may inform the Judge that the jurors are still equally divided in opinion" at the end of the section were added by S. 53 of Act 26 of 1955.

3. Effect of Amendment.—In view of the insertion of sub-section (1-A) in S. 307, the amendment in this section is consequential.

28. *Harakumar Barman Roy*, 46 C 693 : 17 CWN 787 : 14 Cr LJ 392.

29. *Public Prosecutor v. Abdul Hameed*, (1912) 36 M 585 : 15 Cr LJ 197 : 22 IC 981. *Ramadhar Kurmi*, A 1948 P 79; 48 Cr LJ 391; *Jagannath*, A 1925 Oudh 746.

30. *Narayan Changa*, 30 C 485. *Kasimuddin*, A 1935 C 31 : 36 Cr LJ 480.

31. *Jamiruddi Biswas*, 16 CWN 909 : 13 Cr LJ 715; *Eran Khan*, 50 C 658 : 24 Cr LJ 838.

32. *Rash Behari Lal*, 60 IA 354; 38 CWN 11 PC : A 1933 PC 208.

33. *Warren Duncan Smith*, 1934 MWN 1020: A 1934 PC 277 (1).

34. *Kwaku Mensah*, 50 CWN 362: A 1946 PC 20 : 47 Cr LJ 569.

4. Procedure where Jury differ.—It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law.^{34a} Where the first verdict of the jury is a special verdict, and there is no real ambiguity about it the Sessions Judge is bound to record the verdict and apply the law thereto.³⁵ A Judge is not justified in questioning the jury after they have given an unanimous verdict.³⁶

If the jurors are equally divided, then the Judge has to refer to the High Court under S. 307 (1-A).

5. Fresh Charge.—After jury came to a unanimous verdict fresh charge is opposed to the procedure laid down in the Criminal Procedure Code.³⁷

303. Verdict to be given on each charge. Judge may question jury.—(1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Questions and answers to be recorded.—(2) Such questions and the answers to them shall be recorded.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 8. 'May ask them such questions as are necessary to ascertain verdict.' |
| 2. Scope. | 9. Reasons for verdict cannot be asked. |
| 3. Verdict. | 10. Reconsideration after Verdict if legal. |
| 4. Several accused. | 11. Sub-section (2)—Recording Questions and Answers. |
| 5. No prescribed form. | |
| 6. Verdict to be given on each Charge. | |
| 7. Special Verdict. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 263, paragraph 2 of the Code of 1872 and is the same as that of the Code of 1882.

A Judge may question jury when the verdict is incomplete or ambiguous.

2. Scope.—“It is only when it is necessary in order to ascertain what the verdict of the jury really is, that the Judge is justified under this section in putting questions to the jury unless a necessity of this kind truly exists, the questions are not justified in law. No doubt, the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross-examining the jury after they had delivered their final verdict, with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict”.³⁸ The provisions of S. 303 empower a Judge to ask such questions as are necessary to ascertain what the verdict of the jury is, and it was the plain duty of the Judge not to be content with the mere repetition by the foreman

34a. *Mahaddi*, 5 C 871 : 6 CLR 349; *Uk-koor Ghose*, 1 WR (Cr) 50.

35. *Madhavrao*, 19 B 735.

36. *Asfar Sheik*, 15 CWN 198 : 11 Cr LJ 557 (G) : 18 IC 52.

37. *Juhey Sheikh*, 32 CWN 144 : 29 Cr LJ 228.

38. *Per Phear, J.*, in *Sustiram Mandal*, (1873) 21 WR (Cr) 1.

of the jury of the same ambiguous verdict expressed in the same words, but to ascertain what they really meant their verdict to be.³⁹

3. Verdict.—By the word 'verdict' in S. 303 Cr. P. Code it should be understood the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. In cases of disagreement the individual opinions of the Jurors are never intended to be disclosed. The Judge is only entitled to question the jury as to their verdict, where it is ambiguous or incomplete.⁴⁰ If he disagrees with the verdict of the majority he should proceed under S. 307.⁴¹

4. Several accused.—Where there are more than one accused and where there are several charges, it would be a convenient course, if the officer of the Court were to take the verdict of the Jury upon each charge separately.⁴²

5. No prescribed form.—The law does not prescribe any specific form in which the jury are to return their finding and they are at liberty to deliver it in any form which they think fit. If that finding is not exhaustive as to the facts in issue which go to make up the charge or charges it is competent to the Judge and is indeed his duty to put such questions to them as shall elicit a complete finding.⁴³

6. Verdict to be given on each Charge.—In a trial by the jury the Sessions Judge ought to call on the jury under this section to return a verdict on each one of the heads of charge. If the trial is for murder of two persons and the jury return a verdict of guilty the Sessions Judge ought to ascertain whether the verdict relates to the killing of one or the other or both.⁴⁴ Failure to take verdict on each charge is an illegality.⁴⁵

Where the verdict was "not guilty" under Ss. 409 and 403 but "guilty" under Ss. 218, and 477A, it was held that that was a sufficiently clear verdict and there was no necessity for any question to ascertain what the verdict of the jury was.⁴⁶

When verdict given on major charge, verdict on the minor charge need not be taken.—There is no illegality in not taking the verdict of the jury on a charge under S. 304 I. P. C. when they found the accused guilty under S. 302 I. P. C.⁴⁷

7. Special Verdict.—The Code of Criminal Procedure does not permit the recording of what is known in English law as a "special verdict" i.e. where the jury state their findings on the facts themselves, leaving it to the Judge to apply the law to those facts and himself find the prisoner 'guilty' or 'not guilty.' Where the jury give their findings only on the facts leaving it to the Judge to apply the law to those facts, the Judge is empowered to require the jury to return a verdict of 'guilty' or 'not

39. *Chidghan Gossami*, 7 CWN 135.

40. *Abdul Hameed*, 26 M 585 : 15 Cr LJ 197 : 22 IC 981 ; *Madhav Rao*, 19 B 735 ; *Sahadullah*, 53 CWN 1 DR 66.

41. *Kya Nyun*, 7 LBR 140 : 15 Cr LJ 678 : 28 IC 1006.

42. *Eran Khan*, 50 C 658 (663) : AIR (1924) C 47 ; *Rahim Bux Sarkar*, 34 CWN 901 : 32 Cr LJ 321.

43. *Hurry Prasad Ganguly*, 14 WR (Cr) 59 : 8 Beng LR 557.

44. *Berkia Mankia*, Ratanlal 746 ; *Ram-*

prasad, A 1925 N 53 : 26 Cr LJ 1090 ; *Yeswant Tukaram*, A 1947 B 146 : 48 Cr LJ 554 (SB).

45. *Haradhan Sarkar v. Godhan Sheikh*, 64 CWN 101 : A 1959 C 582 : 1959 Cr LJ 1068 ; *Basil Ranger Lawrence*, 38 CWN 562 : A 1933 P C 218.

46. *Bilas Chandra Banerjee*, 27 CWN 626 : AIR (1923) C 647.

47. *Upendra Nath Das*, 19 CWN 653 : 21 GLJ 377 : 16 Cr LJ 561 : 30 IC 113 (FB).

guilty'.⁴⁸ But a contrary view was expressed in the case of *Madhav Rao*.⁴⁹

8. 'May ask them such questions as are necessary to ascertain what their verdict is.'—Under S. 263 of the Code of 1872, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is; but where the verdict although perhaps erroneous, is not ambiguous it is the duty of the judge to record it without further question.⁵⁰

Section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is—that is where the verdict being delivered in ambiguous terms or with uncertain sound their meaning is not clear.⁵¹

Where on a charge under S. 82 (c) of the Registration Act the verdict was a plain and simple one of 'not guilty' the jury having declined to accept the opinion of an expert with respect to the identity of the thumb-impressions the Judge was empowered to ask the Jurors whether they found that the thumb-impression on the bond alleged to have been forged was that of the accused.⁵²

When a jury has returned a clear and unambiguous, though not unanimous verdict, the Sessions Judge has no power to put questions to the jury under S. 303 of the Code. If he disagrees with the verdict of the majority, he should proceed under S. 307.⁵³ A Sessions Judge is not justified in questioning the jury after they have given an unanimous verdict in respect of one of the offences included in the charge.⁵⁴ A judge should put specific questions to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject-matter of the charge.⁵⁵

9. Reasons for verdict cannot be asked.—It is illegal for the Judge to question the jury as to the reasons for their verdict.⁵⁶ A Sessions Judge is not entitled under S. 303 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict even if he intended to make a reference to the High Court under S. 307 of the Code.⁵⁷ A Judge ought not to put questions to any one of the jury as to his reasons for the verdict he has given.⁵⁸

10. Reconsideration after Verdict if legal.—On receiving a plain verdict of the jury the Sessions Judge has no authority to put questions to the jury or to send them back for further deliberation.⁵⁸ All the evidence

48. *Arunachella Thevan*, 13 Cr LJ 586 : 15 IC 1002 (M).

49. 19 B 735.

50. *Dhunum Kazee*, 9 C 53 ; *Chirkhu*, 2 ALJ 475 : 2 Cr LJ 357 ; *Satdeo*, A 1936 Oudh 164 : 37 Cr LJ 182.

51. *Kondiba Dhondiba Powar*, 28 B 412 ; *Abdul Hameed*, 36 M 585 : 15 Cr LJ 197 : 22 IC 981 ; *Evan Khan*, 50 C 658 : 24 Cr LJ 838 ; *Karim Dal*, 35 GWN 407 : 33 Cr LJ 29 ; *Sirandu*, 30 M 459.

52. *Abdul Hamid*, 32 C 759.

53. *Kya Nun*, 7 LBR 140 : 15 Cr LJ 678 : 25 IC 1006.

54. *Asfar Sheikh*, 15 CWN 198 : 11 Cr LJ

557 : 8 IC 52 ; *Ali Hyder*, 4 PLT 425 : AIR (1923) P 474.

55. *Samarali*, A 1936 C 675 : 38 Cr LJ 176 ; *Ramjag Ahir*, (1927) 7 P 55 ; *Siranadu*, 30 M 469.

56. *In re Subbaya Thevan*, 43 M 744 : 39 MLJ 65 : (1920) MWN 347 : 21 Cr LJ 466.

57. *Meajan Sheikh*, 20 WR (Cr) 50 ; *Dhunum Kazee*, (1882) 9 C 53 ; *Dada Ana*, 15 B 452 : *Subbaya Thevan*, *In re* ; 43 M 744 : 21 Cr LJ 466.

58. *Kya Nun*, 7 LBR 140. 15 Cr LJ 678 : 25 IC 1006.

on both sides must be concluded before a case can be submitted to the jury and once a verdict has been delivered there is no power in the trial Court or in the jury to reconsider that verdict after hearing further evidence.⁵⁹

11. Sub-section (2)—Recording Questions and Answers.—If under this section it becomes necessary to question the jury, the Judge is bound to record the questions and the answers.⁶⁰ It is desirable that they should be read over to the jury immediately after they are recorded.⁶¹

Confused verdict—Fresh Charge and second verdict.—Where the verdict of the jury was confused and after a discussion which took place in their presence, the Judge gave a fresh direction about the various sections concerned and the jury retired to reconsider the verdict and gave a second verdict, *held*, there was nothing illegal in the procedure.⁶² Where the jury had not considered a part of the case, the Judge sent jury back to consider that part of the case, *held*, the procedure was not illegal.⁶³

304. Amending verdict.—When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. 'Jury may amend verdict'. |
| 2. Scope. | 6. Fresh evidence after verdict given—Fresh verdict void. |
| 3. 'Accident or mistake.' | 7. Recharging jury. |
| 4. "A wrong verdict is delivered". | |

1. Corresponding sections in former Codes.—This section was new in the Code of 1882 and has not been amended since then.

2. Scope.—This section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury.^{63a}

3. 'Accident or mistake.'—A Judge questioned a jury as to their reasons for a verdict, which was unanimous and unambiguous, and in consequence, two of the jury were led to say that they had been misled as to some of the evidence by the notes of the foreman and that they would like to reconsider the case. *Held* that this was not a case in which it could be said that a wrong verdict was "delivered by accident or mistake" within the meaning of this section.⁶⁴ This section enables a wrong verdict to be corrected, when it is due to an accident or mistake. The verdict would be wrong due to an accident, when for instance, the foreman while informing the Judge of the jury's verdict, accidentally makes a slip and mentions a wrong section of the law. The other case, in which a wrong

59. *Lyme*, 4 L 382 : 25 Cr LJ 425 : AIR (1924) L 17.

60. *Palavesa Thevan*, (1911) MWN 190 : 12 Cr LJ 140 : 9 IC 788.

61. *Ifatullah*, 35 CWN 456 (461) : A 1931 C 345.

62. *Girish Chandra*, 58 C 1335 : 33 Cr LJ 135.

63. *Suranath Dhaduri*, A 1927 A 721 : 28 Cr LJ 950.

63a. *Kondiba Dhondiba Powar*, 28 B 412 : 6 Bom LR 361 ; *Sundaram Ayyar*, 55 M 256 : 32 Cr LJ 1276.

64. *In re Rama Naickar*, 22 MLJ 355 : 13 Cr LJ 285 : 14 IC 669.

verdict can be corrected is, when it is due to a mistake. The mistake may be discovered either by the Jury itself or by the Judge. The Judge can also give reasons on account of which he thinks that there is a mistake.⁶⁵

4. "A wrong verdict is delivered".—A Judge is not obliged to accept an absurd verdict either as a verdict of guilty or not guilty⁶⁶ due to misconception of law.⁶⁷ He is quite entitled to tell the jury to consider the matter over again.

5. 'Jury may, before or immediately after it is recorded, amend the verdict'.—The Court will not disturb a verdict openly given in Court if it is satisfied that all the jurors heard the words of the foreman and expressed no dissent at the time. The power of amendment of a verdict provided by S. 304 must be exercised before or immediately after the verdict is recorded and cannot be exercised after the jurors have dispersed.⁶⁸ After the verdict has been recorded by the Judge and the jury have left the box, it would be improper on the part of the Judge to listen to any application by the jurors to amend the verdict.⁶⁹

6. Fresh evidence after Verdict given—Fresh verdict is void.—Verdict of the Jury once given is final and a second verdict after hearing further evidence is *ultra vires*.^{69a}

7. Recharging jury.—The Calcutta High Court has held that it is open to the Sessions Judge to recharge the Jury on specific points in the absence of anything in the Code which prevents him from doing so.⁷⁰ The Patna High Court⁷¹ has followed this view. The Bombay High Court⁷² and the Madras High Court⁷³ have dissented from this view.

305. Verdict in High Court when to prevail.—(1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.—(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

65. *Bastav Victory Rodrigues*, A 1959 B 434 : 1959 Cr LJ 1150.

66. *Hamid Ali*, 57 C 61 : A 1930 C 320 ; *Janak Singh*, A 1942 P 446.

67. *Janak Singh*, A 1942 P 446 : 43 Cr LJ 205 ; *Nga Tin Gyi*, 4 R 488 : 28 Cr LJ 213 (FB).

68. *Brain Bonham Carter*, 6 PR 1913 (FB) : 9 PWR 13 : 13 Cr LJ 815 : 17 IC 559.

69. *Ifatulla*, 35 CWN 456 : 32 Cr LJ 598.

69a. *Lyme*, 4 L 382 : 25 Cr LJ 425 : 77 IC

425 : AIR (1924) L 17.

70. *Hamid Ali*, 57 C 61 : A 1930 C 321 : *Sadan Mandal*, 61 C 256 : 38 CWN 254.

71. *Janak Singh*, A 1942 P 446 see also *Nga Tin Gyi*, 4 R 488.

72. *Bastav Victory Rodrigues*, A 1959 B 434 : 1959 Cr LJ 1150 (FB) see also *Hatulla*, 35 CWN 456.

73. *Sundaram Aiyar*, 55 M 256 : A 1931 M 775.

SYNOPSIS

1. Corresponding sections in former Codes.
2. State Amendment.
—Madras
3. Scope.
4. Discharge of jury without ascertaining verdict.
5. Reconsideration of verdict by jury.

1. Corresponding sections in former Codes.—This section corresponds to Ss. 97 and 98 of Act X of 1875 and is the same as that of the Code of 1882.

2. State Amendment.

Madras.—Section 305 has been omitted by S. 19 of Madras Act 34 of 1955.

3. Scope.—Section 305 is mandatory. If the Judge agrees with the opinion of the majority of the Jury, he shall give judgment in accordance with such opinion. A majority verdict with which the Judge agrees has exactly the same legal force as a unanimous verdict and if it be a verdict of murder the Court cannot go behind it and take any further verdict upon the facts which have been found by the Jury to amount to murder.⁷⁴ A unanimous verdict of the Jury is bound to be accepted by the Judge and under S. 305 of the Code it is only when the Jury are not unanimous that it lies with the Judge to take one of the courses specified in the section.⁷⁵ When the Judge accepts the verdict of the jury he should pass the appropriate sentences required by law upon the accused.⁷⁶

4. Discharge of jury without ascertaining verdict.—When the Jury is divided in opinion the Judge should not discharge the Jury without ascertaining what the majority verdict is.⁷⁷

If the Judge thinks that the verdict of the jury is wrong, but has got to be accepted because it is unanimous, the Judge may give a certificate to enable an appeal on facts. But where the verdict is not unanimous and the Judge does not accept it, he is bound to discharge the jury under subsec. (3).⁷⁸ Where the Judge disagrees with the verdict he ought to discharge the jury and if he is of opinion that the accused should not be retried, the passing of acquittal is not technically correct. The proper course for the judge is to make an entry against the charge under S. 308.⁷⁹ Where a Judge in accepting the verdict of the majority of the jury that the accused was not guilty wrote: "I accept the verdict as it is purely on a question of fact", *held*, that the Judge disagreed with the verdict.⁸⁰

5. Reconsideration of verdict by Jury.—Once a verdict has been delivered there is no power in the trial Court or in the Jury to reconsider that verdict except under the provisions of S. 304 of the Code.⁸¹ Where the Jury first brought in a verdict of 'culpable homicide not amounting to murder' and after the Judge had put questions to ascertain their verdict their answers revealed the fact that they had not understood the law on the subject and after the Judge had read out to them a passage from 11 L.B.R. at p. 118 and thereupon the Jury returned a verdict of guilty under S. 302, *held* that the Judge was justified in disregarding the first verdict which could not be recorded under S. 303.⁸²

74. *Upendra Nath Das*, (1914) 19 CWN 653 : 21 CLJ 377 : 16 Cr LJ 561 : 50 IC 113 (FB).

75. *S. P. Ghose*, (1915) 8 Bur LT 247 : 8 LBR 274 : 16 Cr LJ 676.

76. *Mohsena Khatun*, 43 CWN 893 : 40 Cr LJ 880.

77. *Jotindra Nath Gui*, (1903) 8 CWN xlviii.

78. *Hashmatulla*, A 1946 B 465 (SB).

79. *Bombay Government v. Abdul Wahab*, A 1946 B 38 : 47 Cr LJ 378.

80. *Government of Bombay v. Sakur*, A 1947 B 36 : 48 Cr LJ 168.

81. *Lyme*, 4 L 382 : 25 Cr LJ 425 : 77 IC 425.

82. *Nga Tin Gyi*, (1926) 4 R 488 FB.

306. Verdict in Court of Session when to prevail.—(1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 562, pass sentence on him according to law.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. 'Does not think it necessary to express disagreement.' |
| 2. Legislative changes. | 5. Sub-section (2). |
| 3. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 263, paragraph 4, of the Code of 1872 and in the Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words '*unless he proceeds in accordance with the provisions of S. 562*' in sub-sec. (2) were inserted by S. 80 of Act XVIII of 1923.

3. Scope.—This section does not impose an obligation on the Judge to refer a case to the High Court except when the conditions set out in S. 307 are satisfied. The disagreement referred to in S. 306 is the same disagreement as impels the Judge to take action under S. 307.⁸³

4. 'Does not think it necessary to express disagreement.'—When the Judge does not think it necessary to express disagreement with the verdict of the jurors, he shall give judgment accordingly. If he does think it necessary to express disagreement, then his only course is to refer the case to the High Court under S. 307.⁸⁴ Where the Judge does not think it necessary for the ends of justice to refer the case under S. 307 it is not proper for him to express disagreement with the verdict of the jury and convict the accused.⁸⁵ When in a trial by jury, the verdict appears to be absurd and in the circumstances an inconsistent one, the Judge may recharge the jury and he need not refer it for consideration to the High Court.⁸⁶ Even where the Judge thinks the verdict to be satisfactory or correct but it is not so perverse a verdict to justify a reference to the High Court, he may disagree but express disagreement.⁸⁷ If the Judge does not think that the verdict is right it is his duty to refer to the High Court under S. 307.⁸⁸ Although the Judge disagrees and does not refer under S. 307 to the High Court he cannot be compelled to make a reference.⁸⁹

5. Sub-section (2).—The words in italics are new and give the Sessions Judge discretion to proceed under S. 562. A prisoner is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced and no formal warrant is necessary.⁹⁰ Even if the Judge entertains

83. *Ramdas Rai*, (1928) 7 P 344 (346), see *Ebrahim Molla*, 56 C 208.

84. *Mhasku Mlu*, A 1935 B 165 : 37 Cr LJ 26.

85. *Ebrahim Molla*, 56 C 473 : 33 CWN 371.

86. *Rafat Sheikh*, 60 C 729 : 34 Cr LJ 1084.

87. *Afsar*, 41 CWN 1020.

88. *Asrafali*, 30 CWN 376 ; *Ebrahim*, 33 CWN 371.

89. *Ramdas Rai*, 8 P 3441 : 30 Cr LJ 721, *Ebrahim Molla*, 56 C 473 ; *Afsar Sheikh*, 41 CWN 1020.

90. *Anon*, 5 MHCR App II.

doubt as to the propriety of the verdict, when he accepts the verdict he must pass adequate sentence.⁹¹

307. Procedure where Sessions Judge disagrees with verdict.—(1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of Section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(1A) If, in any such case, the jurors are equally divided in opinion on all or any of the charges on which any accused person has been tried, the Judge shall submit the case in respect of such accused person to the High Court recording his opinion on such charge or charges and the grounds of his opinion, and in such case, if the accused is further charged under the provisions of Section 310, he shall proceed to try him on such charge as if the verdict of the jury had been one of conviction.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it ; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. What the order of reference should contain. |
| 2. Legislative Changes. | 7. Power of Sessions Judge to refer for conviction of minor offence. |
| 3 & 3a. Effect of 1923 and 1955 Amendments. | 8. Where reference ought not to be made. |
| 4. Scope. | |
| 5. When reference may be made. | |

91. *Ramdas Rai*, 8 P 344 : A 1929 P 313.

9. If in such case the Judge disagrees with the verdict of the jurors or of a majority of jurors.
10. "When he is clearly of opinion that it is necessary for the ends of justice".
11. 'He shall submit... committed.'
12. The Judge should question the jury and record their opinion.
13. Sub-section (1) "In respect of such accused person."
14. 'And in such cases...one of conviction.'
15. Sub-section (1-A).
16. Reference must be made by the Trial Judge and not his successor.
17. Sub-section (2).
18. Sub-section (3)—Powers of High Court.
19. Real test to be applied.
20. Unanimous Verdict—Interference.
21. Aspersions on Jurors—Highly objectionable.
22. 'After giving due weight to the opinions of the Judge and Jury.'
23. Procedure.
24. Power to order retrial.
25. Reference against verdict of acquittal.
26. Previous convictions.
27. 'So submitted.'
28. High Court may exercise Appellate Powers.
29. Procedure in case of difference of opinion between Judges.

1. Corresponding sections in former Codes.—This section corresponds to paragraphs 5 and 6 of S. 263 of the Code of 1872 and the Code of 1882 was similarly worded as the unamended section in the Code of 1898.

2. Legislative Changes.—The words "in respect of such accused person" and "and in such case, if the accused is...conviction" in sub-sec. (1) were added and the words 'such accused' in sub-secs. (2) and (3) substituted for the words 'the accused' by S. 81 of Act XVIII of 1923.

"Clause 69 prescribes that when a Judge accepts the verdict of the jury in respect of some of the accused but not of others he need only refer the case of the latter to the High Court."—*Statement of Objects and Reasons*. Sub-section (1-A) has been added by S. 54 of Act 26 of 1955.

3. Effect of the 1923 Amendment.—The insertion of the phrases 'any accused person' and 'in respect of such accused person' makes the section wider inasmuch as under the present Code a Judge need only refer the case of 'such accused' person to the High Court when he does accept the verdict in respect of some and does not accept the verdict in respect of the remaining accused. The amendment seems to restore the view in *Babsur Ali*.⁹²

The addition of the words at the end of sub-sec. (1) 'and...conviction' provides for trial as to the charge of previous conviction in the Sessions Court.

3a. Effect of 1955 Amendment.—Sub-section (1-A) provides for a case where the jurors are equally divided in their opinion, reference has to be made. That will happen only when the uneven number of the jurors becomes even because of a juror ceasing to attend as mentioned in S. 282.

4. Scope.—Where a Judge dissents from the unanimous finding of a Jury given in accordance with the law, the only procedure open to him to follow is that laid down in the 5th clause of S. 263 of the Code of 1872.⁹³

The provisions of S. 307 of the Cr. P. Code are not in any way cut down by Ss. 418 and 423 ; and the High Court has power under S. 307 to interfere with the verdict of the Jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set aside. The power of the High Court is not limited to interference of questions of law, *i.e.*, misdirection by the Judge or misapprehension by the Jury of the Judge's directions on points of law.⁹⁴ The requirements of the ends of

92. 42 C 789 : 19 CWN 584 : 21 CLJ 492 : 16 Cr LJ 321 : 28 IC 657.

93. *Mahaddi*, 5 C 871 : 6 CLR 349.

94. *McCarthy*, 9 A 420 : (1887) Awn 39.

justice must be the determining factor both for the Sessions Judge in making a reference and for the High Court in disposing of it. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court, merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine facts.⁹⁵ The Privy Council in *Ramanugrah Singh*⁹⁶ approved of the following decisions.⁹⁶ What is required under this section is not merely disagreement with the verdict of the jury but the additional feature that the Sessions Judge "is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court" under S. 307 ; even if the Judge disagrees with the verdict of the jury he must normally give effect to that verdict unless he is prepared to hold the further and clear opinion "that no reasonable body of men could have given the verdict which the jury did."⁹⁷ The mere fact that jury did not state correct grounds for their verdict would not justify a reference under S. 307.⁹⁸

5. When reference may be made.—If a Judge does not believe the verdict is right it is his duty to refer it to the High Court.⁹⁹ It is open to the Sessions Judge to disagree with the Jury ; it is indeed incumbent upon him to do so if he is clearly of opinion that such a course is necessary *for the ends of justice* ; but this does not require that he should make reflections upon the conduct of the jurors which are not supported by evidence on the record.¹ It is not in every case of doubt nor in every case in which a view different from that of the Jury can be entertained on the evidence that a reference under S. 307 of the Code is to be made to the High Court but when the verdict is manifestly wrong.^{1a} It has been held that the statement of the Judge when he states "though not accepting but agreeing with the verdict" is to be deprecated.² When the Sessions Judge did not say that he was clearly of opinion that it was necessary for the ends of justice to submit the case to the High Court and also when the Judge did not say that he disagreed with the verdict of the jury it was held that the reference was bad in law.³ Under sub-sec. (1) two conditions are required to justify a reference, (1) that the Judge must disagree with the verdict of the jury and (2) that the Judge must clearly be of opinion that it is necessary in the interests of justice to submit the case.⁴

6. What the order of reference should contain.—In making a reference under S. 307 the Judge should, in effect, show the reasons for convicting the accused in as clear a manner as he would have done if the case had not been a jury case and he had to write a convicting judgment.⁵ A

95. *Ram Anugraha Singh*, 73 IA 174 : A 1946 PC 141 : 47 Cr LJ 905 followed in *Akakali Hayatali*, (1954) SCA 408 : A 1954 SC 173 ; *Ramkripal Choudhury*, 25 P 825 : A 1947 P 398 ; *Afsar Sheikh*, 41 CWN 1020 : 38 Cr LJ 1075 ; *Debendra Nath Roy*, ILR 1943, 1 Cal 417. *Baldeo Paswan*, A 1951 P 470. *Dattaraya Sadashiv*, A 1940 N 17 ; 41 Cr LJ 289 (FB) ; *Anil Ranjan Dutta*, A 1952 C 534 ; *K. M. Nanavati v. The State of Maharashtra*, (1962) SCA 434.

96. *Sham Bagdee*, 13 BLR App 19 ; *Dada Ana*, 15 B 452 ; *Harimohan*, A 1927 C 848.

97. *Moseb Khan v. State of West Bengal*, A 1956 SC 536 : 1956 Cr LJ 940.

98. *Shankar Gangaram*, A 1956 N 208.

99. *Arajali*, (1926) 30 CWN 376.

1. *Mamfru Choudhury*, 51 C 418 : 38 CLJ 397 : AIR (1924) C 323 following leading case of *Sham Bagdee*, 13 BLR App 19 and *Surnamoyee Biswas*, 41 C 621 ; *Bajil Mian*, (1927) 6 P 817 following *Eran Khan*, 50 C 658.

1a. *Surnamoyee Biswas*, 41 C 621 : 14 Cr LJ 660 : 21 IC 900.

2. *Ebrahim Molla*, 33 CWN 371 : 56 C 208.

3. *Rajeshar Bairagi*, 9 CWN LXVI.

4. *Ram Anugraha Singh*, 73 IA 174 ; A 1946 PC 151.

5. *Sheo Din*, (1927) 50 A 540 (542).

letter of reference should state the offence which the judge considers has been committed although a mere omission to state the offence, when the Judge's opinion as to the offence committed appears from the body of the letter, is not necessarily a ground for rejecting the reference.⁶ The Judge should state in some detail his own opinion regarding the evidence and more particularly to state which part of the evidence in his opinion would entitle the Court in the interests of justice to convict the accused upon the charges referred,⁷ he should state the grounds of his opinion.⁸

7. Power of Sessions Judge to refer for conviction of minor offence.—It is not always true that a Judge having accepted the Jury's findings on graver charges cannot make a reference with the object of having some of the accused convicted on a minor charge under S. 332 of the Indian Penal Code.⁹

When the Jury trying an offence triable by Jury finds as an incident to such trial that certain facts are only proved in the trial, which facts constitute a minor offence and return a verdict of guilty with regard to such offence (though such minor offence be not triable by a Jury), the Sessions Judge may convict the accused of such minor offence *with the aid* of the Jurors as Assessors.¹⁰

8. Where reference ought not to be made.—It is not open to a Sessions Judge when he has once accepted the verdict of the Jury and has postponed the case for passing sentence, to reconsider his order and to refer the case to the High Court under this section but he must pass sentence on the persons awaiting sentence on the verdict.¹¹ Where the verdict of the jury is unanimous and the Judge has agreed with it, he can make no reference.¹² Where on the Sessions Judge's own showing in his charge to the Jury, the evidence for the prosecution was so open to hostile criticism as to justify the jury in regarding it with suspicion, it was held that the Sessions Judge was not justified in making a reference under S. 307 against a verdict of acquittal delivered upon such evidence.¹³ It was not improper for a Judge to refer a case to the High Court under S. 307 merely because there is a weak link in the evidence for the prosecution to which he drew the attention of the jury and asked them to pause and consider it before returning their verdict.¹⁴ The Sessions Judge is not obliged to make a reference because in his charge to the jury he has clearly and definitely expressed himself for acquittal but the jury returned a verdict of guilty.¹⁵ A reference is not called for where the Judge does not consider the verdict is so unreasonable that a reasonable body of men could have come to that verdict and is made on his own view of questions of fact and also fails to say that in his opinion the reference is necessary for the ends of justice.¹⁶ After the Privy Council decision in *Ram Anugraha Singh's case*¹⁷ the view taken in¹⁸ which

6. *Panchanan Sarkar*, 37 CWN 341 : A 1933 C 404 ; *Jogi Kar*, A 1931 C 15.

7. *Sukhi Chand Kumbhar*, A 1929 P 16 : 30 Cr LJ 210 ; *Anjani*, A 1958 Mys 34.

8. *Taribullah Shaikh*, 25 CWN 682.

9. *Haridas*, 37 CLJ 34 : 24 Cr LJ 674 : 73 IC 770 : AIR (1923) C 108.

10. *Pattikandan Umaru*, (1902) 26 M 243 ; *In re Adabala Muthiyalu*, 37 M 236 : 13 Cr LJ 739 : 17 IC 51.

11. *Mojahur Rahman*, 4 CWN 683.

12. *Madan Mandal*, 41 C 662.

13. *Chidghan Gossain*, 7 CWN 135.

14. *Abdul Rahaman*, 9 CLJ 432.

15. *Moseb Kuka Choudhury v. State of West Bengal*, A 1956 SG 586 : 1956 Cr LJ 548.

16. *Godeng Sui*, A 1953 Ass 28 : 1953 Cr LJ 226 ; *Anil Ranjan Dutta*, A 1952 C 534 : *Dinanath Das*, A 1951 Ass 65.

17. 73 IA 174 : 50 CWN 906 : 47 Cr LJ 195 (PC).

18. *Ramchandra*, 55 C 879 ; *Ismail*, 23 CWN 747 ; *Meajan*, A 1929 C 737 ; *Guruwadu*, 13 M 543.

held that reference could be made if the view of the jury were perverse or against the weight of evidence is no longer tenable.

9. 'If in such case the Judge disagrees with the verdict of the jurors or of a majority of jurors.'—A Sessions Judge may under S. 263 of the Code of Cr. Procedure submit it to the High Court a case in which he disagrees with the Jury in their finding of facts as well as a case in which he complains that the jury has not followed his directions as to the law; and the High Court in a case submitted under that section may acquit the prisoner, if it so thinks fit, on the facts notwithstanding that the jury has found the prisoner guilty.¹⁹

A Sessions Judge ought to record distinctly whether or not he agrees with the verdict of the jury.²⁰

The verdict of the jury, particularly when it is unanimous should not be disturbed unless it can be demonstrated beyond a peradventure that it is manifestly perverse or unreasonable. S. 307 is intended to provide against a clear case of miscarriage of justice at the trial and is not meant for indiscriminate use of over zealous judges to make references. This power must be sparingly used.²¹ When two possible views can reasonably be taken of the evidence, the mere fact that the Court itself prefers to take a view which does not happen to be in consonance with the view of the jury would not provide a sufficient ground for a reference under this section. The Judge must be clearly of opinion that imperative requirements of justice constrain him to take a contrary view and must record the grounds in support of the course taken by him to enable the High Court to judge the correctness of the grounds. The grounds stated by the Judge should be such as to persuade the High Court reviewing the evidence and faced with the choice between the two to consider that "no reasonable body of men could have reached the conclusion arrived at by the jury."²² The Judge must think it necessary to express disagreement, otherwise he should act under S. 306.²³ The word "Perverse" indicates the completeness of a Judge's disagreement with the jury but complete disagreement is not sufficient to make a reference.²⁴ It must also be unreasonable.²⁵ The view in²⁵ is the view to be taken after the Privy Council decision in *Ram Anugraha Singh's case*.²⁶

10. When he is clearly of opinion that it is necessary for the ends of justice.—What is required under this section is not merely a disagreement with the verdict of the jury but the additional factor that the Sessions Judge "is clearly of opinion that it is necessary for the ends of justice" to submit the case to the High Court.²⁷ See also *Ram Anugraha Singh's case*.²⁸ No doubt the ends of justice as laid down in the section itself is the determining factor in making a reference but the "rule of the ends of justice" is

19. *Koonjo Leth*, 11 BLR 14 : 20 WR (Cr)

20. *Chand Bagdee*, 7 WR (Cr) 6 ; see *Ebrahim Molla*, 56 C 208.

21. *Anjani*, A 1958 Mys 34 : 1958 Cr LJ 395.

22. *Bhagwan*, A 1955 A 78 : 1955 Cr LJ 252 ; *Ganesh Sahi*, A 1952 P 1 : 1952 Cr LJ 145 ; *Lal Mohammed*, A 1930 P 174

23. *Afsar Shaikh*, 41 CWN 1020 ; A 1937 C 540 ; *Manjla*, A 1937 A 195 : 38 Cr LJ 465.

24. *Panchanan Sarkar*, 37 CWN 34.

25. *Anjani*, A 1958 Mys 34 ; *Baldeo Pashwan*,

A 1951 P 470 ; *Dattaraya Sadasiv*, A 1940 N 17 ; *Anil Ranjan Dutta*, A 1952 C 534 ; *Kalicharan Pal*, A 1949 Ass 1.

26. 73 IA 174 ; 50 CWN 692 (PC).

27. *Maseb Kuka Chaudhury v. State of West Bengal*, A 1956 SC 536 : 1956 Cr LJ 940 ; *Jogikar*, 57 C 1183.

28. 73 IA 174 ; A 1946 PC 151 : 47 Cr LJ 905 followed in *Aklakali Mayatali*, (1954) SCA 408 : A 1954 SC 173 ; *Ram Kripal Chaudhury*, 25 P 825 ; A 1947 P 398 ; *Afsar Sheikh*, 41 CWN 1020 : 38 Cr LJ 1075 ; *Debendra Nath Roy*, ILR 1943 IC 417.

to be applied on the principle of reasonableness on the part of the jury.²⁹ The words "necessary for the ends of justice to submit a case" mean something more than perverse and the necessity of submitting a case should depend on the quality of the offence and considerations of a similar nature.³⁰ The paramount consideration in the High Court must be whether the ends of justice require that the verdict should be set aside. In general, if the evidence is such that it can properly support such a verdict of guilty or not guilty, according to the view taken of it by the Trial Court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail as they are the judges of facts. In such a case the reference is not justified. If the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, the reference is justified.³¹

11. He shall submit committed.—A Sessions Judge who refers a case under S. 307 should state exactly what material portions of the evidence he believes to be true and his reasons for arriving at his conclusions. He should not content himself with repeating any remarks in his charge to the Jury adding merely such a vague remark as "for these and other reasons I submit the case for the orders of the High Court."³² When the Sessions Judge in his letter of reference under S. 307 expresses an opinion which is inconsistent with the opinion which he has expressed to the jury in his summing up, it was held that the Jury are judges of facts and having regard to the directions of the Judge the verdict of the majority of the jury must be upheld.³³ In referring a case to the High Court, under S. 307 of the Cr. P. Code the Sessions Judge must say in his reference in clear and unambiguous terms which is the offence which has in his opinion been committed by the accused, and on what grounds in that respect he differs from the jury. He should state with some fulness his view of the evidence and the credibility of the more important witnesses, because not being in a position to pronounce any opinion upon the demeanour of the witnesses the High Court has to attach more or less weight to the opinion of the Judge who saw and heard the witnesses.³⁴ Where a Judge disagrees with the Jury and disagrees to such an extent that he feels that he cannot accept their verdict he is entitled to refuse to accept that verdict and submit the case with his reasons to the High Court.³⁵ Where a Sessions Judge in his letter of reference merely said that the verdict of the jury was against the weight of the evidence and expressed no other opinion, it was observed that in a case of this description it is the duty of the Sessions Judge to set out on what portions of the evidence or on what facts disclosed by the evidence the accused should have been convicted.³⁶

It is the duty of a Judge in sending up a case to the High Court when he disagrees with a verdict of *acquittal* to state the offence which, in his opinion, has been committed.³⁷

12. The Judge should question the jury and record their opinion.—Upon a reference under this section the High Court is bound to consider the entire evidence and give weight to the opinions of the Sessions

29. *Ganesh Sahi*, A 1952 P 1; *State of M. P. v. Shankar Gangaram*, A 1956 N 208.
 30. *Panchanan Sarkar*, 37 CWN 341 : 34 Cr LJ 608.
 31. *Ranayad Rai v. State of Bihar*, A 1957 SC 373 : 1957 Cr LJ 557.
 32. *Dyamanaiik*, 6 Bom LR 519.
 33. *Sristidhar Majumder*, 37 CLJ 30 : AIR

(1923) C 97.
 34. *Chandra Krishna*, 10 Bom LR 173 : 7 Cr LJ 192.
 35. *Nanni Kudumbam*, 45 MLJ 406 : (1923) MWN 695 : 25 Cr LJ 145 : 76 IC 289 : AIR (1924) M 232.
 36. *Bhutnath Ghose*, 7 CWN 345.
 37. *Sahae Rao*, 3 C 623 : 2 CLR 304.

Judge and the jury. In such a case the Sessions Judge should ask the jury the reasons for their verdict, but his failure to do so does not debar the High Court from entertaining the reference.³⁸

Where in a trial by jury in a Court of Session, the case depends entirely on circumstantial evidence and the jurors are divided in opinion, the Judge ought, if he intends to make a reference to the High Court under S. 307 to ascertain from the jurors the reasons for their opinion.³⁹ Where in a trial by jury, a brief verdict of 'not guilty' is given and the Sessions Judge disagrees, he should before making a reference under S. 307 put such further questions to the jury as may bring out their meaning more precisely.⁴⁰

When a Sessions Judge after the jury have given their verdict disagrees with the verdict and decides to make a reference to the High Court, he may, after telling the jury his intention to do so, ask the jury to give their reasons for the verdict and record those reasons⁴¹ and in making a reference under this section, the Sessions Judge is limited to the evidence at the trial which was before the jury.⁴² If the judge disagrees with the verdict under S. 304 I. P. C., and is of opinion that it should be under S. 302 I. P. C., he has to make a reference under S. 307, and for that purpose, it would be open to him to question the jury in order to find out their reason for the verdict that they brought in.⁴³

13. Sub-section (1)—“In respect of such accused person”.—The amendment of 1923 introduced the words “any accused person” for the word ‘accused’ and the words ‘In respect of such accused person’ are a consequential amendment. Hence the Judge cannot refer the whole case when there are several accused and he disagrees with the jury in respect of some of the accused. In such cases he has to pass orders of conviction or acquittal in respect of the accused persons for whom he has accepted the verdict and refer the case of the others when he has disagreed with the opinion of the jury.

It has been held, however that under sub-sec. (2) the Judge has not been permitted to divide the verdict of the jury against a particular accused and to accept a part of it and reject the other. The entire case must be referred to the High Court even though the Judge cannot agree with the verdict of the jury in respect of one or some only of the charges.⁴⁴ By recording a judgment the trial Judge prevents the High Court from properly exercising the powers under S. 307 (3) as the reference made is not of the entire case with respect to the accused.⁴⁵

14. ‘And in such case, if the accused is further charged under the provisions of S. 310, shall proceed to try him on such charge as if such verdict had been one of conviction’.—These words are new and have been added by the amendment and provide for trial on a charge of previous conviction in the Sessions Court. This amendment seems to give effect to *Kandasami Gounden’s* case⁴⁶ and superseded the view in *Govind Jhaveya*.⁴⁷

38. *Bhailothan Singh*, 6 Pat LJ 264 : 23 Cr LJ 11 : 64 IC 379.

39. *Zohra*, 21 Cr LJ 278 : 55 IC 294.

40. *Walter Turner*, 35 PWR (Cr) 1915 : 16 Cr LJ 587 : 30 IC 139.

41. *Annadacharan Thakur*, 36 C 629 : 13 GWN 757 : 9 CLJ 638.

42. *Jadab Das*, 27 C 295 : 4 CWN 129.

43. *Sadek Mandal*, 61 C 256 : A 1934 C 173 ; 38 Cr LJ 496 (SB).

44. *Durgeswar Datta*, A 1958 Ass 44 : 1958 Cr LJ 142 ; *Ananda*, 121 GWN 435 : *Bishnu Charan Das*, 37 CWN 1180 : A 1933 C 665 ; *Nawal Behari Lal*, 52 A 881 ; *Hazarilal*, A 1932 P 156.

45. *Sashimohan Debnath v. State of West Bengal*, A 1958 SC 194 ; *Bepin Behari Mandal*, A 1959 C 659.

46. 30 M 134.

47. 2 Bom LR 336.

15. Sub-section (1-A).—Provides for a reference when the jurors are equally divided in their opinion. It has been added by Act 26 of 1955.

16. Reference must be made by the Trial Judge and not his successor.—A reference made under this section is not valid in consequence of its having been made by an officer, who held the trial but who at the date of the reference had ceased to be a Judge.⁴⁸

17. Sub-section (2).—In submitting the case of an accused it is a grave irregularity to acquit him of certain charges and to refer the case with respect to other charges, the whole case has to be referred to.⁴⁹ S. 307 (2) specifically prohibits the Judge when he considers it necessary to submit the case by way of reference under S. 307, from recording any judgment of acquittal or of conviction or any one of the charges. Judge must refer the whole case.⁵⁰ The procedure of submitting to the High Court only a part of the case under S. 307 is irregular.⁵¹ Where a reference is made only in respect of some of the accused and some of the charges, it is valid in law.⁵² It is not open to a Court of Session to accept the verdict of the jury on one charge and disagree with the jury on another charge and refer the matter to the High Court.⁵³ Where an accused person was charged for six offences and the jury found him not guilty and the Judge, accepting the verdict of the jury acquitted him of five of the charges but regarding the 6th charge referred that part of the case, *held* the Judge abetted illegally in making the improper reference.⁵⁴

18. Sub-section (3)—Powers of High Court.—Section 537 of the Code does not in terms apply to a reference under S. 307 but the limitation contained therein applies to such a reference. In the case, therefore, of a reference under that section, it is not competent to the High Court to take any action in the form of an order questioning the whole of the proceedings on the ground of want of sanction if such want of sanction has in fact not occasioned a failure of justice.⁵⁵ The High Court under this section has all the powers of an Appellate Court and should form its own opinion after considering the entire evidence and giving weight to the opinion of the Sessions Judge and the jury.⁵⁶ In a reference under this section what the High Court has got to find before it can refuse to accept the verdict of the Jury is that it is *unreasonable*.⁵⁷ Before the High Court can substitute its own opinion for that of the majority of the jury, it must be able to say that in the legal sense of the expression, the jury's verdict is against the weight of evidence, that is to say, it is not such a verdict as reasonable men properly instructed could have arrived at.⁵⁸ The High Court cannot throw out a reference under S. 307 of the Criminal Procedure Code merely because it might be argued, upon the fact of the charge to the jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of

48. *Dil Monamed Sheik*, 2 CLJ 48 : 2 Cr LJ 386.

49. *Bepin Behari Mandal*, A 1959 C 659 ; (1959) Cr LJ 309 ; *Sashimohan*, A 1955 C 27.

50. *Sashimohan Debnath*, 1958 SCR 200 ; A 1958 SC 194 : 1958 Cr LJ 303.

51. *Jagamohan*, A 1947 A 99 : 48 Cr LJ 829.

52. *Muktar Ali*, 48 CWN 547 : A 1944 C

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53. *Ramjanam Tewari*, A 1935 P 357 : 36 Cr LJ 856.

54. *Bishnu Chandra*, 1933 C 665 : 34 Cr LJ 918.

55. *Shankar Balkrishna Deshpande*, 47 B 31 : 24 Bom LR 484 : AIR (1922) B 368.

56. *Kotiya*, 7 Bur LT 290 : 15 Cr LJ 513 ; 24 IC 601.

57. *Premananda Dutt*, (1925) 29 CWN 738.

58. *Khuday Gazi*, (1928) 48 CLJ 541.

the Judge and Jury.⁵⁹ Sanderson, C. J., held "When a learned Judge makes a reference to this Court under S. 307, it is the duty of this Court not only to consider the entire evidence but also to give due weight to the opinion of the learned Judge and the jury and where in the circumstances of the case it would not be right for this Court to hold that the verdict of the jury was perverse the reference ought not to be accepted".⁶⁰ On a reference under S. 307 it is the duty of the High Court to examine for itself the entire evidence in the case deriving such assistance as it can by giving what is described as due weight to the opinion of the Judge and Jury. The High Court is not bound in any way by their opinions.⁶¹

High Court can consider entire evidence as the whole matter is before it.⁶² Jurors are the Judges of fact and so far as their findings of fact are concerned they are entitled to weight.⁶³ The High Court may exercise any of the powers which it might exercise upon an appeal and this includes the power to call fresh evidence conferred by S. 428. The High Court must consider the whole case and give due weight to the opinions of the Sessions Judge and the Jury and then acquit or convict the accused. The paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. It is incumbent on the High Court when the reference is heard by it to consider the entire evidence and come to its own conclusion whether the evidence was such that it could support the verdict is against the accused.⁶⁴ High Court can order a retrial.⁶⁵

Prior to the Privy Council decision in⁶⁶ there was a conflict of opinion. One view was that the High Court will interfere with the verdict of the jury if it finds the verdict "perverse" in the sense of being unreasonable "manifestly wrong or against the weight of evidence".⁶⁷ In other cases the view has been taken that the High Court on a reference must act on its own view of the facts and is not bound by the opinion of the jury, even if not shown to be unreasonable.⁶⁸ The Privy Council accepted the former view. The view in⁶⁹ is to the same effect as the view taken in.⁶⁷

19. Real test to be applied.—In a reference under this section it is necessary for the High Court to consider the evidence that was before the Jury and the view of the Sessions Judge and also the view of the jury and after having done so to arrive at its own conclusion upon the case. The *real test* to be applied is to see whether it can be said that the verdict of

59. *Annada Charan Thakur*, 36 C 629 : 13 CWN 757 : 9 CLJ 638 : *Sheikh Neamatullah*, 17 CWN 1007 : 14 Cr LJ 556 : 21 IC 156 ; *Bhailothan Singh*, 6 PLJ 264 : 23 Cr LJ 11.

60. *Mofizel Peada*, (1925) 29 CWN 842 ; *Sheikh Neamatulla*, 17 CWN 1077 : 14 Cr LJ 556 : 21 IC 156 ; *Mamfru Chaudhury*, 51 C 418 : 38 CLJ 397 ; see per Richardson, J., in *Jamaldi Fakir*, (1923 Aug.) 28 CWN 536 (539) ; *Dhananjay Roy*, 51 C 347 : 38 CLJ 384.

61. *Nannikudumban*, 45 MLJ 406 : (1923) MWN 695 : 25 Cr LJ 145 : AIR (1924) M 232.

62. *K. M. Nanavaty v. State of Maharashtra*, A 1962 SC 605.

63. *Anjani*, A 1958 Mys 34 : 1958 Cr LJ 395.

64. *Ramyed Rai v. State of Bihar*, A 1957 SC 375 ; 1957 Cr LJ 557 ; *Ramanugraha Singh*, 50 CWN 906 : A 1946 PC 151.

65. *Rafiqueuddin Ahmad*, 39 CWN 368 : A 1933 C 184.

66. *Ram Anugraha Singh*, 73 IA 174 (182-183) : 50 CWN 906.

67. *Sham Bagdi*, 13 BLR (Appendix) 19 ; *Dada Ana*, 15 B 452 ; *Harmohan Das*, 54 C 708 ; *In re Veerappa Goendan*, 54 C 708 : *Bari Lali*, 34 Bom LR 896.

68. *Ram Chandra Roy*, 55 C 878 ; *Lyall*, 29 C 128 ; *The Crown v. Barwick*, 13 L 573.

69. *Jagamohan*, A 1947 A 99 ; 48 Cr LJ 829 ; *Nabharesh Mondal*, A 1938 C 295 ; *Sri Kishan*, A 1935 A 970 ; *Moshaken Balu*, A 1935 B 163 ; *Makhan Lal*, A 1933 C 472.

the jury was so unreasonable that the jurors could not have arrived at that verdict.⁷⁰ This case and the case of *Nritya Gopal Roy*⁷¹ was explained in *Harmohan Das's* case.⁷² Section 307 requires the Court to give due weight to the opinion of the Sessions Judge and of the jury after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the jury. In giving *due weight to the opinion of the jury*, the High Court should always hesitate to reverse a *unanimous* verdict unless it holds it to be unreasonable.⁷³ On a reference under S. 307 Cr. P. Code the High Court which has not the opportunity to see the witnesses must act with great caution and therefore it will not ordinarily interfere with the unanimous verdict of the jury, which has been accepted by the Judge with regard to some of the accused.⁷⁴ In a reference under S. 307 Cr. P. Code all that the High Court has got to decide is whether the verdict of the Jury was a reasonable verdict, which a body of reasonable men could arrive at having regard to the evidence irrespective of the question whether the High Court itself would arrive at the same conclusion after hearing the case.⁷⁵ The view in *Asgar Mandal* and other cases⁷⁶ that the High Court interferes with the verdict when it is perverse or erroneous, is no longer maintainable.

20. Unanimous Verdict—Interference.—The High Court will exercise the powers vested in it by S. 263 only in cases in which it finds the verdict of the jury clearly and undoubtedly wrong.⁷⁷ The High Court on a reference under S. 307 of the Cr. P. Code is reluctant to interfere with a unanimous verdict of jury and if that verdict is not unreasonable and can, upon the evidence, be supported it should accept it even though it may not wholly agree with it.⁷⁸

Where the evidence did not appear to the High Court hearing the reference to be so very convincing as it could accept the same as conclusive in view of the verdict of not-guilty returned by the jury, the accused was acquitted.⁷⁹ The mere fact that upon consideration of all the evidence before the Court, a Judge would have arrived at a conclusion different from that arrived at by the jury would not justify the High Court in interfering with their unanimous verdict.⁸⁰

21. Aspersions on Jurors—highly objectionable.—It is open to a Sessions Judge to disagree with the jury, it is incumbent upon him to do so, if he is clearly of opinion that such a course is necessary for the ends of justice; but this does not require that he should make reflections upon the conduct of the jurors, which are not supported by evidence on the record. Such reflections are unfair to the juror, to the Sessions Judge and to the High Court.⁸¹

22. 'After giving due weight to the opinions of the Sessions Judge and the Jury.'—Under S. 307 (3) the High Court has to give due weight to the opinion of both the Sessions Judge and jury.⁸²

70. *Galam Kader*, (1924) 28 CWN 876.

71. (1922) 38 CLJ 1.

72. (1927) 54 C 708 (715).

73. *Sagarmal Agarwalla*, (1924) 29 CWN 947 (952) : 40 CLJ 135.

74. *Akbar Molla*, (1923, Sep.) 51 C 271 : 38 CLJ 379.

75. *Ananda Charan Roy*, 21 CWN 435 : 18 Cr LJ 551 : 39 IC 695.

76. 22 CWN 811 : 20 Cr LJ 20 ; *Dhanum Kaze*, 9 C 53 ; *McCarthy*, 9 A 420.

77. *Sham Bagdee*, 20 WR (Cr) 73 : 13 BLR (App) 19.

78. *Pramatha Noth Bagchi*, 30 CLJ 503 : 21 Cr LJ 266.

79. *Garib Hari*, (1926) 30 CWN 454 (458).

80. *Chirkua*, 2 ALJ 475 : 2 Cr LJ 357.

81. *Mamfru Chaudhury*, 51 C 418 : 38 CLJ 397 : AIR (1924) C 323.

82. *Sheikh Neamatulla*, 17 CWN 1077 : 14 Cr LJ 556 : 21 IC 156. See *Dhananjay Roy*, 51 C 347 : 38 CLJ 384 ; *Ram Prasad Singh*, A 1953 P. 354 ; *Balai Ghose*, A 1930 C 141 ; 31 Cr LJ 667 ; *Ram Chandra*, 55 C 879 ; *Mofizul Peada*, 29 CWN 841 : A 1929 C 909.

In hearing a case which is referred to the High Court under S. 307 of the Cr. P. Code, the Court is not to be confined to points of difference between the Judge and the Jury, but the whole case is thrown open to the Court and it must be decided after giving the weight to the opinions of the Judge and the jury,⁸³ and it is to form its own opinion on the evidence. The 'opinion' of the jury in S. 307 of the Code of Cr. Procedure is the conclusion of the jury and not reasons on which that conclusion is based.⁸⁴ The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and the jury and then acquit or convict the accused.⁸⁵

Opinion of the Jury—meaning of.—The expression "opinion of the Sessions Judge and the jury" in sub-sec. (3) of S. 307 Cr. P. Code is equivalent to "opinion of the Sessions Judge and verdict of the jury" and it is not necessary for a Sessions Judge before making a reference to the High Court to ascertain the opinion of the jurors apart from their verdict.⁸⁶

Due weight.—See *Dhananjoy's case*⁸⁷ discussed *ante*.

23. Procedure.—The addition of the words 'such accused' in the section by the Amending Act of 1923 gives the Sessions Judge power to refer the case of the accused regarding whom he does not accept the verdict and the Judge ought to convict or acquit the other accused about whom he accepts the verdict. This was also the view of the Calcutta High Court in *Babur Ali*, 42 C. 789, and *Nritya Gopal Roy*, 38 C. L. J. 1 : 24 Cr. L. J. 897 : 75 I. C. 145 : A. I. R. (1924) C. 317. Hence the following cases which held that on reference the case of all the accused must be referred are no longer good law.⁸⁸ A person cannot be convicted of an offence of which the Jury have found him not guilty.⁸⁹

Under S. 307 a duty is imposed upon the High Court to consider the entire evidence and to acquit or convict the accused after giving due weight to the opinion of the Sessions Judge and the Jury.⁹⁰

24. Power to order retrial.—Under sub-sec. (3) of this section the High Court has ample power in a case in which there has been no proper or adequate trial, to make an order that the accused should be retried.^{90a} High Court must consider evidence and excluding inadmissible evidence can convict or acquit, without ordering retrial.⁹¹ For powers of Appellate Court *see*.⁹²

25. Reference against verdict of Acquittal.—In cases where the verdict is one of not guilty it is the practice of High Courts not to reverse the verdict unless it is perverse or manifestly wrong, on the other hand, where the jury has returned a verdict of guilty the matter stands on a different footing.⁹³

83. *Chandra Krishna*, 10 Bom LR 632 : 8 Cr LJ 143.

84. *Chellan*, 29 M 91 : 3 Cr LJ 371.

85. *Ramanugrah Singh*, 73 IA 174 : 50 CWN 906 : A 1946 PC 151.

86. *Tarapada Naskar*, 18 CWN 615 : 18 CLJ 522 : 15 Cr LJ 31 : 22 IC 175 ; *Nanni Kudamban*, 45 MLJ 406 : (1923) MWN 695 : AIR (1924) M 232 : 76 IC 289 ; *Chellan*, 29 M 91.

87. 51 C 347 : 38 CLJ 384 : AIR (1924) C 321.

88. *Udya Changa*, (1873) 20 WR (Cr) 73 ; *see Horace*, 29 C 286.

89. *Palavasa Tevan*, (1911) MWN 190 : 12 Cr LJ 140 : 9 IC 788.

90. *Mamfru Chaudhury*, (1923 Sep.) 51 C 418 : 38 CLJ 397.

90a. *Rafiqueuddin Ahmed*, 39 CWN 368 ; 36 Cr LJ 803 FB ; *Md. Adam Chohan*, A 1937 B 60.

91. *Ranadhar Kurmi*, A 1948 P 79 : 48 Cr LJ 391.

92. *Ramkishan v. Bombay State*, A 1955 SC 104.

93. *Basit*, A 1938 A 227 : 38 Cr LJ 758 ; *Sherali Baidyakar*, 38 Cr LJ 758.

In such cases, there is a much greater onus upon the Judge to convince the Appellate Court with extreme particularity than when he makes a reference with regard to a conviction.⁹⁴

26. Previous convictions.—See Commentary *ante* under the concluding words of sub-sec. (1) added by Act XVIII of 1923.

27. 'So submitted'.—See Commentary *supra* under the heading 'Powers of the High Court'.

28. High Court may exercise any of the powers which it may exercise on appeal.—See S. 423 *infra*.

29. Procedure in case of difference of opinion between the Judges disposing of a Reference under this section.—The jurisdiction which the High Court exercises in hearing a case submitted to it under S. 307 is not its original criminal jurisdiction but it hears the case as a Court of Reference in the exercise of the jurisdiction, vested in it by Cl. 28 of the Letters Patent, which is co-extensive with its appellate jurisdiction⁹⁵ and if the Court is equally divided in opinion, the procedure prescribed by S. 429 Cr. P. C. for appeals must be adopted and the case must be heard by a *third Judge*.⁹⁶

G—Re-trial of Accused after Discharge of Jury

308. Re-trial of accused after discharge of jury.—Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. "Considers that he should not be retried". |
| 2. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 100 of Act X of 1875 and is the same as that of the Code of 1882.

2. Scope.—In a case where the jury were divided in the proportion of 5 to 4 and the Judge entertained a doubt as to the guilt of the prisoner, the accused was discharged under this section.⁹⁷

The Sessions Judge has inherent power to discharge the jury, before the verdict for misconduct or other similar and sufficient ground and to empanel another. The power is discretionary and not to be used nor until the Judge has satisfied himself, by such inquiry as in the circumstances he can adopt, that reasonable grounds exist for exercising it. S. 308 applies where a jury is discharged for misconduct.⁹⁸

94. *Goothe Sardar*, A 1936 G 407 : 37 Cr LJ 1149.

95. *Horace Lyall*, 29 C 286.

96. *Parna Hazam*, 2 CLJ 77 ; *Dada Ana*, 15 B 452.

97. *Bishonath Chowbay*, 8 CWN GXXVIII.

98. *Rahim Sheikh*, 50 C 872 : 37 CLJ 595 : 24 Cr LJ 677 : AIR (1923) C 724 followed in *Rebati Mohan Chakravarty*, (1928) 32 CWN 945.

This section provides that making entry to the effect that the accused should not be retried amounts to an acquittal.⁹⁹ The Bombay High Court by a full bench decision held that though the entry has the effect of an acquittal it would not be technically correct to record an order of acquittal.¹

Where the jury empanelled at the retrial included the foreman of the previous trial, *held*, the proceedings should be laid before another jury.^{1a}

3. “**Considers that he should not be retried**”.—It is competent to a Judge when he disagrees with the majority of the jurors and discharges them under S. 305 (3) to order the accused not to be retried under this section.²

A prisoner is unanimously acquitted of some of the charges, and the jury are divided as to the rest and discharged and he is ‘retried’. Under this section before a different jury, he is not being “tried again” within the meaning of S. 403 but his retrial is on the original indictment and plea, and the Court continues the trial before another jury and the process may continue till a verdict is passed on all counts.³

H.—Conclusion of trial in cases tried by the Judge himself

309. Judgment in cases tried by the Judge himself.—

(1) When, in a case tried by the Judge himself, the case for the defence and the prosecutor’s reply (if any) are concluded, the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 562, pass sentence on him according to law.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative changes. |
| | 3. Effect of Amendment. |

1. Corresponding sections in former Codes.—This section corresponds to S. 324 of the Code of 1861, S. 255 (paragraph 1), Ss. 261 and 262 of the Code of 1872, and the Code of 1898 unamended was similarly worded as that of the Code of 1882, and was amended by S. 82 of Act XVIII of 1923.

2. Legislative changes (1955).—This section has been substituted by S. 35 of Act 26 of 1955.

3. Effect of 1955 Amendment.—The amendment is consequential on the abolition of trial with the aid of assessors. This section provides for delivery of judgment in cases tried by himself.

I.—Procedure in Case of Previous Conviction

310. Procedure in case of previous conviction.—In the case of a trial by a jury or by the Judge himself when the accused is charged with an offence and further charged that he is by

99. *Mir Ahmad Shah*, A 1929 S 145.

1. *Government of Bombay v. Abdul Wahab*, A 1946 B 38 ; 47 Cr LJ 378.

1a. *Salamatullah*, A 1941 C 328 ; 42 Cr LJ

674.

2. *Premchand K. Sahani*, A 1935 S 189 ; 36 Cr LJ 1359.

3. *Nirmal Kanta Roy*, 41 C 1072.

reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely :—

- (a) such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,
 - (i) he has been convicted of the subsequent offence, or
 - (ii) in the case of a trial by a jury, the jury have delivered their verdict on the charge of the subsequent offence ;
- (b) in the case of a trial held by the Judge himself, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

SYNOPSIS

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|--|---------------------------------|
| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. Legislative Changes. | 4. Previous conviction. |
| | 5. Verdict of jury to be taken. |

1. Corresponding sections in former Codes.—This section was new in the Code of 1882.

2. Legislative Changes.—The Section was substituted by Act 18 of 1923. Again with the abolition of assessor trial, the words “or by the Judge himself” after the opening words “In the case of a trial by a jury and in Cl (b),” the words “held by the Judge himself” have been substituted by S. 56 of Act 26 of 1955 for the words “held with the aid of assessors”.

3. Scope.—Section 310 lays down a special form of trial in the issue of liability to enhanced punishment in consequence of a previous conviction. But this section is expressly made applicable to trial before the Court of Session only, and does not apply to trials before a Magistrate.⁴

4. Previous conviction.—Must necessarily mean a conviction for an act which is an offence under the Code. Offence as defined in S. 4 (1) (o) of the Code means “any act or omission made punishable by any law for the time being in force”. These last words necessarily postulate that the law must be in force in the territories of India.⁵ See S. 511 for proof of previous conviction. This section is imperative and the further charge about previous convictions and the accused’s statements in respect thereof should not be read out and the accused should not be questioned in respect thereof unless and until he had been convicted on the charge of the subsequent offence.⁶ The Judge should include the previous convictions in his charge under S. 75 I. P. C. as also the fact, date and place of the previous convictions. If such

4. *Dehri Sonar*, (1923, January) 50 C 367 : AIR (1923) C 707.

5. *Govinda Kesheo Power v. State of M. P.*,

A 1955 N 236 : 1955 Cr LJ 1275.
6. *Raju*, A 1927 L 774 : 28 Cr LJ 687 ;
Goli, A 1930 A 17 : 31 Cr LJ 8.

statement on question of previous conviction, has been omitted, the Court can add it at any time before the sentence is passed.⁷

5. Verdict of jury to be taken.—In a case tried by jury the fact that the accused is registered member of a Criminal tribe is like a previous conviction,⁸ which should not be disclosed to the jury until after the verdict lest they might be prejudiced.⁹

311. When evidence of previous conviction may be given.—Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

SYNOPSIS

1. Corresponding sections in former Codes. can be given.
2. When evidence of previous conviction

1. Corresponding sections in former Codes.—This section corresponds to the last paragraph of S. 313 of Act X of 1882.

2. When evidence of previous conviction can be given.—A full bench of the Calcutta High Court has held that under S. 54 of the Evidence Act a previous conviction is in all cases admissible as evidence against an accused person.¹⁰ S. 45 of the Evidence Act was modified according to the above decision¹⁰ as pointed out in *Nabakumar Patnaik*.¹¹ According to this section evidence of previous conviction can be given if it is relevant under the Evidence Act and in the manner and circumstances provided for in the Act.¹²

A *kaifut* or report from the Record Officer that A had been convicted of a crime, is no evidence of a previous conviction.¹³

J—List of Jurors for High Court, and summoning Jurors for that Court

312. Number of special jurors.—The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list.

SYNOPSIS

1. Corresponding sections in former Codes. —Bombay.
2. Legislative Changes. —Madras.
3. State Amendments.
4. Effect of Amendment.

1. Corresponding sections in former Codes.—This section corresponds to S. 40 of Act X of 1875.

2. Legislative Changes.—This section has been substituted in the place of old S. 312 by S. 12 of the Criminal Law Amendment Act, 1923 (XII of 1923).

7. *Abbulu*, 11 Cr LJ 217; *Venkata Subbaraya*, A 1943 M 418.
 8. *Moshaheb Dome*, A 1940 P 14 : 40 Cr LJ 33 (2).
 9. *Manindra Nath Mallik*, A 1947 C 158 : 47 Cr LJ 685.
 10. *Kartick Chandra Das*, (1887) 14 C 721

(FB).
 11. (1897) 1 CWN 146.
 12. *Govind Kesheo Power v. State of M. P.*, A 1955 N 236: 1955 Cr LJ 1275.
 13. *Sheikh Ramzan*, (1871) 6 Beng LR App 151.

The proviso was omitted by Act 17 of 1949, S. 3 (2).

3. State Amendments.

(1) **Bombay.**—In the heading “J” after the words “High Court”, the words “and the Court of Session for Greater Bombay” and for the words “that Court”, the words “such Court” were inserted by Bombay Act 32 of 1948.

After the word ‘list’ in S. 312 the words “for the High Court and the Court of Session for Greater Bombay” were inserted by Bombay Act 32 of 1948.

(2) **Madras.**—The heading “J—List of Jurors for High Court and summoning jurors for that Court” and the provisions thereunder, namely Ss. 312 to 318 omitted by Madras Act 34 of 1955.

4. **Effect of the Amendment.**—The proviso was not to be found in Cl. 72 of Original Bill III of 1924 and it seems the Legislature meant to include more non-Europeans in the list.

313. Lists of common and special jurors.—(1) The Clerk of the State shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

(a) a list of all persons liable to serve as common jurors ;
and

(b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors’ list merely because he may have been entered in the special jurors’ list for a previous year.

(4) The State Government may exempt any salaried servant of the Government from serving as a juror.

Discretion of officer preparing lists.—(5) The clerk of the State shall, subject to such rules as aforesaid, have full discretion to prepare the said lists as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative Changes.
3. State Amendment.

- Madras.
4. Rules.

1. Corresponding sections in former Codes.—This section corresponds to Ss. 42 and 43 of Act X of 1875, and S. 313 of the Code of 1898 as it stood before the amendment was almost similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words “or the Local Government” in sub-sec. (4) were inserted by S. 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

3. State Amendment.—

Madras.—Section 313 has been omitted by Act 34 of 1955.

4. Rules.—For rules made by the High Court, North-Western Provinces, under this section, in conjunction with S. 276, *see* United Provinces and Oudh *Gazette*, 1902, Pt. II, p. 539 ; for rules by the High Court, Madras, under this section, *see* Mad. R. and O. ; for rules by the High Court, Calcutta, *see* Ben. R. and O. Jury Rules of the Calcutta High Court are contained in Ch. 37 of the Original Side Rules.

314. Publication of lists, preliminary and revised.—
(1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the State, shall be published once in the *Official Gazette* before the fifteenth day of April next after their preparation.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the *Official Gazette* before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the court-house.

SYNOPSIS

1. Corresponding sections in former Codes. —Madras.
2. State Amendment.

1. Corresponding sections in former Codes.—This section corresponds to S. 44 of Act X of 1875 and is the same as S. 314 of the Code of 1882.

2. State Amendment.—

Madras.—Section 314 has been omitted by Act 34 of 1955.

315. Number of jurors to be summoned.—(1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve on special or common juries respectively as the Clerk of the State considers necessary.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

Supplementary summons.—(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

SYNOPSIS

1. Corresponding sections in former Codes. —Bombay.
2. Legislative Changes. —Madras.
3. State Amendments.
4. Sub-section (3)—Applicability.

1. Corresponding sections in former Codes.—This section corresponds to S. 45 of Act VIII of 1875 and the Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words “in the Town.....necessary” in sub-sec. (1) were substituted by S. 84 of Act XVIII of 1923 for the words “in each Presidency Town at least twenty-seven of those who are liable to serve on special juries and fifty-four of those who are liable to serve on common juries.”

3. State Amendments.—

(1) **Bombay**—In sub-sec. (1) for the words “in the town which is the usual place of sitting of each High Court” the words “of the High Court in the town which is the usual place of sitting of such High Court and for such Sessions of the Court of Sessions for Greater Bombay” were substituted by Bombay Act 32 of 1948.

(2) **Madras.**—Section 315 has been omitted by S. 24 of Madras Act 34 of 1955.

4. Sub-section (3)—Applicability.—Sub-section (3) does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of Ss. 276 and 279 (2) and the trial has already begun.¹⁴

316. Summoning jurors outside the place of sitting of High Courts.—Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

SYNOPSIS

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|--|---------------------|
| 1. Corresponding sections in former Codes. | 3. State Amendment. |
| 2. Legislative Changes. | —Madras. |

1 Corresponding sections in former Codes.—This section corresponds to S. 50 of Act X of 1875 and S. 316 of the Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words ‘town which....High Court’ have been substituted for the words “presidency towns” by S. 85 of the Criminal Procedure Amendment Act XVIII of 1923.

3. State Amendment.

Madras.—Section 316 has been omitted by S. 24 of Madras Act 34 of 1955.

317. Military jurors.—(1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in the Indian Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

14. *Sewaram Jathanand*, A 1929 S 209: 41 Cr IJ 28.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code, but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent official duty, or for any other special official reason.

SYNOPSIS

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|--|---------------------|
| 1. Corresponding sections in former Codes. | 3. State Amendment. |
| 2. Legislative changes. | —Madras. |

1. Corresponding sections in former Codes.—This section corresponds to S. 51 of Act X of 1875 and is similarly worded as that of the Code of 1882.

2. Legislative changes.—The word “*official*” was substituted for the word ‘military’ by Act X of 1927.

3. State Amendment.

Madras.—Section 317 has been omitted by S. 24 of Madras Act 34 of 1955.

318. Failure of jurors to attend.—Any person summoned under Section 315, Section 316 or Section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Madras. |
| 2. State Amendment. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 46 of Act X of 1875 and is similarly worded as that of the Code of 1882.

2. State Amendment.

Madras.—Section 318 has been omitted by S. 24 of Act 34 of 1955.

K.—List of Jurors for Court of Session, and summoning Jurors for that Court

319. Liability to serve as jurors.—All persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors at any trial held within the district in which they reside, or, if the State Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

SYNOPSIS

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|--|---------------------|
| 1. Corresponding sections in former Codes. | 4. State Amendment. |
| 2. Legislative Changes. | —Bombay. |
| 3. Effect of Amendment. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 303 of the Code of 1861 and S. 404 of the Code of 1872. The words “or, if the Local Government on consideration of local circumstances, has fixed any smaller area in this behalf within the area so fixed” were new in the Code of 1898 and the words that precede these expressions are same as in the Code of 1882.

2. Legislative Changes (1955).—The word ‘male’ after ‘All’ and the words ‘or assessors’ after the word ‘jurors’ have been omitted by S. 57 of Act 26 of 1955.

3. Effect of Amendment.—Now women also shall be liable to serve as jurors. The omission of the words “or assessors” is a consequential amendment after the abolition of trial with the aid of assessors.

4. State Amendment.

Bombay.—In the heading ‘K’ after the words ‘Court of Session’ the words ‘other than the Court of Session for Greater Bombay’ were inserted by Bombay Act 32 of 1948.

320. Exemptions.—The following persons are exempt from liability to serve as jurors namely :—

- (a) officers in civil employ superior in rank to a District Magistrate ;
- (aa) members of Parliament or members of the Legislature of any State ;
- (b) salaried Judges ;
- (c) Commissioners and Collectors of Revenue or Customs ;
- (d) police-officers and persons engaged in the Preventive Service in the Customs Department ;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty ;
- (f) persons actually officiating as priests or ministers of their respective religions ;
- (g) persons in the Indian Army, Navy, or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors ;
- (h) surgeons and others who openly and constantly practise the medical profession ;
- (i) legal practitioners (as defined by the Legal Practitioners’ Act, 1879), in actual practice ;
- (j) persons employed in the Post-Office and Telegraph Departments ;

- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, Sections 640 and 641^{14a};
- (l) other persons exempted by the State Government from liability to serve as jurors.

SYNOPSIS

1. Corresponding sections in former Codes. 2. Legislative Changes.

1. Corresponding sections in former Codes.—This section corresponds to S. 335, paragraph 1, of the Code of 1861, S. 406 of the Code of 1872, and excepting Cl. (i) which was new in the Code of 1898, is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The words 'or assessors' in the heading 'K' as also in Ss. 320, 321, 324, 326-32 and 339-A were omitted by S. 58 of Act 26 of 1955.

321. List of jurors.—(1) The Sessions Judge, and the Collector of the district or such other officer as the State Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under Section 278, Clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person.

SYNOPSIS

1. Corresponding sections in former Codes. —Madras.
2. Legislative Changes. —West Bengal.
3. State Amendments.

1. Corresponding sections in former Codes.—This section corresponds to S. 329 of the Code of 1861 and S. 400 of the Code of 1872 and is similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words 'and if the person is a European or an American, the list shall mention the race to which he belongs' at the end of sub-sec. (2) were deleted by Act I of 1951. The words 'or assessors' were omitted by S. 58 of Act 26 of 1955.

3. State Amendments.

(1) **Madras.**—In sub-sec. (1) after the words 'collectors of the district', the brackets and the words '(or the collector of Madras in the Presidency-town of Madras)' have been inserted by S. 25 of Madras Act 34 of 1955.

(2) **West Bengal.**—Sections 321, 323, 324, 325, 326 and 332 and Form XXXIII of Schedule V of the Code shall be construed in their application to the city Sessions Court as if references therein to assessors were omitted, reference to the District Magistrate or the Collector were reference to the Chief Presidency Magistrate, Calcutta, and in S. 322 the reference to the District Court was a reference to the City Sessions Court—*Vide* S. 9 (2) City Sessions Court, W. B. Act 20 of 1953.

In forming a jury a Sessions Judge should endeavour to seek for persons of an independent condition in life, men of judgment and of experience.¹⁵

14a. See now Code of Civil Procedure 1908 (V of 1908), Ss. 132 and 133.

15. *Ram Dutt Chowdhry*, (1874) 23 WR (Cr) 35.

But not a gentleman of a high position such as a hereditary Raja unless it was known that he would be willing to act as such¹⁶ should be enlisted.

322. Publication of list.—Copies of such list shall be struck up in the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

SYNOPSIS

1. Corresponding sections in former Codes. —West Bengal.
2. State Amendments. —Madras.

1. Corresponding sections in former Codes.—This section corresponds to S. 380, paragraph 1, of the Code of 1861 and S. 401, paragraph 1, of the Code of 1872, and excepting the words '*extracts therefrom*' which were added in the Code of 1898, is the same as that of the Code of 1882.

2. State Amendments.

(1) **West Bengal.**—See under S. 321.

(2) **Madras.**—After the words 'District Court', the words 'Or, as the case may be, of the Chief Presidency Magistrate and of the Sessions Court' have been inserted by S. 26 of Madras Act 34 of 1955.

323. Objections to list.—To every such copy or extract shall be sub-joined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

SYNOPSIS

1. Corresponding sections in former Codes. —West Bengal.
2. State Amendment.

1. Corresponding sections in former Codes.—This section corresponds to S. 401, paragraph 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. State Amendment.

West Bengal.—See under S. 321.

324. Revision of list.—(1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or who may establish his right to any exemption from service given by Section 320 and insert the name of any person omitted from the list whom they deem qualified for such service.

16. *Raja Bhup Indar Singh*, (1897) Awn 167.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

Annual revision of list.—(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Restoration of Names cancelled from the list of jurors. |
| 2. State Amendment.
—West Bengal. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 331 of the Code of 1861, S. 402 of the Code of 1872 and is the same as that of the Code of 1882.

2. State Amendment.

West Bengal.—See under S. 321.

3. Restoration of Names cancelled from the list of jurors.—An order restoring the names of the jurors which were cancelled from the list is not a judicial order.¹⁷

325. Preparation of list of special jurors.—In the case of any district for which the State Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

17. *Narayan Chandra v. Bonamali Das*, 38 CWN 363 : A 1934 C.

SYNOPSIS

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|--|-----------------------------|
| 1. Corresponding sections in former Codes. | 2. State Amendment.—Madras. |
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1. Corresponding sections in former Codes.—This section corresponds to S. 325-A of Act X of 1882.

2. State Amendment.

Madras.—In sub-sec. (1) after the words “District Magistrate”, the words “or in the Presidency Town of Madras, the Chief Presidency Magistrate” has been inserted by Madras Act 34 of 1955. In sub-sec. (1) after the words ‘any district’ the brackets and words “(including the Presidency Town of Madras)” and after the words “the Collector of such district” the brackets and words “(or the Collector of Madras in the Presidency Town of Madras)” have been inserted by Madras Act 34 of 1955.

326. District Magistrate to summon jurors.—(1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury at the said Sessions, the number to be summoned not being less than double the number required for any such trial.

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

SYNOPSIS

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|--|--|
| 1. Corresponding sections in former Codes. | —Madras. |
| 2. Legislative changes. | 4. Scope. |
| 3. State Amendment. | 5. Summoning of less than double is a mere irregularity. |

1. Corresponding sections in former Codes.—This section corresponds to S. 336 of the Code of 1861, S. 407 of 1872, and the Code of 1898 before amendment was similarly worded as that of the Code of 1882.

2. Legislative changes.—In sub-sec. (1) the words “and Trial with the aid of assessors” after the word ‘jury’ were omitted by Act 26 of 1955. The concluding words of sub-sec. (1) and sub-secs. (3) and (4) added by Act 18 of 1923 were omitted by Act 17 of 1949.

3. State Amendment.

Madras.—In sub-sec. (1) after the words ‘or in the Presidency Town of Madras, the Chief Presidency Magistrate’ have been inserted by Madras Act 34 of 1955.

4. Scope.—Section 326 provides that those who are to be summoned to act upon the Jury are to be drawn by lot among the whole body of persons who are liable to serve as Jurors.¹⁸

5. Summoning of less than double is a mere irregularity.—It has been held by a full bench of the Calcutta High Court that it is no part of the intention of the Legislature to have a large area of selection to the persons attending upon the summons. Where in a murder case the

18. *Brojendra Lal Sircar*, (1902) 7 CWN 188.

jurors summoned are fourteen, nine of whom appear and are chosen by lot, the trial is not bad.¹⁹ The Allahabad view²⁰ and the Patna view²¹ also is that although the underlying principle in a trial by jury is to serve an impartial trial, S. 537 will cure the defect.

327. Power to summon another set of jurors.—The Court of Session may direct jurors to be summoned at other periods than the period specified in Section 326, when the number of trials before the Court renders the attendance of one set of jurors for a whole Session oppressive, or whenever for other reasons such direction is found to be necessary.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative changes. |
| | 3. Fresh set of jurors if can be summoned. |

1. Corresponding sections in former Codes.—This section corresponds to S. 338 of the Code of 1861, S. 410 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words 'or assessors' occurring after 'jurors' have been omitted by S. 56 of Act 26 of 1955.

3. Fresh set of jurors if can be summoned.—Where after summoning the jurors the case is adjourned, the Sessions Judge has power under this section to summon a fresh set of jurors, if he thinks fit to do so and to take steps to obtain a sufficient number of jurors to avoid a suggestion of packing of jurors.²²

328. Form and contents of summons.—Every summons to a juror shall be in writing, and shall require his attendance as a juror at a time and place to be therein specified.

SYNOPSIS

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|--|-------------------------|
| 1. Corresponding sections in former Codes. | 2. Legislative changes. |
|--|-------------------------|

1. Corresponding sections in former Codes.—This section corresponds to S. 337 of the Code of 1861, S. 409 of the Code of 1872 and is the same as that of the Code of 1882.

See Sch. V Forms XXXII and XXXIII respectively.

2. Legislative changes (1955).—The words 'or assessor' after 'juror' have been omitted by Act 26 of 1955.

329. When Government or Railway servant may be excused.—When any person summoned to serve as a juror is in the service of the Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his

19. *Erman Ali*, 57 C 1228 : A 1930 C 212 (FB) : 31 Cr LJ 536, Case of *Amir Khan*, 33 CWN 1053 and *Tamizuddin*, 33 CWN 1054 ; *Serajul Islam*, 55 C 794 : 29 Cr LJ 927, *Rahmat Sheikh*, 54 C 1027 which held a contrary view have been overruled; *Mahabir Singh*,

A 1946 C 36; 47 Cr LJ 446.

20. *Lala*, 55 A 210; 35 Cr LJ 668.

21. *Bihari Mahton*, A 1931 P 152 : 32 Cr LJ 797.

22. *Bakhori Gope v. Abdul Halim*, A 1941 P 362.

attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror without inconvenience to the public.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative changes.

1. Corresponding sections in former Codes.—This section corresponds to S. 339 of the Code of 1861, S. 411 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words ‘or assessor’ have been omitted by Act 26 of 1955.

330. Court may excuse attendance of juror.—(1) The Court of Session may, for reasonable cause, excuse any juror from attendance at any particular Session.

Court may relieve special jurors from liability to serve again as jurors for twelve months.—(2) The Court of Session may, if it shall think fit at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative changes.

1. Corresponding sections in former Codes.—This section corresponds to S. 340 of the Code of 1861, S. 412 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words ‘or assessor’ have been omitted by Act 26 of 1955.

331. List of jurors attending.—(1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors at such session.

(2) Such list shall be kept with the list of the jurors as revised under Section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative Changes.
3. Scope.

1. Corresponding sections in former Codes.—This section corresponds to S. 341 of the Code of 1861, S. 413 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The words “and assessors” have been omitted by Act 26 of 1955.

3. Scope.—This section contemplates a stage at which it should be ascertained whether the jurors have attended or not and that stage is when their names are called out for empanelling.²³

332. Penalty for non-attendance of juror.—(1) Any person summoned to attend as a juror who, without lawful excuse, fails to attend as required by summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any movable property belonging to such juror within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —West Bengal. |
| 2. Legislative Changes. | —Madras. |
| 3. State Amendments. | 4. Fines. |

1. Corresponding sections in former Codes.—This section corresponds to S. 354 of the Code of 1861, S. 414 of the Code of 1872 and, excepting sub-sec. (3) introduced in the Code of 1898, is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The words ‘or as an assessor’ in sub-sec. (1) and ‘or assessor’ in sub-sec. (2) have been omitted by Act 26 of 1955.

3. State Amendments.

West Bengal.—See under S. 321.

Madras.—In sub-sec. (3), after the words ‘District Magistrate’ the words ‘or in the Presidency town of Madras, the Chief Presidency Magistrate’ were inserted by Madras Act 34 of 1955.

4. Fines.—The order of a Sessions Judge under S. 354 of the Code of 1861 fining an Assessor is not applicable, nor liable to be interfered with by the High Court under S. 404 of that Code.²⁴

L—Special provisions for High Courts

333. Power of Advocate General to stay prosecution.—At any stage of any trial before a High Court under

23. *Lala*, A 1933 A 940 : 35 Cr LJ 662.

24. *Gour Mohan Dass*, (1867) 8 WR (Cr) 83.

this Code, before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Government that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Madras. |
| 2. State Amendments. | 3. Scope. |
| —Bombay. | 4. Distinction between Ss. 333 and 494. |

1. Corresponding sections in former Codes.—This section corresponds to S. 146 of Act X of 1875 and is the same as that of the Code of 1882.

2. State Amendments.

Bombay.—In the heading 'L' after the words 'High Courts' the words 'and the Court of Sessions for Greater Bombay' were inserted by Bombay Act 32 of 1948.

Madras.—The heading 'L—Special provisions for High Courts' have been omitted by Madras Act 34 of 1955.

3. Scope.—It is called *nolle prosequi* and at the third Trial the Advocate General entered *nolle prosequi* or stay of proceedings under S. 333 and the accused were discharged.²⁵

When the Jury returned a verdict of "not guilty" by a majority of seven to two the Judge disagrees with this verdict, the Advocate-General entered stay of proceedings under S. 333 of the Code and the accused was discharged.²⁶

4. Distinction between Ss. 333 and 494.—The provision corresponding to the power of the Attorney General to enter *nolle prosequi* is S. 333 which refers to jury trials in the High Court. The provisions under S. 494 does not correspond to it.²⁷

334. Time of holding sittings.—For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. State Amendment. |
| | —Madras. |

1. Corresponding sections in former Codes.—This section corresponds to S. 4 of Act X of 1875 and is the same as that of the Code of 1882.

2. State Amendment.

Madras.—Section 334 has been omitted by Madras Act 34 of 1955.

25. *Nirmal Kanta Roy*, 41 C 1072 (1091) overruled in *Barendra Kumar Ghosh's case*, 52 C 197 on the construction of S. 34 IPC.
26. *Nirmal Kanta Roy's case*, (1914) 41 C 1072 (1091) overruled by *Barendra*

Nath Ghose, 52 C 197 on the construction of S. 34 IPC.

27. *State of Bihar v. Ram Naresh*, 1957 SCR 336 : A 1957 SC 389 (394); 1957 Cr LJ 567 where *Arch-Bold*, 32nd ed pp 108, 109, S. 12 referred to.

335. Place of holding sittings.—(1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the State Government may direct.

(2) But it may, from time to time, with the consent of the State Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

Notice of sittings.—(3) Such officer as the Chief Justice directs shall give notice beforehand in the Official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. State Amendment.
—Madras. |
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1. Corresponding sections in former Codes.—This section corresponds to S. 5 of Act X of 1875 and is the same as that of the Code of 1882.

2. State Amendment.

Madras.—Section 335 has been omitted by Madras Act 34.

336. [*Place of trial of European British subjects.*] *Rep. by the Criminal Law Amendment Act, 1923 (12 of 1923), Section 20.*

CHAPTER XXIV

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

337. Tender of pardon to accomplice.—(1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, Sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the

offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(2B) In every case where the offence is punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been examined under sub-section (2), then, notwithstanding anything contained in sub-section (2A), a Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 10. "Or any offence S. 477-A". |
| 2. Legislative Changes (1923 and 1955). | 11. Sections 337 and 494—Distinction. |
| 3. State Amendments. | 12. Who can grant pardon. |
| —Bombay. | 13. 'May at any stage of investigation or inquiry into or the trial of an offence.' |
| —Saurashtra. | 14. 'Any person supposed offence.' |
| —Madras. | 15. Proviso. |
| —West Bengal. | 16. 'To such person on his making a full and true disclosure.' |
| 4. Report of the Select Committee—(1923). | 17. Effect of Pardon. |
| 5. Effect of 1923 and 1955 Amendments. | 18. Sub-section (1-A). |
| 6. Scope of old section. | 19. Sub-section (2). |
| 7. Scope of present section. | 20. 'Shall be examined in the subsequent trial if any.' |
| 8. Applicability of section. | 21. Sub-section (2-A). |
| 9. Tender of pardon by Special Judge. | |

22. Sub-section (2-B).
 23. Sub-section (3).
 24. 'Shall be detained in custody.'

25. Forfeiture of Pardon.
 26. Approver's evidence.

1. Corresponding sections in former Codes.—This section corresponds to S. 209 of the Code of 1861, S. 347 of the Code of 1872 and the Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes (1923).—This section is altogether recast. Proviso to Cl. (1) and Cl. (1-A) and proviso to Cl. (1-A) and Cl. (2-A) are altogether new. In Cl. (3) the words "unless he is already on bail" are substituted for the words "if not on bail." Cl. (4) has been deleted.

(1955).—In sub-sec. (1) the words "which may extend to seven years" have been substituted for the words "which may extend to ten years, or an offence punishable under S. 211 of the Indian Penal Code with imprisonment which may extend to seven years" and the figures and letters '161, 165, 165-A' have also been inserted and sub-sec. (2-B) has been added by Act 26 of 1955.

3. State Amendments.

Bombay.—In the proviso to sub-sec. (1) the words 'other than the District Magistrate' were deleted and from the words 'sanction of the District Magistrate' the words 'sanction of the Sessions Judge' were substituted by Bombay Act 23 of 1951.

Saurashtra.—Same as in Bombay, *vide*, Saurashtra Act 4 of 1952.

Madras.—In sub-sec. (1) the words 'High Court or' have been omitted, and in sub-sec. (2-A) the words 'or High Court as the case may be' have been omitted by Madras Act 34 of 1955.

West Bengal.—In the West Bengal Criminal Law Amendment (Special Courts) Act, 21 of 1949, the following sub-section has been inserted by the West Bengal Criminal Law Amendment Act 26 of 1956. '(1-A)—sub-sec. (2-A) of S. 337 of the Code of Criminal Procedure shall not apply and shall be deemed never to have been applied to West Bengal'.

4. Report of the Select Committee.—(1923).—"After considerable discussion of the provisions of S. 337 and examination of the large body of opinions on this clause, we have unanimously come to the following decisions :—

- (a) Instead of including all offences punishable with imprisonment for a term which may extend to seven years, we have made the limit ten years, and have added, as special cases, Ss. 211, 216-A, 369, 401, 435 and 477-A of the Indian Penal Code.
- (b) The Magistrate who should be allowed to tender a pardon should, in our opinion, be Magistrates of the first class who are inquiring into the offence and any District Magistrate, Presidency Magistrate, Sub-Divisional Magistrate or with the sanction of the District Magistrate, a Magistrate of the first class, having jurisdiction in any place where the offence might be inquired into or tried.
- (c) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun.
- (d) We have deleted the words "other than a Presidency Magistrate." We see no reason why Presidency Magistrates should not record their reasons for tendering a pardon.
- (e) We do not agree with the Committee of 1916 that it should not be necessary to produce as a witness in the Sessions Court an accused person who has accepted a pardon.
- (f) We think all cases in which there is an approver should be com-

mitted for trial, and we have deleted the provision which enabled cases to be transferred to S. 30 Magistrates."

5. Effect of the 1923 Amendment.—The procedure with regard to the plea contemplated by the proviso to sub-sec. (1) is, as the Select Committee observes, to be found in the new S. 339-A. The addition of "or any offence477A" in sub-sec. (1) by the Amending Act XVIII of 1923 has the effect of overruling the following cases,²⁸ which have held that S. 337 requires that there should be an offence that is triable exclusively by a Court of Session, and modifying and restoring *Mahandu*.²⁹ The words "Sub-divisional Magistrate" have been added by the amendment. The first proviso invests a Magistrate of the first class with jurisdiction in a place when the offence might be inquired into or tried by obtaining the sanction of the District Magistrate. See *Sultan Khan's case*³⁰ overruled by S. 339 (1). The following decisions³¹ in so far as they lay down that a tender of pardon can be made only during an inquiry into an offence under the Code are no longer good law as under the amended section pardon might be granted *after* the Magisterial inquiry has begun. Proviso (1-A) enjoins that the Magistrate tendering a pardon under sub-sec. (1) shall record his reasons for so doing, this has the effect of superseding the following decision³² and of restoring the views in *Banu Singh* and other case.³³ The words "Presidency Magistrates" in sub-sec. (1) have been deleted. They should also record reasons for tendering pardon. The proviso (1-A) further provides for furnishing copy of the record by the Magistrate of his reasons for tendering pardon on payment of costs unless for some special reason the Magistrate dispenses with the costs. In sub-sec. (2) the words printed in Italics have been substituted for the expression "the case" to make the meaning clear so as to include the subsequent trial and not to restrict it to the preliminary inquiry and have in effect superseded the following decisions.³⁴ Proviso (2-A) provides for committing the approver for trial before the Court of Sessions or the High Court when the Magistrate tendering the pardon has reasonable grounds for believing that the approver is guilty of an offence. This provision is an improvement over sub-sec. (4) of the old Code. It does not disqualify the Magistrate tendering pardon from committing the approver for trial before the Court of Sessions.

It has been decided in *Paban's case*³⁵ that a Local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others charged with him.

A pardon granted by the Government is not granted under this section.³⁶ See S. 401 (5-A) which provides for 'conditional pardon'.

Sub-section (4) is repealed, because the first part of that sub-section has been re-enacted as sub-sec. (2-A) and the latter part was also thought redundant in view of sub-sec. (2-A).

28. *Sheobhajan Ahir*, 2 Pat LT 125 : *Paban*, 10 CWN 847 : 4 Cr LJ 44 ; *Harumal Parmanand*, (1914) 9 SLR 43 : 15 Cr CJ 632 : 30 IC 456.

29. 1 L 120 : 1 LLJ 182 : 21 Cr L7 599 : 57 IC 167.

30. 5 ALJ 69.

31. *Motilal Hiralal*, (1921) 46 B 61 : 23 Bom LR 884 : 22 Cr LJ 728 : 64 IC 40 : AIR (1922) B 138 ; *Shamacharan*, 13 Cr LJ 588 : 15 IC 1004.

32. *Waryam Singh*, 5 LLJ 407 : 25 Cr LJ

174 : 76 IC 398 : AIR (1924) L 90.
33. 5 CLJ followed in 224 *Annada Charan Thakur*, 36 C 629.

34. *Ramasami*, (1900) 24 M 321 ; *Aiagiri-swami*, 33 M 514 : 5 IC 831 : (1910) MWN 5 followed in *Andul*, (1911) SLR 174 : 13 Cr LJ 33 : 13 IC 273.

35. 33 C 1353 : 10 CWN 847 : 4 Cr LJ 44 : *Bawar Faquir Singh*, 65 IA 388 : A 1938 PC 266 ; 40 Cr LJ 366.

36. *Alladad*, 9 PR 1906 : 4 Cr LJ 282.

(1955).—As Ss. 161, 165-A or 165-A I. P. C. are scheduled offences mentioned in the Criminal Law Amendment Act (XLV) of (1952) which provides for trial of these offences and the aggravated offence under S. 5 (2) of Act II of 1947 by the Special Judge, it is a mere consequential amendment. Though the old section did not apply to S. 161 I. P. C., it was held that the non-applicability of the section does not render the accomplice's evidence in such cases inadmissible.³⁷

6. Scope of the old section.—It is not necessary, in order to make an accomplice a competent witness, that the procedure prescribed by this section should be invariably made use of.³⁸ The Calcutta High Court has held that S. 494 may also be resorted to.³⁹

The meaning of sub-sec. (3) old Code is that the approver shall not be set at large until the judicial proceedings pending against the accused are finished.⁴⁰

Object of old sub-section (3)—is to secure the evidence of the approver for such trial.⁴¹

7. Scope of the present section.—The expression 'inquiries and trials' in the heading of Chapter XXIV refers to inquiries contemplated under Chapter XVIII in cases triable by a Court of Session which may include enquiries under Chapters X and XII and trials in summons cases, warrant cases, summary trials and trials by Courts of Session.⁴² This section applies only to cases concerning graver offences specified therein for obtaining the evidence of approvers and provides a safeguard against the State and the accused.⁴³ S. 337 is merely an enabling section that empowers a Magistrate to grant a pardon to any person supposed to be concerned in or privy to the offence and the word 'accused' in Ss. 342 and 343 must mean a person who is accused in the case that is proceeding before the Magistrate.⁴⁴ When an approver has been tendered a pardon under S. 337 (1) and he has accepted the tender, his statement can be legally recorded under S. 164 as an affirmation. Such a statement will be admissible against him at a subsequent trial after the forfeiture of the pardon for an offence in respect of which the pardon was tendered.⁴⁵

8. Applicability of section.—Under Ss. 337 and 338 it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by a Court of Session.⁴⁶ The Lahore High Court has however held in *Sardara*⁴⁷ that S. 337 applies where there is a *bona fide* enquiry into what it is believed at the time may prove to be an offence triable by the Court of Sessions, and held in *Balmukand*,⁴⁸ that it is permissible to the Magistrate inquiring into any offence triable exclusively by the Court of Session or High Court to tender a pardon to any person

37. *Hara Prasad Agarwalla*, 45 A 226 : A 1923 A 91.

38. *Har Prasad Bhargava*, (1922) 45 A 226 : 21 ALJ 42 : AIR (1923) A 91.

39. *Intya Salabat Khan*, 37 B 146 : 14 Bom LR 897 : 13 Cr LJ 842.

40. *G. v. Raman*, (1929) 33 CWN 468.

41. *In re, Dagadu Bapu*, (1921) 46 B 12 : 23 Bom LR 839 : 22 Cr LJ 620 : 63 IG 156 : AIR (1922) B 177.

42. *Artaram Maheswara*, A 1956 Or 129 : 1956 Cr LJ 908.

43. *Harihar Sinha*, 40 CWN 876 : A 1936

C 356 (FB).

44. *Amdu Mian*, A 1937 N 17 : 38 Cr LJ 237 (FB) ; *Har Prasad Bhargava*, 45 A 226 : 25 Cr LJ 497.

45. *Ranbhorose*, A 1944 N 105 (FB) at P 118.

46. *Kanshiram*, (1922) 6 NLR 144 : 24 Cr LJ 566 : 73 IC 262 : AIR (1923) N 248.

47. (1921) 22 Cr LJ 676 : 63 IC 612 (L).

48. 246 PLR 1915 : 17 PR Cr 1915 : 16 Cr LJ 354.

supposed to have been directly or indirectly concerned in, or privy to any offence.

No pardon can under this section be granted in respect of an offence under S. 5 of the Official Secrets Act, as this offence is punishable with imprisonment which may extend to two years.⁴⁹ Although *prima facie* according to the language of this section the case of the accused whose case has been separated would seem to be within the scope of this section there is no warrant for saying that before he could be examined as a witness pardon should have been granted to him.⁵⁰ The question of tender of pardon is not to be decided with reference to the charges under which an accused person is committed to the Court of Session, it depends upon the question as to whether or not the offence alleged against an accused person or persons is one which is mentioned in this section.⁵¹

9. Tender of pardon by Special Judge.—This section empowers only a Magistrate to tender pardon and has nothing to do with the powers of a Special Judge. But considering that he has powers to tender pardon under S. 8 (2) of the Criminal Law Amendment Act the tender of pardon to the accused by a Special Judge cannot be held to be invalid.⁵² Reading the proviso to Ss 337 and 338 it appears that a District Magistrate empowered to tender pardon even after commitment under S. 8 (2) of the Criminal Law Amendment Act, 1952, the Special Judge has also been granted power to tender pardon.⁵³ In West Bengal, S. 337 (2-B) does not apply to a trial under the West Bengal Criminal Law Amendment Special Courts Act 1949 as amended by W. B. Act 26 of 1956.

If pardon is not granted by the Magistrates specially empowered as mentioned in sub-sec. (1) the proceedings will not be void. See S. 529 (g). It has been held however in *Chidda's case*⁵⁴ that where the Magistrate having no jurisdiction to tender pardon did tender pardon, his action was not covered by S. 529 (g).

10. 'Or any offence.....S. 477-A.'—These words have been added by S. 86 of the Amending Act XVIII of 1923 and by the insertion of these words the following decisions under the old Code⁵⁵ which held that the section is applicable only to cases or charge of an offence triable exclusively by a Court of Sessions are no longer good law.

11. Sections 337 and 494—Distinction.—The proceedings to be taken under S. 337 are different in character from those to be taken under S. 494. The former section deals with the action of a judicial, the latter of an executive officer. S. 494 says nothing about pardon at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court which may be determined on many possible grounds, one of which no doubt, is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under S. 494 differ from those under

49. *A. L. Mehra*, A 1958 Punj 72 : 1958 Cr LJ 413.

50. *Kandasami Goendar, In re*, A 1957 M 727 : 1957 CLJ 1287.

51. *Anilash Chandra*, A 1951 Ass 122 (2) : 52 Cr L J 1222.

52. *Bhansingh Jubar Singh*, 1957 Cr LJ 67 (MB).

53. *Kamla Prasad v. Delhi Administration*, 1958 SCJ 668 : A 1958 SC 350 : *Shan-*

ker Bhaurao Khiroda, A 1959 B 437 : 1959 Cr LJ 1153.

54. 20 A 40.

55. *Mahandru*, 1 L 102 : 1 LLJ 182 : 89 PLR 1920 : 21 Cr LJ 599 : 59 IC 167 ; *Sheobhajan Ahir*, 2 Pat LT 125 ; overruled and *Motilal Hiralal*, 46 B 61 : 23 Bom LR 884 : 22 Cr LJ 728 : AIR (1922) B 138 ; *Harumal*, 9 SLR 43 : 15 Cr LJ 632 : 30 IC 456 modified.

S. 337.⁵⁶ Although an accomplice or an approver can be tendered pardon under this section, it was open to achieve the purpose of securing the evidence of a co-accused by resorting to the provisions of S. 494.⁵⁷

12. Who can grant pardon.—A Special Magistrate has power to tender a pardon to an accused person.⁵⁸ A District Magistrate can tender a pardon to person accused of an offence though he does not hold any inquiry under Chapter XVIII.⁵⁹

A District Magistrate can tender pardon under the proviso to subsec. (1).⁶⁰

13. 'May at any stage of investigation or inquiry into or the trial of an offence.'—These words have been added by S. 86 of the Amending Act XVIII of 1923 and given the Magistrate wider powers of tendering pardon "at any stage" giving him a discretion. Under the Code as it stood before the amendment an offence under investigation was, as observed before, in the case of *Motilal* and other cases excluded.

Inquiring into the offence.—The words inquiring into the offence in S. 337 (1) of the Criminal Procedure Code, qualify the words "Magistrate of the first class" and not the words "District Magistrate or Presidency Magistrate." A District Magistrate can legally grant a pardon although he does not himself inquire into the offence.⁶¹

"From the definition in the Code I think 'inquiry' is meant to include everything due in a case by a Magistrate, whether the case has been challenged or not".⁶²

14. 'Any person supposed offence.'—It seems the Legislature has adopted the language used in *Balmokand* discussed *ante*.

15. Proviso.—is altogether *new* and gives effect to *Chidda's*⁶³ case which has decided that a Magistrate, not being the one before whom inquiry is being held cannot tender pardon under S. 337 and such action on his part is not covered by S. 529 of the Code.⁶³

The provisions of S. 337 of the Code are very salutary provisions, the neglect of which may lead to difficulties. But where a confession was made before a Magistrate who with the *oral* sanction of the District Magistrate tendered (the accused confessing his guilt) a pardon which was accepted but which was subsequently withdrawn, *held* that the statement made by such an approver on oath could be used in evidence against him when he was subsequently tried and that the tender of pardon although irregular was legal.⁶⁴

A pardon may be tendered at any stage of the enquiry or trial.⁶⁵ Where the pardon was tendered when the offence was under investigation by a first class Magistrate without the sanction of the District Magistrate, the tender of pardon is in direct contravention of the terms of the proviso to

56. *Bawarpaquir Singh*, 65 IA 388 : 42 CWN 1252 : A 1938 PC 266 ; *Harihar Sinha*, 40 CWN 876 FB : A 1936 C 356 ; *G. v. Ramna*, 33 CWN 468 : A 1929 C 319.

57. *Kandaswami Gounder*, 1957 Cr LJ 1287 : A 1957 M 727.

58. *Md. Salauddin*, 39 CWN 698 : 35 CrLJ 884.

59. *Andal*, 13 Cr LJ 33 (Sind).

60. *A. J. Peris v. State of Madras*, A 1954 SC 616.

61. *Andul*, 5 SLR 174 : 13 Cr LJ 33 : 13 IC 273.

62. *Bhullu*, 3 PR 1897.

63. *Chidda*, 20 A 40.

64. *Sultan Khan*, 5 ALJ 691 : (1908) AWN 259 : 8 Cr LJ 445.

65. *Uma Krishna*, A 1956 Ajmer 57 ; 1956 Cr LJ 1134.

this section and was therefore illegal. As the Magistrate can not be said to have acted in good faith, S. 529 cannot save the illegality.⁶⁶

16. 'To such person on his making a full and true disclosure.'—The tender of a pardon does not preclude the prosecution from prosecuting the approver who has not fulfilled the conditions of pardon.⁶⁷

The obligation to make a full and true disclosure would arise whenever the approver is carefully called upon to give evidence touching the matter; it may be in Committing Court or it may be in the Sessions Court. If at any stage he either wilfully conceals material particulars or gives false evidence, he would have failed to comply with the conditions on which the pardon was tendered to him and thereby incurred its forfeiture.⁶⁸ Where the accused was warned that he would be liable to prosecution if he resiled from his previous confession, *held* that the Magistrate had merely warned him of the action that might be taken against him if he gave false evidence.⁶⁹

17. Effect of Pardon.—A pardon once tendered by the District Magistrate and accepted by the accused cannot be withdrawn afterwards.⁷⁰ Where an approver makes a statement disclosing his illegal possession but has been released after pardon, he can not be subsequently tried under S. 30 of the Arms Act in respect of it.⁷¹

18. Sub-section (1-A).—The fact that the Magistrate has not recorded his reasons under sub-sec. (1-A) of this section is merely an irregularity on the part of the Magistrate.⁷² In order to vitiate the trial, it has to be shown that the omission to record reasons has in effect occasioned a failure of justice.⁷³ See S. 339 as amended which requires the certificate of the Public Prosecutor.

19. Sub-section (2).—The words "in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any" has been substituted for "in the case" by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

The effect of the amendment is that the approver shall not only be examined as a witness "in the case" before the Magistrate taking cognizance of the offences but also in the supplementary trial or before the Sessions Court. The amendment supersedes the view in *Ramaswami* and other cases⁷⁴ which held that the words "in this case" were purposely used as to include the preliminary enquiry, and did not refer to the trial only, and the view in *Bala* and other cases⁷⁵ which held that the Legislature by using the word "case" did not mean that the approver should also be examined at the Sessions trial.

The provision that the accomplice who has been tendered a pardon must be examined both in the Committing Court and in the Court of Session

66. *Ram Chandra Reddy, In re*, A 1958 AP 165.

67. *In re Dagdu Bapu*, 46 B 120 : 23 Bom LR 839 : 22 Cr LJ 620.

68. *Arunaswami Goundar, In re* ; A 1959 M 274 : 1959 Cr LJ 852.

69. *Bhagavather, In re*, A 1946 M 271 : 47 Cr LJ 785.

70. *Pir Imam Shah*, A 1944 S 184 : 46 Cr LJ 218.

71. *Sham Sunder*, A 1921 A 334 : 22 Cr LJ 699.

72. *Bawa Fakir Singh*, 42 CWN 1252 : A 1938 PC 266 : 40 Cr LJ 360 ; *Annada Charan Thakur*, 36 C 629 ; *Pir Imam Shah*, A 1944 S 184 ; 46 Cr LJ 218.

73. *Dukhu*, A 1929 A 321 : 30 Cr LJ 1157.

74. *Ramasami*, (1900) 24 M 321 ; *Alagrisami Naithu*, (1910) 33 M 514 : *Sashi Rajbanshi*, 42 C 856 (870).

75. *Bala*, (1910) 25 B 675 differing from *Bhau*, (1898) 23 B 493 ; *Brijnarain Man*, (895) 20 A 529 ; *Budhan*, (1906) 29 A 24 ; *Sultan Khan*, (1908) 5 ALJ 691.

is inserted in the interests of justice and is not intended for the benefit of the approver.⁷⁶ It is also open to a Magistrate other than the Magistrate taking cognizance of the offence to record statement of the person to whom pardon has been tendered.⁷⁷ It is not obligatory upon the prosecution to examine an accomplice as a witness after he has forfeited his pardon.⁷⁸

20. 'Shall be examined in the subsequent trial if any'.—The amendment requires that the approver must be examined at the trial.

21. Sub-section (2-A).—Is altogether new and has been added by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). This clause has in effect superseded *Sashi Rajbanshi*⁷⁹ and restored the view in *Pitambar Dhube* and other cases⁸⁰ which held that the Sessions Judge ought not to try a person to whom a tender of conditional pardon has been granted along with the prisoners in which case he has already given testimony. The real object of the change by the amendment by Act XVIII of 1923, is that where a Magistrate tenders a pardon to an accused person who so becomes an approver, and the Magistrate becomes incompetent to try the case himself provided he is satisfied that a *prima facie* case has been made out against the accused, though he can discharge him under S. 209 if he thinks that this has not been done.⁸¹ The meaning of S. 337 (2-A) is simply that where a pardon has been granted to one accused who has been examined as a witness, the case against the other accused must be committed to the Court of Session if a *prima facie* case against the latter is established. It does not mean that the approver must also be committed for trial to the Court of Session with the others.⁸² The Magistrate who has tendered pardon has no power to try the case himself.⁸³ The procedure for tender of pardon as laid down in sub-sec. (1) is in respect of four classes of offences. Under sub-sec. (2-A), it is only when the Magistrate is satisfied that there are reasonable grounds for believing that the accused is guilty of any offence mentioned in the section he has to commit.⁸⁴

In sub-sec. (2-A) the word 'person' refers to the approver and the word 'accused' to persons who are accused other than the approver.⁸⁵ Where a special Magistrate tries a case under Ordinance II of 1932 and tenders pardon to an approver, under this sub-section it is not obligatory on him to commit the accused to the Sessions but he may try the case himself.⁸⁶

22. Sub-section (2-B).—The Amending Act 26 of 1955 has permanently inserted this clause in S. 337. Prior to this S. 5 of the Criminal Law Amendment Act, Act 46 of 1952 amended S. 337 in these terms and provided that the said amendment will be in force for two years from 28th July, 1952. It provides that the Magistrate without making any further inquiry may send the case for trial to the Court of the Special Judge.

76. *Arusami Goundan, In re*, A 1959 M 274; 1959 Cr LJ 852; *Sahadino Dhani Parto*, A 1940 S. 114: 41 Cr LJ 747; *Chat Singh*, A 1931 L 102: 32 Cr LJ 1126; *Malla*, A 1930 L 95: 31 Cr LJ 111.

77. *Amar Singh*, A 1930 L 796: 40 Cr LJ 543.

78. *Nayeb Sahana*, 38 CWN 659: 35 Cr LJ 1479.

79. (1914) 42 C 856.

80. *Pitambar Dhube*, (1870) 14 WR (Cr) 10; *Bipro Das*, (1873) 19 WR (Cr) 43; *In re Joyudee Pramanik*, (1880) 7 CLR 66; *Mulua*, (1892) 14 A 502; *Rama*

Tevan, (1892) 15 M 352 and *Jagat Chandra Mali*, (1894) 22 C 50.

81. *Nana Amrita Savant*, A 1935 B 70: 36 Cr LJ 499.

82. *Raja Ram*, A 1932 A 581: 33 Cr LJ 802 (1).

83. *Md. Yusuf*, ILR (1955) 1 C 248.

84. *Narsingdas*, 58 CWN 769: A 1954 G 541.

85. *Mali Jaba Bhoja*, A 1961 Guj 49.

86. *Abdul Majid*, 60 B 652: 34 Cr LJ 1023; *Harihar Sinha*, 40 CWN 876 (FB); 37 Cr LJ 758 (FB).

23. Sub-section (3).—The words ‘*unless he is already on bail*’ have been substituted for the words “if not on bail” by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923) and the words “by the Court of Session or High Court, as the case may be” have been omitted by the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). The words ‘*unless he is already on bail*’ in place of the words “if not on bail” is a mere verbal alteration.

The words “by the Court of Session or High Court, as the case may be”, have it seems been deleted because the Legislature has already inserted in sub-sec. (2) the words ‘*and in the subsequent trial, if any*’ and these words have been further omitted because under the Code as amended no formal withdrawal of pardon is necessary.

24. ‘Shall be detained in custody’.—According to sub-secs. (2) and (3) of S. 337 of the Code every person accepting a pardon under this section must be examined as witness in the case and *if not on bail* shall be detained in custody until the termination of the trial of the other accused of the High Court or the Court of Session, as the case may be.⁸⁷

The Legislature has imposed a statutory and an imperative obligation to the Court to detain an approver in custody until the conclusion of the trial even when the prosecution of the case has been unreasonably delayed.⁸⁸ An approver cannot be detained in custody of the police.⁸⁹ The approver should not be at large till the proceedings in respect of other accused is over, whether by discharge before trial or acquittal.⁹⁰ Section 337 (3) can be given no other meaning except that an approver already detained in custody, cannot be released on bail for the period the trial has not been concluded.⁹¹ After the approver has deposed only in the Committing Magistrate’s Court and if committal ensues, before he has deposed at the trial in the Sessions Court.⁹²

25. Forfeiture of Pardon.—Section 339 does not enact that a person who has accepted a tender of pardon renders himself liable to be tried for the offences in respect of which pardon was tendered, if he gives false evidence.⁹³ Where an approver has forfeited his pardon, on his examination at the preliminary enquiry, the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused⁹⁴ but in view of the addition of the *proviso* to S. 339 by the Amending Act XVIII of 1923 the approver who in the opinion of the Public Prosecutor has forfeited the pardon cannot be jointly tried.

The Code of 1898 contained no provision for the withdrawal of pardon. The question whether the pardon has been forfeited in each case is a question of fact.⁹⁵ In the following cases the question of the change in the law effected by the substitution of the word “forfeited” for the word “withdrawn” in S. 339 of the Code of 1898 was considered by various High Courts.⁹⁶ Where

87. *Haji Jiand*, (1921) 16 SLR 131 : 23 Cr LJ 611 : 835 : AIR (1922) Sind 31.

88. *A. L. Mehra*, A 1958 Punj 72 : 1958 Cr LJ 413 : *Pajaria Krishna Reddy*, A 1952 M 839 : 1953 Cr LJ 50 : *Ali Mohamed*, A 1932 S 40.

89. *Dan Bahadur Singh*, A 1943 A 91 : 44 Cr LJ 927 : *Khairati Ram*, A 1931 L 476 : 32 Cr LJ 1913.

90. *Intya Salabat Khan*, 37 B 146 : *Sultan Ahmad*, 39 CWN 233 : 36 Cr LJ 1308.

91. *Bhavani Singh*, A 1956 Bhopal 4 : 1956 Cr LJ 44.

92. *Karappa Servai v. Kundaro*, A 1952 M 833 : 1953 Cr LJ 45.

93. *Kothia Navalya Bhill*, (1906) 8 Bom LR 740.

94. *Shashi Rajbanshi*, (1914) 42 C 856 : 19 CWN 295 : 18 Cr LJ 65 : 26 IC 657.

95. *Nga T. Gale*, (1912) 7 LBR 1 : 6 LT 96 : 14 Cr LJ 401 : 20 IC 225.

96. *Kothia*, (1906) 30 B 611 ; *Kullan*, (1908) 32 M 173 : *Alagirisami*, (1910) 33 M 514 ; *Abani Bhusan Chakraborty*, (1910) 37 M 845 ; see also *Saugur*, 37 A 331.

an accused after accepting pardon denies all knowledge of facts before the Committing Magistrate and the case is committed to the Sessions Court, the pardon cannot be forfeited before the accused is examined in the Sessions Court.⁹⁷

26. Approver's Evidence.—Is not to be relied upon unless it is corroborated in material particulars by independent evidence in the matter of circumstances of the crime and also in the matter of identifying the accused with the offence.⁹⁸ The approver's evidence must show that he is a reliable witness. The moment there is corroborative evidence which connects or tends to connect an accused with the crime, such corroborative evidence relates to the identity of the accused in connection with that crime. It is the approver's evidence which is the direct evidence of the crime. There should be corroboration in material particulars^{98a} not only concerning the crime but corroboration of the approver's story by evidence which connects or tends to connect an accused with the crime.⁹⁹

In *Sarwan Singh's case*¹, it was held that the appreciation of the approver's evidence has to satisfy a double test (1) he is a reliable witness and (2) his evidence must receive sufficient corroboration.

338. Power to direct tender of pardon.—At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

SYNOPSIS

1. Scope.
2. Offence not exclusively triable by a Court of Session.
3. 'Supposed.'

1. Scope—This section vests the Court to which commitment is made, with power to tender pardon or order the committing Magistrate or the District Magistrate to tender pardon during the trial of the case, but it does not take away the power conferred under the proviso to S. 337 (1).^{1a} Where there was no effective pardon under S. 337 the provisions of S. 339 not come did into operation.²

2. Offence not exclusively triable by a Court of Sessions.—A Sessions Judge cannot tender a pardon to an accused under S. 338, where the offence for which he has been committed is not "triable exclusively by the Court of Session".³ Under Ss. 337 and 338, it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the Court of Session; all that is requisite is that the person to whom a pardon is tendered, who

97. *Shadina Dhanipatra*, A 1940 S 114 : 41 Cr LJ 747.

98. *Debi*, A 1953 Raj 49 : 1953 Cr LJ 447
Hafizuddin, 38 CWN 777 : A 1934 C 678.

98a. *Bhira v. State of Maharashtra*, A 1963 SC 599 following *Bhuboni Sahu*, 76 IA 147 : A 1949 PC 257 and *Baskerrelli*, 1962 KB 638.

99. *Jnanendra Nath v. State of West Bengal*, A 1959 SC 1199 where *Sarwan Singh*

v. State of Punjab, A 1957 SC 637 : 1959 Cr LJ 1492 was distinguished.

1. A 1957 SC 637 ; 1957 Cr LJ 1014 and *State of Bihar v. Baswan Singh*, A 1958 SC 506 followed in *Govindarajalu*, A 1962 Mys 275.

1a. *A. J. Peris v. State of Madras*, A 1954 SC 616.

2. *Anwarali Sarkar*, A 1955 C 555.

3. *Sadhee Kasal*, (1884) 10 C 936.

need not be an accused in the case, should be supposed to have been directly or indirectly concerned in or privy to an offence, triable exclusively by the Court of Session with which another person is charged.⁴

3. 'Supposed'—Excludes the case of a person who has been actually convicted of the crime and not the case of a man, who although admitted to be a party to the crime is unconvicted.⁵

The Assistant Sessions Judge when he is conducting a sessions trial is the Court which has jurisdiction either to tender a pardon or to order the committing Magistrate or the District Magistrate to tender a pardon to an accused person.⁶

339. Commitment of person to whom pardon has been tendered.—(1) Where a pardon has been tendered under Section 337 or Section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter :

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made ; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

SYNOPSIS

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| 1. Earlier Law. | 6. Certificate of Public Prosecutor. |
| 2. Report of the Select Committee. | 7. Onus is on the prosecution. |
| 3. Effect of the Amendment. | 8. Proviso. |
| 4. Scope. | —'such person shall not be jointly tried with any other accused'. |
| 5. Has either wilfully concealing anything essential or by giving false evidence not complied with the condition on which the tender was made. | 9. Sub-section (2). |
| | 10. Sub-section (3). |

1. Earlier Law.—This section corresponds to Ss. 209 and 211 of the Code of 1861 which contained no such provision as in sub-sec. (2) which

4. *Kashiram*, (1922) 6 NLJ 144 : 24 Cr LJ 566 : 73 IC 252 : AIR (1923) Nag 248.
5. *per* Duthoit, J., in *Kallu*, (1884) 7 A

160.
6. *Ijjatulla Akanda*, A 1945 C 42; 46 Cr LJ 537.

provision was first enacted by S. 349 of the Code of 1872. Section 211 however did not occur in the Code of 1861 before the Amending Act VIII of 1869 inserted the same as a new section.

The views in *Pitambar Dhoobee*, 14 WR (Cr) 10 and *Biprodas*, 19 WR Cr 43 concurred in *Rama Thevan*, (1892) 15 M 352 which have held that it is unfair to put an approver whose conditional pardon has been cancelled on trial, along with other persons, in the course of whose trial such approver has given evidence have, it seems, been restored in view of *proviso* newly added. The view in *Kisto Dhoba*, 14 WR (Cr) 16, where it was doubted whether mere belief on the part of the Judge, drawn from the behaviour of the witness that he is not speaking the truth at the Sessions trial, is sufficient to satisfy the terms of S. 339 can no longer be assumed to be good law.

Section 349 of the Code of 1872 as amended by Act XI of 1874 is as follows:—"When a witness is produced before the Court of Sessions or before the High Court in the exercise of its Original or Appellate Criminal Jurisdiction, the evidence given by him before the committing Magistrate may, in the discretion of the Presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person." It was upon this section that, Field, J., decided in *Joyndee Pramanik*,⁷ that there is a grave doubt whether the deposition of an approver taken before the committing Magistrate, may be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon having been withdrawn. It was further held in that case that in the absence of argument, the Court was unwilling to decide that the evidence of an approver given before the Magistrate but retracted before the Sessions Court was absolutely irrelevant, but if upon a construction of the law, it could be supposed to be admissible, the value to be attached to it was so exceedingly small that it ought not to affect the case made against the prisoners by the rest of the evidence. Before the amendment of the Code by Act XVIII of 1923 by insertion of S. 339-A the law was silent about the Court by whose order the person who had not complied with the condition on which the tender of pardon was made, or the time at which such order might be made. The Codes of 1882 and 1898 as well as the Code of 1861 did not contain a provision like that enacted in S. 349 of the Code of 1872 which declared that such order could be passed by "the Magistrate before trial, or the Court of Session before judgment had been passed by the High Court as a Court of Reference or Revision."

The Code of 1898 amended the corresponding S. 339 of the Code of 1882 by substituting the word "*forfeited*" for the word 'withdrawn' in sub-sec. (2) see the well-considered judgment in *Kullan*⁸ where the earlier law as noticed above has been discussed with reference to cases and it was held that under the Code of 1898 there was no necessity for 'withdrawing' the pardon and such withdrawal had no effect.

2. Report of the Select Committee.—"We accept Cl. 86 so far as it goes except that we should substitute a certificate by the Public Prosecutor for an allegation by the prosecution as the basis of a prosecution of a person who has accepted a tender of pardon. We consider, however, that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-sec. (1). The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it, and

7. 7 CLR 66.

8. 32 M 173, see cases referred to.

difficulties of procedure may obviously arise with reference to Ss. 255, 271 (2) and 272. We therefore propose a new section to be added after S. 339, which lays down that where a person to whom a pardon is being tendered is being tried under the section, he should, at the commencement of the proceedings, be asked whether he raises the plea that he has complied with the conditions on which the pardon was granted, and if he does so plead, the Court shall record a finding on the point and, if it finds that the conditions have been complied with, shall acquit the accused. This provision we have inserted as a new Cl. 86-A in the Bill (S. 339-A)."

3. Effect of the Amendment.—The addition of the words "*The Public Prosecutor certifies that in his opinion*" acts as a safeguard for the approver and supersedes *Manik's* case and other cases⁹ which held that the proper authority to withdraw a pardon was the authority which had granted it. The expression "such person" has been substituted for the word 'he' and refers to approver whose pardon has been forfeited.

The *proviso* gives effect to the following Madras, Bombay and Burma rulings which held that an approver forfeiting pardon cannot be jointly tried "with any of the other accused".¹⁰ The *proviso* to Cl. (1) seems to have superseded the following decisions¹¹ and restored the following cases.¹² A new S. 339-A has been added for regulating the procedure in the trial of an approver under S. 339.

Instead of the trying Court determining whether the pardon has been forfeited under the present Code a certificate by a Public Prosecutor is sufficient. Under the amended section the certificate to the Public Prosecutor is required. See *Ali's* case.¹³

4. Scope.—A mere tender of pardon does not attract the provisions of this section. There must be an acceptance of it and the person who has accepted the pardon must be examined as a witness. It is only thereafter that the provisions of this section comes into play and the person who accepted the pardon may be tried for the offence for which the pardon was tendered on the Certificate of the Public Prosecutor. This section does not apply unless there is in existence an effective pardon under S. 337.¹⁴ An approver must be examined both in the Committing Magistrate's Court and the Sessions Court before it can be held that he has forfeited his pardon.¹⁵ He cannot be tried and convicted of the offence of murder until the Court trying him had recorded a finding that he had forfeited the pardon which had been offered to him owing to non-compliance with the conditions.¹⁶

9. *Manik Chandra Das*, (1897) 24 C 492, followed in *Ramasami*, (1900) 24 M 321 (325) see this decision has been modified by the amendment of S. 337 (2); *Shoshi Rajbanshi*, (1914) 42 L 856.

10. *Bhau*, 23 B 493, followed in *Revappa*, (1902) 4 Bom LR 826; *Rama Thevan*, (1892) 15 M 352; *Ramasami*, (1900) 24 M 321 (324).

11. *Brij Narain Man*, (1898) 20 A 529, followed in *Budhan*, (1906) 29 A 24; *Shashi Rajbanshi*, (1914) 42 C 856, (871, 872); *Basireddy Naiappa*, (1923) MWN 697; 45 MLJ 77; AIR (1924) M 391.

12. *Pitambar Dhoobee*, (1870) 14 WR (Cr) 10; *Bipro Das*, 19 WR Cr 43 followed in *Rama Thevan*, 15 M; *Neter* (1899) 27 C 137; *Mulua*, (1892) 14 A 502.

13. *Ali*, (1924) 5 L 379; 26 Cr LJ 238; 84 IC 61; AIR (1925) L 15.

14. *Bepin Behari Sarkar v. State of W. B.*, (1959) SCR 1320; A 1959 SC 13; 1959 Cr LJ 102.

15. *Bhoora*, A 1961 Raj 274; 1961 (2) Cr LJ 798 following *Akshoy Kumar*, A 1934 C 686 and *In re Arusami Goendan*, A 1959 M 274.

16. *Itwari*, A 1929 Oudh 256; 30 Cr LJ 559 (1).

5. Has either by wilfully concealing anything essential or by giving false evidence not complied with the condition on which the tender was made.—Section 339 must be construed strictly, and a person to whom pardon has been tendered can only be tried for the offence in respect of which he was pardoned, if it is shown that he has forfeited the pardon either by wilfully concealing anything essential,¹⁷ or by giving false evidence.¹⁸

The Criminal Procedure Code does not specify by whom a pardon may be withdrawn. Ordinarily the authority which makes an offer has power to withdraw it, and in the case of *Manik Chandra Sircar*, 24 C 492 it was expressly ruled that the proper authority to withdraw a pardon is the authority which granted it even after the trial has been held in the Sessions Court.¹⁹ The amended section requires the certificate of the Public Prosecutor. Hence this decision¹⁹ is no longer good law.

6. Certificate of Public Prosecutor.—The whole basis of the prosecution of a person to whom pardon had been tendered under S. 337 is the certificate of the Public Prosecutor that such person has broken the condition on which the tender was made.²⁰ The certificate under sub-sec. (1) is not without jurisdiction if it was not issued by the Assistant Public Prosecutor who was originally in charge of the case but by the Public Prosecutor who subsequently took charge of the case.²¹

Where a pardon is tendered and the approver is afterwards put on his trial, he ought to be asked if he relies on the pardon as a bar to his trial; and if he does so rely, then the prosecution should first prove that the pardon has been forfeited by an incomplete or false disclosure. When this course is not adopted, the conviction is illegal, and will be set aside.²² This is practically enacted in proviso to S. 339-A (1) (b).

7. Onus is on the prosecution.—The onus of proving forfeiture of pardon lies upon the prosecution. An approver who is put on his trial may plead his pardon either before the Magistrate or at the Sessions Court.²³

An approver if tried should be tried separately and after the trial of the other accused is over.²⁴

8. Proviso.—See notes under 'Effect of Amendment'.

'Provided that such person shall not be jointly tried with any other accused'.—These words added by the amendment have in effect superseded the following cases.²⁵ These words introduced by the Amending Act of 1923 seem to have restored the view in *Bhau* and other cases.²⁶

17. *Maung Po Hla*, (1916) 8 LBR 357 : 9 Bur LT 76 : 17 Cr LJ 391 : 35 IC 823.

18. *Brij Narain*, 20 A 529 ; In re *Arusami Goundan*, A 1959 M 274 : 1959 Cr LJ 852.

19. *Ramasami*, (1900) 24 M 321.

20. *Patta*, A 1947 A 71 ; 48 Cr LJ 99 ; *Nawal Kishore Rai*, A 1943 P 146 ; 44 Cr LJ 494 : *Narit Basappa*, A 1925 B 135.

21. *Shahadino Dhanipatro*, A 1946 S 114 : 41 Cr LJ 747.

22. *Kullan*, (1908) 32 M 173 following *Sudra*, (1892) 14 A 336 and *Nathu*,

(1900) 27 C 137 ; *Alagirisami Naicken*, (1910) 33 M 514.

23. *Seha Rajbanshi*, 42 C 856 : 16 Cr LJ 85 ; *So Liyan*, (1930) MWN 773 ; *Dipchand*, A 1935 L 790 : 37 Cr LJ 79.

24. *Arunachellam*, (1908) 31 M 272 following *Ramasami*, (1900) 24 M 321.

25. *Sultan Khan*, (1908) 5 ALJ 691 : (1908) Awn 259 ; *Bala*, (1901) 25 B 675 ; *Brijnarain Man*, (1898) 20 A 529 ; In re *Basireddi Naiappa*, (1923) 45 MLJ 613 : (1923) MWN 697 : 33 MLJ 77 : 25 Cr LJ 210.

26. *Bhau*, (1898) 23 B 493 ; *Arunachellam*, (1908) 31 M 272.

The joint trial of a person to whom pardon has been tendered and subsequently withdrawn along with other accused is an illegality.²⁷

An approver where he gives false evidence and is unwilling to step into the witness box on behalf of the prosecution forfeits his pardon and he can be tried for the offence for which he was tendered pardon.²⁸

He shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.—When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the jury thereon, and then proceed with the trial of the accused for the offences charged.²⁹

Beaman, J., held :—“At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put on his trial for the offence, he may plead to a competent Court his pardon in bar. And that is a plea that the Court would be bound to hear and decide upon going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon; whether he had or had not made a full and true disclosure of the whole facts”.³⁰

*Issue whether pardon has been forfeited should be tried first.*³¹

9. Sub-section (2), Legislative Changes.—The words “at such trial” have been substituted for the words “when the pardon has been forfeited under this section” by S. 88 of Act XVIII of 1923.

The provision contained in S. 339 (2) is in the nature of an exception to S. 164 Cr. P. C. and S. 24 of the Evidence Act.³²

The Nagpur High Court by a full bench has held that the statement of the approver, who has been tendered a pardon under S. 337 (1) and accepted it, can be recorded under S. 164. Such a statement will be admissible in evidence against him at a subsequent trial after forfeiture of the pardon.³³ Confession recorded prior to pardon is to be admitted not under S. 339 (2) but under S. 164,³⁴ but if the statement of a confessional nature recorded before tender of pardon is not recorded under the strict procedure for recording confession under S. 164, it is inadmissible.³⁵

10. Sub-section (3).—The sanction of the High Court under S. 339 (3) be obtained only by motion on behalf of the Crown.³⁶ The Punjab

27. *C. Chashan*, A 1935 Oudh 226; 35 Cr LJ 889; *In re Arunachallam*, 31 M 272.

28. *State v. Dalchand Hardayal*, A 1960 M P 63; 1960 Cr LJ 238.

29. *Sabar Akunji*, (1914) 42 C 756; 19 CWN 179; 16 Cr LJ 120; 27 IC 184 approving *Kullan*, (1908) 32 M 173; *Abanibhusan Chakraverty*; 37 C 845 and other cases.

30. *Kathia*, (1906) 30 B 611 (621); *Mullu*, (1914) 11 NLR 59; 16 Cr LJ 417; 7 LBR 1.

31. *Kullan*, (1908) 32 M 173; *Alagirisami*

Naicker, (1910) 33 M 514; *Kothia*, (1906) 30 B 611; *Bala*, (1901) 25 B 675; *Kalu*, 31 PR (1904); *Shashi Rajbanshi*, (1914) 42 C 856.

32. *Khali Bahara*, A 1951 Or 78.

33. *Rambhoro*, A 1944 N 105; 45 Cr LJ 673 (FB).

34. *Miral*, A 1943 S 166; 45 Cr LJ 118.

35. *Horilal*, A 1940 N 218; 41 Cr LJ 433.

36. *Manick Chandra Sarkar*, (1897) 24 C 492; *Madiga Nallavadu*, (1908) 32 M 47; *Raja*, (1912) PLR No. 230 and 175 of 1912; 13 Cr LJ 451.

Chief Court has held that action can be taken under S. 339 (3) by the Chief Court (now High Court).³⁷ Sanction of the High Court would be necessary under S. 339 (Act X of 1882).³⁸ It is discretionary to grant *locus penitentia*.

Section 339 does not cancel S. 476. It only infuses an additional condition as essential to the institution of a prosecution for perjury by an approver.³⁹ If it appears that the approver in collusion with the other accused resiled from the statement made by him, his subsequent statement must be false and it is not only desirable but expedient to order the prosecutions for giving false evidence.⁴⁰ Sanctions will be refused if the approver made the statement alleged to be false under undue influence.⁴¹

It sometimes happens that when an Investigating Officer is confronted with a weak case he in his misplaced zeal attempts to bolster it by getting hold of an approver, and if there is any such indication in the circumstances of a particular case, sanction ought not to be given for prosecution of the approver.⁴²

The mere fact that the two statements are contradictory cannot in every case be a warrant for directing the prosecution of the approver.⁴³

339A. Procedure in trial of person under Section 339.

—(1) The Court trying under Section 339 a person who has accepted a tender of pardon shall—

- (a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under Section 271, sub-section (1), and
- (b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall notwithstanding anything contained in this Code, pass judgment of acquittal.

SYNOPSIS

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| 1. State Amendment.
—Madras. | 3. Effect of the Amendment. |
| 2. Report of the Select Committee. | 4. Scope. |

37. *Raja*, 227 PLR (1913): 17 PWR (1913) (Cr): 14 Cr LJ 64: 18 IC 352.

38. *Bodha*, 11 ALJ 964 followed in *Dhuku*, AIR (1929) A 321; *Dala Jiva*, (1885) 10 B 190.

39. *Gambhir Bhujna*, A 1927 N 189; 28

Cr LJ 645.

40. *Mathura*, 56 A 288; 35 Cr LJ 444.

41. *Waryan Singh*, A 1934 L 90; 25 Cr LJ 174.

42. *Dial Singh*, A 1958 Punj 310; 1958 Cr LJ 1092.

43. *Prabhu*, A 1937 L 531; 38 Cr LJ 1079.

This section is new and lays down the procedure in cases where a person who has accepted pardon is tried under S. 339.

1. State Amendment.

Madras.—In Sub-sec. (1) (a) the words 'High Court or' were omitted by Madras Act 34 of 1955.

2. Report of the Select Committee.—See quoted under S. 339.

3. Effect of the Amendment.—The first issue is whether the pardon has been in fact forfeited. See *Shashi Rajbanshi*.⁴⁴

4. Scope.—"Section 339-A lays down that the Court trying a person, who has accepted a tender of pardon, shall, if the Court is a Court of Session, before the charge is read out and explained to the accused, ask him whether he pleads that he has complied with the condition on which the tender of pardon was made".⁴⁵ The Lahore High Court held that the trial was vitiated by non-compliance of the provisions of Ss. 339 and 339-A. Section 339-A does not apply at all to the case of an approver who has stated that his statement as an approver was completely false.⁴⁶ Under this section it is imperative on the Court of Session to ask the accused before the charge is read out and explained to him under S. 271 (1), whether he pleads that he has complied with the condition on which the tender of the pardon was made and to record his plea and proceed with the trial.⁴⁷ See notes under S. 339.

340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.—(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

(2) Any person against whom proceedings are instituted in any such Court under Section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under Section 552, may offer himself as a witness in such proceedings.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. —Pleader—meaning of. |
| 2. Legislative Changes. | 7. Who is an accused? |
| 3. State Amendment. | 8. Accused, if entitled to confidential communication with his advocate. |
| —East Punjab. | 9. Citing defence counsel as witness. |
| 4. Scope. | 9. Sub-section (2). |
| 5. Right to be defended by a Pleader. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 432 of the Code of 1861, paragraphs I and 2 of S. 186 of the Code of 1872 and the Code of 1898 read similarly as that of the Code of 1882.

2. Legislative Changes.—This section has been substituted for old S. 340 by Act XVIII of 1923.

44. 42 C 856.

45. *Ali*, (1924) 5 L 379.

46. *Gurdit Singh*, A 1939 L 66; 40 Cr LJ

614.

47. *Harilal*, A 1940 N 77; 40 Cr LJ 956.

3. State Amendment.

East Punjab.—The following shall be deemed to have been added by S. 38 (3) of East Punjab Public Safety Act (V of 1949) as Sub-s. (3) of S. 340, namely, "If it appears to the Court that any person has had a reasonable opportunity of engaging a pleader and has neglected or omitted to do so, and if, in the opinion of the Court, it is necessary for the purpose of justice that such accused should be defended by pleaders, the Court may direct any person appointed to be District Pleader, whose name appears in a panel maintained by the District Magistrate for this purpose, to appear before it and conduct the defence of the accused. Any person so directed shall receive remuneration according to a scale to be laid down by the Provincial Government and any sums so paid to him, may if the District Magistrate so directs, be recovered from the accused as an arrear of land revenue."

4. Scope.—Article 22 (1) of the Constitution guarantees the right of the accused to consult and to be defended by a legal practitioner of his choice.⁴⁸ The right conferred by S. 340 (1) does not extend to an accused person to be provided with a lawyer by the State. That is a privilege given to him to and it is his duty to engage a lawyer.⁴⁹ It was held in *Jonardan Reddy v. State of Hyderabad*⁵⁰ that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented the trial should be held to be vitiated. The circular orders by Mysore High Court lay down that in cases where capital sentence may be awarded a counsel should be appointed to defend the accused if he states that he has no means of engaging a lawyer.⁵¹ The practice of the Calcutta High Court is the same as in.⁵¹ See the circular orders.⁵²

5. Right to be defended by a Pleader.—The importance of persons to be accused of a serious crime having the advantage of a counsel to assist them before the Courts cannot be doubted. An appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a Counsel assigned to him by the Government who was unable, without any default on his part to reach the Court in time to conduct on the appeal.⁵³ There is nothing in the Bombay Children Act or rules thereunder, which take away the right of a juvenile accused 'to be defended by a pleader'.⁵⁴ The High Court condemned the action of the authorities detaining the accused in the Police lines and directed that full opportunity must be given for the conduct of his defence.⁵⁵

Pleader—meaning of.—Includes a muktear appointed with the permission of the Court to act in such proceedings,⁵⁶ but the amended S. 4(r) does not require the muktear to appear with such permission.

A criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions. The Court has no power to tell the accused, who has a right to be defended by a pleader of his choice to engage another pleader, as the pleader already engaged by him did not know how to behave in Court.⁵⁷ "The decision in *Hanmanta's* case⁵⁸ can best be explained by holding that by the "accused" (in S. 342) is meant a person over whom the Magistrate

48. *The State of Punjab v. Ajab Singh*, A 1953 SC 10.

49. *Tara Singh*, 1951 SGR 729 A 1951 SC 441; 52 Cr LJ *Govinda Reddy, In re*; A 1958 Mys 150.

50. 1951 SCR 344; 52 Cr LJ 736.

51. *Gobinda Reddy, In re*; A 1958 Mys 150; 1958 Cr LJ 1489.

52. Circular No.

53. *Golas Hirad*, A 1944 PC 93; 46 Cr LJ 105.

54. *Krishnamurthy Aiyar v. The State of Madras*, A 1954 SG 406.

55. *Harihar Roy*, 23 CWN 481, 20 Cr LJ 675; *Kailash Nath Agarwalla*, A 1947 A 436; 48 Cr LJ 868.

56. *Ishan Chandra Bhutt*, (1911) 38 C 488; 13 CLJ 635; 15 CWN 409; 13 Cr LJ 111.

57. *In re James Fitzgerald*, (1896) Rat 861.

58. 1 B 610.

or other Court is exercising jurisdiction; and on the whole we think that this restricted meaning suits the context".⁵⁹ It is the duty of the Magistrate to afford the accused and his friends every opportunity of making his defence, and he should not personally interpose in any way between them.⁶⁰ A pleader is bound to call witnesses, whose evidence his client wishes to submit to the Court even though he suspects their evidence. It is for the Court to determine the value of such testimony; and any threatening on its part to report to the High Court the conduct of the pleader in calling such witnesses, is improper.⁶¹

The *practice* of admitting private vakils to defend parties in criminal Courts is not illegal. It is discretionary with the Magistrate to hear such agents or not.⁶² Fulllest opportunity should be given to prisoners to exercise *vakalatnamas*, to whomsoever they please, and without reference to the mode in, or circumstances by which they may be influenced to do so.⁶³ Where a pleader representing a party in a Criminal proceeding does not file in Court a *vakalatnama* from his client, such pleader shall be required to file a memorandum of appearance containing a declaration that he had been duly instructed to appear for or on behalf of the party whom he claims to represent.⁶⁴

6. Who is an accused?—The word "accused" is one of the words that have not been defined in any statute.

"In S. 340 the words in the Code of 1898 were 'Every person accused before a Criminal Court'. They have been substituted by the words 'every person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court.' This to my mind clearly shows 'that an accused person' is not identical with a 'person' accused of an offence, and I can find no reason to hold that the word 'accused' when it was used in the Code of 1898 and where it has retained its place after the amendment may not include both the classes of persons mentioned above unless there is something in the context repugnant to that meaning".^{64a}

"The Code of Criminal Procedure contains no definition of an 'accused person' but it was held by the Bombay High Court in *Muna Puna*^{64b} that the term 'accused' means 'a person over whom a Magistrate or other Court is exercising jurisdiction.' The same view was held by the Calcutta High Court in *Jhoja Singh*, (1896) 23 C 493. I see no reason to put a different interpretation on the words 'an accused person' in S. 437".^{64c}

The right which a person against whom proceedings are held under these sections has of being defended by a pleader cannot be exercised by him unless a date is fixed for hearing, and notice of such date is given to him.⁶⁵ A person against whom proceedings under S. 133 Cr. P. Code are taken, is not an accused person, and he commits an offence under S. 193 I. P. Code if he makes false statement during his examination on oath, in

59. *Mona Puna*, (1892) 16 B 661.

60. *Wasudev Hari Chapeker*, (1899) 1 Bom LR 856.

61. *Bajya Anandrao*, (1901) 3 Bom LR 562.

62. Proceedings, 11th November 1874: 7 MHCR App xxxvii.

63. *In the matter of the Petition of Sheik Dada Bhai*, (1863) 1 Bom HGR (Gr Ca) 16.

64. *In re Muniram Reddy*, (1909) 5 MLT 290: 9 Cr LJ 305: 1 IC 546.

64a. *per* Mukherji, J., in *Narendra Chandra Rudra Pal v. Sabarali Bhuiya*, (1925) 41 CLJ (FB) 479 (494): 29 GWN 600; see to the same effect the view of Fawcett, J., in *In re Evans*, (1926) 50 B 741 (746).

64b. (1892) 16 B 661.

64c. *Mutsaddi Lal*, (1898) 21 A 107.

65. *Girand*, (1903) 25 A 375.

the proceedings.⁶⁶ In view of the amendment this decision⁶⁶ has been modified. Where a Judge proceeds to hold a preliminary enquiry under S. 476 of the Code the person against whom such enquiry is started is not an accused person; and even if he be an accused person, the Court making such enquiry is not a criminal but a Civil Court.⁶⁷ It is an elementary principle of law that no order should be made to a man's prejudice, especially in a criminal case, without hearing him, and the very object of the Legislature in allowing parties to be represented at trials by Counsel is that Counsel must be heard before a final opinion is formed by the Court. It is not, as the Magistrate supposes a question of indulgence but of right.⁶⁸ The Madras High Court has held that an accused person has a right to be heard through the pleader who defends him and a denial of that right is not a mere irregularity.⁶⁹ A Counsel or Pleader is entitled to appear and act on behalf of the prosecution in the criminal Courts.⁷⁰

7. Accused, if entitled to confidential communication with his advocate.—All communications between an accused person and his legal advisers are privileged. It is impossible to have anything confidential about communications with his lawyer if he is surrounded by Police officers.⁷¹ Right to interview with the accused's counsel begins from the time of his arrest.⁷²

8. Citing defence counsel as witness.—It is recognised by both the Court and the profession that it is undesirable when the matter to which the counsel deposes is other than formal, that they should depose either for or against their client.⁷³ An advocate who has appeared as a witness for the prosecution in a particular case may be allowed to appear for the accused unless the Court thinks that the trial will be embarrassed.⁷⁴

9. Sub-section (2).—This sub-section was inserted by Act 18 of 1923 and provides that any person against whom proceedings under S. 107 or under Chapter X, XI, XII or XXXVI are instituted may be examined as a witness. Section 340 as amended makes the person accused wider to include all persons against whom proceedings are instituted. Hence the Legislature had to make this distinction in proceedings of a quasi Civil nature. Oath can not be administered to a person against whom proceedings under S. 488 have been instituted.⁷⁵

341. Procedure where accused does not understand proceedings.—If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the

66. *Hirananda Ojha*, (1905) 9 CWN 983: 2 CLJ 149.

67. *Ramkishore Umar*, (1911) 8 ALJ 237: 12 Gr LJ 231: 10 IC 740.

68. *Iboo*, (1904) 6 Bom LR 665 (666).

69. *Mothukaruppa Servai*, (1928) 55 MLJ 626: AIR (1928) M 1234.

70. *In the matter of Chandi Charan Chatterjee*, (1870) 5 BLR App 70.

71. *Sudha Sindhu*, 62 C 384; 39 CWN 250;

A 1935 C 101; *Dikson Mali*, A 1942 P 90.

72. *Moti Bai*, A 1954 Raj 241.

73. *Chattur Kully, In re*; A 1959 Ker 119: 1959 Cr LJ 474.

74. *Nimba*, A 1955 Mys 112; 1953 Cr LJ 1083.

75. *Karnail Singh v. Mst. Bachan Kaur*, A 1955 Punj 26.

case, and the High Court shall pass thereon such order as it thinks fit.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 5. "In the case of a Court other than a High Court." |
| 2. Scope. | 6. Proceedings shall be forwarded to the High Court. |
| 3. Deaf and Dumb Accused.—Procedure. | 7. Power of High Court to pass thereon such order as it thinks fit. |
| 4. "If the accused though not insane.... the proceedings." | |

1. Corresponding sections in former Codes.—This section corresponds to S. 186 of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope—Procedure where accused does not understand proceedings.—Sec. 186 of the Code of 1872 is intended to provide for cases in which the accused person is deaf and dumb, or, from ignorance of the language of the country and the want of an interpreter is unable to understand or make himself understood.⁷⁶

3. Deaf and Dumb Accused—Procedure.—The finding of the Magistrate as to the accused's being able to understand the nature of the proceedings brought against him must be taken as conclusive and S. 186 of the (Code of 1872) was held not applicable.⁷⁷ Section 341 does not apply where it is shown that the accused understood the proceedings.⁷⁸ The law in England appears to be that though great caution and diligence are necessary in the trial of a deaf and dumb person, if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment. The same is the law and practice in India.⁷⁹

Although a presumption can be made in the case of a deaf and mute in favour of the absence of mind, every case must be judged on the evidence available in that particular case.⁸⁰ Where a deaf and dumb man is caught red-handed in an act of theft, he must be held guilty.⁸¹ The Magistrate must in the case of a deaf and dumb person charged with a serious offence record a finding whether the accused can be made to understand the proceedings before passing the commitment order.⁸²

It is not safe to infer from his signs that the deaf and dumb person admitted the ingredients of the offence.⁸³ It is essential to record a finding as to whether he can be made to understand the proceedings.⁸⁴

4. 'If the accused though not insane....the proceedings.'—This section requires that the Court shall proceed to the end of the trials and then report the result if a conviction follows.^{84a} In serious cases reported under this section it is usually the practice to refer the matter to the Local Government. In the case, however, of a minor offence, the High Court itself may pass an appropriate sentence or discharge the accused.⁸⁵

76. *Husen*, (1881) 5 B 262.

77. *Doobri Hulwai*, (1873) 19 WR (Cr) 37.

78. *Dada Mahadu*, (1901) 3 Bom LR 37. *Naru Lachman*, A 1950 EP 174; 51 Cr LJ 908.

79. *A deaf and dumb accused*, (1916) 40 B 598; 18 Cr LJ 143; 18 Bom LR 553 see cases referred to; *Isso Gaman*, A 1943 S 237; 45 Cr LJ 138.

80. *Avakhit*, A 1953 Or 30; 1953 Cr LJ 289.

81. *Gunga*, A 1950 A 143; 51 Cr LJ 450.

82. *Ulfat Singh*, A 1947 A 301; *N. M. Jagat*, A 1960 Mys 315; 1960 Cr LJ 1476. *In re Pathanberam*, A 1959 Ker 165.

83. *In re*; *Oamayan*, A 1947 M 353.

84. *Ulfat Singh*, A 1947 A 301.

84a. *In re Deaf and Dumb man*, (1902) 4 Bom LR 825.

85. *Rahman*, (1919) 1 Lah. 260; 2 PL R (1921); 21 Cr LJ 621; 57 IC 285.

5. In the case of a Court other than a High Court.—This section does not apply until there is a conviction.⁸⁶

6. The proceedings shall be forwarded to the High Court.—A Magistrate convicting an accused person under S. 304-A I. P. C. cannot pass an order under S. 562 Cr. P. Code. He can only report the case for the order of the High Court under this section.⁸⁷

7. Power of High Court to pass thereon such order as it thinks fit.—The High Court may, in the case of a deaf and dumb accused person who cannot understand the proceedings against him, or plead to the charge, treat the proceedings as amounting to a sufficient trial.⁸⁸

An accused person, who had been for some time confined in a lunatic asylum, was tried and committed to the Sessions by a Deputy Magistrate on a charge of murder. The accused was deaf and dumb and could not be made to understand the proceedings which had been taken. The High Court held that the accused was guilty of the alleged murder but that he was by reason of unsoundness of mind not responsible for his action and it directed him to be kept in the District Jail to await the orders of the Government.⁸⁹ A deaf and dumb person was found guilty of attempt to commit suicide. At the trial he made certain signs to signify what took place. On the case being referred under this section, the High Court affirmed the conviction and sentenced the accused to one day's simple imprisonment.⁹⁰ On reference the High Court may discharge the accused⁹¹ and can pass sentence.⁹² Where a deaf and dumb person with 25 others charged under Ss. 302, 251, 325 and 328 read with S. 149 I. P. C. was committed to Sessions and the proceedings were submitted to the High Court under this section, the High Court to ensure a fair trial ordered the appointment of a special counsel.⁹³

Where the accused is deaf and dumb, it is *inconvenient to try him summarily*. In such a case, attempt should be made to find whether the accused has any friends or relatives who are accustomed to communicate with him.⁹⁴

342. Power to examine the accused.—(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

86. *In re a Dumb man*, Rat 879.

87. *Addala Yerivadu v. Magt. Vizagapatam*, (1912) 11 MLT 404 : 13 Cr LJ 248 : 14 IC 600.

88. *Dwaraka v. Noder*, (1874) 22 WR (Cr) 35; *Bowka*, (1874) WR (Cr) 72; *Trinbark*, A 1938 B 352; 39 Cr LJ 866 (Magistrate should refer the case of deaf accused and co-accused to High Court).

89. *Somir Bowra*, (1899) 27 C 368 : 4 CWN 421, followed in *Nga San*

Myin, (1910) 4 Bur LT 150 : 12 Cr LJ 386; *Avakhit*, A 1953 Or 30; 1953 Cr LJ 289.

90. *Khashaba Tatyia Lawand*, (1922) 25 Bom LR 43 : 24 Cr LJ 340; 72 IC 349 : AIR (1923) B 194.

91. *Dwaraka*, 22 WR (Cr) 35.

92. *Goonga*, A 1950 A 143.

93. *Iso*, A 1943 S 237 : 45 Cr LJ 138.

94. *In re a deaf and dumb man*, (1906) 8 Bom LR 849 : 4 Cr LJ 444.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1).

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 11. Time of examination of accused. |
| 2. Legislative Changes. | 12. Written statement filed by accused.
—cannot take the place of examination under S. 342. |
| 3. Effect of 1955 Amendment. | 13. Sub-section (1)
—Accused in his own interest must explain circumstances. |
| 4. Scope. | 14. Power of special Bench. |
| 5. Object. | 15. Procedure. |
| 6. Section not <i>ultra vires</i> . | 16. Accused jointly Tried.
—procedure. |
| 7. Non-compliance with the mandatory provision of the section.
—Effect of | 17. Distinctions between S. 342 and S. 164 statements. |
| 8. At what stage of the Trial is the accused to be examined. | 18. Sub-section (2).
—may draw such inference from refusal to answer.
—statements under S. 342 if privileged. |
| 9. Additional evidence under S. 428. | 19. Sub-section (3). |
| 10. Applicability.
—to proceedings under S. 110.
—not applicable to S. 488 proceedings.
—not applicable to proceedings under Calcutta Municipal Act.
—applicable to warrant cases.
—Summons cases.
—Summary Trials.
—Presiding Magistrate.
—Person exempted under Sec. 205. | 20. Sub-section (4). |
| | 21. What is sufficient examination under S. 342. |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 202, 204, 373 of the Code of 1861, Ss. 193, 250, 342 and 343 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative changes (1955).—The words “when he is examined under sub-section (1)” at the end of sub-sec. (4) were added by Act 26 of 1955.

3. Effect of 1955 Amendment.—The amendment is consequential on the insertion of S. 342-A by Act 26 of 1955 which has provided that the accused is a competent witness and may offer himself to be examined as a defence witness.

The Select Committee on the Bill of Act X of 1882 added :—

“We have, therefore, limited the power of interrogating the accused by adding to the first paragraph of S. 342 the words ‘*for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.*’ We think the accused should always have this opportunity of explaining, and we have, therefore, required the Court to question him generally for that purpose before he enters on his defence.”

This was thought necessary because under the Code of 1872 a general examination on whatever might suggest itself to the Court could be held as in *Hossein Buksh's* case.⁹⁵

4. Scope.—Carnduff J., held “even if S. 146 were held to be inapplicable, the provisions of that section and of Ss. 342 and 364 of the Procedure Code are not *exhaustive* and do not limit the generality of S. 21 of the Evidence Act as to the relevance of admissions”.⁹⁶ This section imposes an imperative duty on the Judge of giving the accused an opportunity of explaining the circumstances appearing in evidence against him.⁹⁷

5. Object.—The object of the examination referred to in the section is to enable the accused to explain any circumstances appearing in the evidence against him and it is clearly indicated in the last part of the section that the time, at which the Court shall question the accused generally on the case, is *after* the prosecution case is completed and *before* the accused person is called on for his defence.⁹⁸ It is not competent to the Court under this section to *cross-examine* the accused.⁹⁹ The object of this section is *not to fill up a gap in the evidence for the prosecution*,¹ or to puzzle the accused,^{1a} but to enable the prisoner to explain any circumstances appearing in the evidence against him.¹

It is not enough to read over the questions and answers put in the Committing Magistrate's Court and ask the accused whether he has anything to say about them. The accused must be questioned about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused fair and proper opportunity of explaining circumstances which appear against him.^{1b}

It is not sufficient compliance with the section to generally ask the accused that having heard the prosecution evidence what he has to say about it. The questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.²

6. Section not ultra vires.—This section is not *ultra vires* of the Constitution in infringing the guarantee of Art. 20 (3).³

7. Non-compliance with the mandatory provisions of the section.—The first part of Cl. (1) is not mandatory. The Court may at any stage of any inquiry or trial put questions to the accused. *Non-compliance with the*

95. *Hussein Buksh*, (1880) 6 G 96 : 6 CLR 521.

96. *Barindra Kumar Ghose*, 37 C 467 (513) : 14 CWN 1114 : 11 Cr LJ 453 : 7 IC 359.

97. *Abdul Razak*, (1894) Rat 710 ; *Harish Chandra Talcherkar*, (1907) 10 Bom LR 201 : 7 Cr LJ 194 ; *Savalya Atma Pasty*, (1907) 9 Bom LR 356 : 5 Cr LJ 352 ; (1885) 2 Weir 405.

98. *Mazhar Ali*, (1922) 50 G 223 : 27 CWN 99 : 36 CLJ 417 : 71 IC 662 ; AIR (1923) C 196.

99. *Umar Din*, (1922) 2 L 129 : 3 LLJ 287 : 23 Cr LJ 388 : 67 IC 340 ; *Mg. Hanan*, 1 R 689 : AIR (1920) R 172 ;

See *Panchu Chowdhury*, (1921) 3 PLT 649 : 23 Cr LJ 233 ; *Hurry Charan Chakrabarty*, (1883) 10 C 140.

1. *Basanta Kumar Ghattak*, (1898) 26 G 49 ; followed in *Mohideen Abdul Kadir*, (1903) 27 M 238 and *Yasin*, (1901) 28 C 689.

1a. *Kheoraj*, (1903) 30 A 540 ; *Anant Narayan*, (1904) 6 Bom LR 94.

1b. *Tara Singh v. State*, A 1951 SC 441 (445-466).

2. *Ajmer Singh*, A 1953 SC 76.

3. *Banwari Lal*, A 1956 A 385 : 1956 Cr LJ 841 ; *Ranjit Singh*, A 1952 HP 81 : 1952 Cr LJ 1720.

provisions of this section vitiate a trial.⁴ Where the accused was questioned by the Magistrate before all the witnesses for the prosecution had been examined, cross-examined, and re-examined, the conviction was set aside and the case remanded to the lower Court for a fresh trial.⁵ Non-compliance with the provisions of this section vitiates the trial.⁶ Sir Lancelot Sanderson, the late Chief Justice of the Calcutta High Court, observed: "I hope that in future the Court will observe the provisions of S. 342 (1) of the Code. If they will do so, they will save the High Court an immense amount of time, because, in my experience, the point herein considered is frequently arising, and Rules have to be issued by reason of the fact that the trial Court has not observed the provisions of the section".⁷

The examination of the accused, only after the examination-in-chief of the prosecution witnesses, and before the close of their cross-examination and re-examination is not a compliance with the provisions of this section and the conviction is illegal.⁸ The Bombay High Court has adopted the same view in *Fernandez* and other cases.⁹ The Patna High Court has also adopted the same view.¹⁰

The Allahabad High Court has held a *contrary view*. Stuart J. held that the omission to comply with the provisions of the section is an error but does not vitiate the trial unless the accused has been prejudiced.¹¹ The Madras High Court by a full bench decision has held that the provision in the latter part of S. 342 Cl. (1) directing the Court to question the accused on the case is *mandatory* and not merely discretionary, and failure to comply with the terms of the section is an illegality vitiating the trial, and not a mere irregularity which can, in a proper case, be cured under S. 537 of the Code.¹² The Lahore High Court has held that the omission to comply with the provisions of S. 342 is an illegality.¹³ The Rangoon High Court has also held the same view.¹⁴ The Nagpur Judicial Commissioner's

4. *Raghu Bhumji*, (1920) 5 Pat LJ 430 : 21 Cr LJ 705 : 58 IC 49 ; *Haro Nath, Malo v. Ala Bux*, (1922) 38 CLJ 281 : 28 GWN 119 : 25 Cr LJ 289 : 76 IC 961 : AIR (1924) Cr 182 ; *Sailendra Chandra Singh*, (1923) 38 CLJ 175 : AIR (1924) C 153 ; *Abdul Samed*, (1924) 40 CLJ 319 ; *Hamid Ali v. Sriksissen Gossain*, (1922) 37 CLJ 413 ; *Akshoy Kumar Mukherjee*, (1917) 22 GWN 405 ; *Ah Foong Chinaman*, (1918) 22 CWN 834.
5. *Kashi Pramanik v. Damu Pramanik*, (1921) 27 GWN 28.
6. *Promotha Nath Mukherjee*, decided by third Judge, 50 C 923.
7. *Mazhar Ali*, (1922) 50 C 223 : 24 Cr LJ 198 : 71 IC 662 : AIR (1923) C 196.
8. *Jummon Christian*, (1922) 50 C 308 ; *Gulzarilal*, (1922) 49 C 1075 : 39 CLJ 31 ; *Alimuddin Nasker*, (1924) 41 CLJ 101 ; *Legal Remembrancer Bengal v. Satisch Chandra Roy*, (1924) 51 C 924.
9. *Fernandez*, (1920) 45 B 672 : 22 Bom LR 1040 : 22 Cr LJ 17 : 59 IC 129, followed in *Gulabjan*, (1921) 46 B 441 : 23 Bom LR 1203 : 23 Cr LJ 45 : 64 IC 669 ; *Rustamji Mancherji*, (1921) 23 Bom LR 984 : *Abdul Gani Bhadurbhai*, (1925) 49B 878 (884) ; *Harjivan Velji*,

- 28 Bom LR 115 ; *Basappa*, (1915) 17 Bom LR 892 : 16 Cr LJ 765 ; *Nathu Kasturchand Marwadi*, (1924) 50 B 42 : 27 Bom LR 105, following *Dibakar Mukherjee*, (1923) 50 C 939. *Express Diary Ltd. v. Corporation of Calcutta*, A 1950 C 61 ; *In re K. G. Jagannathan*, A 1958 M 333 ; *Nirmal Prasad Barua*, A 1952 Ass 2 ; *Sitaram Gope*, A 1946 P 128 ; *Md. Nawaz*, A 1938 L 543 ; *Mastan Singh*, A 1953 Pepsu 125.
10. *Mitrajit Singh*, (1921) 6 PLJ 644 following *Raghu Bhumji*, (1920) 5 Pat LJ 430 : 1 PLT 241 : 21 Cr LJ 705 : 58 IC 49, *Debram*, A 1952 A 33 ; *Tota Ram* A 1948 A 1137 ; *Kondibu Bolaji* ; A 1940 B 314 ; *Dar Singh*, A 1952 Punj 214 ; 1952 Cr LJ 998 ; *Shiam Manohar*, A 1953 A 443.
11. *Bechu Chaube*, (1922) 45 A 124 : 20 ALJ 874 : 24 Cr LJ 67 : 71 IC 115 : AIR (1923) A 81.
12. *Varisai Rowther*, (1922) 46 M 449 FB : 44 MLJ 567 ; *Gopal Naidu*, (1922) 46 M 605 (FB) ; *Kuppu Mudali*, (1925) 49 M 71.
13. *Bahawala*, (1925) 6 L 183 ; *Lachman Das Singh*, (1926) 7 L 564.
14. *Mg Haman*, 1 R 689 : 2 Bur LJ 235 : AIR (1924) Rang 172 ; *Nga Tung Hlang*, 26 Cr LJ 108.

Court has held the same view.¹⁵ The failure by a Magistrate to examine an accused person for the purpose of this section is a grave irregularity and might be a suitable ground for setting aside a conviction.¹⁶

But in the following cases¹⁷ it has been held that the omission to examine the accused after the prosecution is closed and the accused called on to enter on his defence is an *irregularity* curable under S. 537.

The conflict of opinion as to whether the omission to comply with the mandatory provisions of the second part of the section vitiates the trial or is a defect or irregularity curable under S. 537 is now set at rest by the decisions of the Supreme Court which have held that unless the accused have been prejudiced or was likely to be prejudiced by the improper examination of the accused, the trial is not vitiated. The importance of observing faithfully and fairly the provisions of S. 342 can not be too strongly stressed. Every error or omission in this behalf does not necessarily vitiate a trial because the errors of this type fall within the category of curable irregularities. Therefore the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned.¹⁸ It was held in¹⁸ that it is not a proper compliance to read out a long string of questions and answers made in the Committal Court and ask whether the statement is correct. It was held in *Ajmer Singh's* case¹⁹ that it is not sufficient compliance with the section to generally ask the accused that having heard the prosecution's evidence what he has to say about it.

It was held however in *Bimladhar Pradhan v. State of Orissa*²⁰ that it is not ordinarily necessary to put the evidence of each individual witness in his examination under S. 342. The appellant was put the question, 'Have you anything to say about the evidence?' It was held in *Bejoy Chand Patra v. State of West Bengal*²¹ that it is not sufficient for the accused merely to show that he has not been fully examined as required by S. 342. Where the accused was tried and convicted of murder of his brother by strangulation and the only evidence against him was that of his wife, the examination under S. 342 was perfunctory and he was not asked to explain the circumstances appearing in the evidence against him, *held*, that in the circumstances the disregard of the provisions of S. 342 had resulted in grave prejudice to the accused vitiating the trial.²²

It is no doubt true that S. 342 contemplates an examination in Court, and the practice of filing written statements is to be deprecated. But that is not a ground for interference unless prejudice is established.²³ A judgment is not to be set aside merely by reason of inadequate compliance with S. 342. Clear prejudice must be shown. Possibility of prejudice is not enough.

In the instant case the only question put to the accused was: "You have heard the charge made and the evidence adduced against you. Now say, what is your defence what have you to say"?²⁴ "This Court has, on more

15. *Mussamat Tani*, (1918) 20 Cr LJ 12 : 48 IC 487 (Nag).

16. *Krishnappa*, AIR (1924) Nag 51.

17. *Jhubbar Mal*, (1926) 26 ALJ : 197 ; *Nga Hla U*, (1925) 3 R 139.

18. *Tara Singh*, 1951 SCR 729 : A 1951 SC 441 ; 52 Cr LJ 491 followed in *Ajmer Singh*, 1953 SCR 318.

19. 1953 SCR 318 ; A 1953 SC 76 ; 1955 Cr LJ 521 ; *Warappan*, A 1958 Manipur 17.

20. 1956 SCR 206 ; AIR 1956 SC 489

(held sufficient examination) ; *Daraiswamy Goundan*, A 1946 M 179.

21. 1952 SCJ 17 ; A 1952 SC 105 ; 1952 Cr LJ 644.

22. *Bihari Singh Mudha Singh v. State of Bihar*, A 1954 SC 692.

23. *Tilakdhari Singh v. The State of Bihar*, A 1956 SC 288.

24. *Mosab Kaka Chowdhury*, (1956) SCA 754 : A 1956 SC 536 followed in *Madanlal*, A 1961 C 240.

than one occasion stated that compliance with the provisions of S. 342 is not a mere idle formality and we are in agreement with the comment made by the learned Judges of the High Court that in this case the examination of the circumstances appearing against them was neither full nor very satisfactory. We also agree with them that no serious prejudice was caused—such as to vitiate the whole trial”.²⁵ If prejudice is caused to the accused, retrial will be ordered.²⁶

Where statement of accused was recorded at close and not beginning of defence evidence but no prejudice was shown for recording the examination improperly, held case need not be sent back for retrial.^{26a}

Accused has to show ‘prejudice’.²⁷ Where no grievance was made in the trial court and the High Court about non-compliance with the requirements of S. 342 it cannot be raised for the first time in an appeal to the Supreme Court under Art. 136 of the Constitution, the reason being that whether there was prejudice, is a question of fact.^{27a} Where accused charged with murder confessed six days after arrest but was not questioned about the confession in his examination under S. 342 and the trial lasted over 4½ years, he was acquitted. Bose, J., observed:—“We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial Judges omit to do their duty”.²⁸ Where accused was asked whether his statement under S. 342 before committing Court was correct, held, as it was read out by the Sessions Judge, no prejudice was caused for insufficient recording by Sessions Judge.²⁹

8. At what Stage of the Trial is the accused to be examined.—Sub-sec. (1) of S. 342 contemplated two stages at which an accused can be examined. The use of the words ‘may’ and ‘shall’ in two parts of the section goes to show that under the first portion the Court may put questions at any stage of the inquiry or trial and examine the accused. But it must do so after the evidence for the prosecution is over and before the accused is called upon to enter on his defence.³⁰ Before the Supreme Court decision in *Masab Kaka Choudhury*,³¹ and other cases which have been discussed under the heading ‘Non-compliance’; it has been held in cases⁵ to¹⁷, before the decision by the Supreme Court in *Masab Kaka Choudhury*,³¹ that the provisions of the second part of the section is *mandatory* and *vitiates* the trial.

9. Additional evidence under Section 428.—This section does not apply to evidence taken under S. 428 as S. 428 (3) contemplates evidence in the absence of the accused person.³²

10. Applicability.—to proceedings under Section 110.—This section does not apply to an inquiry under S. 117. The omission to examine the person called upon for security is not an illegality vitiating the conviction, but an irregularity covered by S. 537 of the Code.³³

25. *Chikkarange Gowda v. Mysore State*, A 1956 SC 731.

26. *Kedar*, A 1954 SC 602 : 1954 Cr LJ 1742.

26a. *M. B. Kanwar*, A 1963 Punj 201 following *Masab Koka v. State of W. B.* A 1956 SC 536 and *Arjun Singh*, A 1953 SC 76.

27. *Rajana*, A 1959 A 718.

27a. *Radha Krishna v. State of U. P.* A 1963 SC 822.

28. *Mauchander son of Panderang v. State of Hyderabad*, (1955) 2 SCR 524 : A 1955 SG 792.

29. *Wasim Khan v. State of U. P.*, (1956) SCR 191 ; A 1956 SC 400.

30. *B. Madhaya Ahanoi v. Moktyar Sakim*, A 1957 Mys 9 (2) ; 1957 Cr LJ 206.

31. (1956) SCA 754 ; A 1956 SG 536.

32. *Narayan Keshav*, (1928) 30 Bom LR 651 : AIR (1928) B 200 following 4 P 458 ; *Nathu Singh*, A 1941 N 66 ; *Ram chandra*, A 1937 P 245 ; 38 Cr LJ 657.

33. *Binode Behari Nath*, (1923) 50 C 985 : 39 CLJ 75, doubted by Mukerji J., in *Narendra Chandra Rudra Pal v. Sabrati Bhuiya*, (1915) 41 CLJ 479 (FB) (491).

The provisions of this section apply to all sorts of proceedings in Magistrate's Courts, whether the case is *one triable by a Court of Sessions* or otherwise.³⁴ A Sessions Judge has no power to question the prisoner *at a stage when no evidence has been recorded* which he could be required to explain.³⁵ A person proceeded against under S. 107 is not an accused within the meaning of S. 342.³⁶

Not applicable to proceedings under Section 488.—This section is not applicable to a proceeding under S. 488.³⁷

Not applicable to proceedings under the Calcutta Municipal Act.—The section does not apply to a proceeding under the Calcutta Municipal Act.³⁸

Not obligatory in case of Court witnesses.—It is not obligatory to comply with the provisions of the section in the case of Court witnesses.³⁹ Although the view in *Mahadu's case*³⁹ follows the decision in *Prayag Gope*⁴⁰ it is open to doubt whether the Court can dispense with a further examination of the accused in such cases.

Section applicable to Warrant cases.—All the High Courts agree in holding that the section is applicable to warrant cases.

Does the section apply to Summons cases?—The Calcutta,⁴¹ Patna⁴², Bombay⁴³ and Lahore High Courts⁴⁴ agree in holding that this section is applicable to summons cases and failure to examine an accused under S. 342 in a summons case vitiates the trial. The Madras High Court by a full bench decision has held that the section is not applicable to summons cases.⁴⁵ Rankin and Duval J.J., in *Bechulal Kayastha*⁴⁶ have reviewed the above full bench decision in *Ponuswami's case*⁴⁵ and differing from it have held that the section is applicable to summons cases and the omission to comply with the provisions of the section vitiates the trial.

Section applies to Summary trials.—The section applies to 'Summary Trials' of warrant-cases, but it is not necessary to record the questions put to the accused person or his pleader.⁴⁷

34. *Malik Hussain*, (1914) 15 Cr LJ 474 : 24 IC 562 (Oudh) : *Raghu Bhumji*, (1920) 5 Pat LJ 430 : 1 Pat LT 241 : 21 Cr LJ 705 : 58 IC 49.

35. *In re Sadayan*, (1908) 5 MLT 216 : 11 Cr LJ 193 : 4 IC 1126.

36. *Kathak v. Pannalal*, A 1958 C 140.

37. *In re Vithaldas Bhurabhai*, (1928) 30 Bom LR 957 : AIR (1928) B 347, *Mehr Khan* AIR (1929) L 32 *see contra Demello*, 27 Cr LJ 1000 (L) ; *Kumbhar v. Mangru Kumbharim*, A 1959 C 454 ; *Vithaldas Bhurabhai*, A 1928 B 147 ; *Ahadikhan v. Mst. Gul Begum*, 28 Cr LJ 478 (Lah).

38. *Krishen Dayal Jalan v. Corporation of Calcutta*, (1927) 45 CLJ 469.

39. *Mahadu Raghavji Thakur*, (1928) 30 Bom LR 1086 : AIR (1928) B 338.

40. 3 P 1015.

41. *Bechulal Kayastha*, (1926) 54 C 286 : 45 CLJ 8 ; *Gulzarilal*, (1922) 49 C 1075 : 24 Cr LJ 3 ; *Sia Ram*, A 1935 A 217 ; *Karna Shankar*, A 1936 Oudh 16 ; *Raghuvalu, P. In re* ; 1955 An WR 749.

42. *Gulam Rasul*, (1921) 6 Pat LJ 174 : 2

Pat LT 290 : 22 Cr LJ 427 : 61 IC 715 ; *Sukhdeo Parsad*, 16 P 97 ; 39 Cr LJ 321.

43. *Gulebjan*, 46 B 441 : 23 Cr LJ 45 : 64 IC 669 : 23 Bom LR 1203 and *Rustomji Mancherji*, (1921) 23 Bom LR 984 following *Fernandez*, (1920) 45 B 672 : 22 Bom LR 1040 : 59 IC 129 ; *Kandiba Balaji*, A 1940 B 314, *Nabu*, A 1926 SL.

44. *Mahomed Baksh*, (1922) 4 LLJ 230 : 23 Cr LJ 154 : 65 IC 613 : AIR (1923) L 45 ; *Lachman Singh*, (1926) 7 L 564 ; *Devi Dyal*, (1922) 4 L 55 ; *Karan Din*, 15 L 69 ; 35 Cr LJ 1394 ; *Denello v. Mrs. Denallo*, 27 Cr LJ 1000 ; *Contra Kalo Khan*, A 1927 L 268.

45. *Ponuswami v. Ramasami*, 46 M 758 (FB). *Nga Lul Gyi*, A 1931 R 244 (FB) : 32 Cr LJ 1190.

46. (1926) 54 C 286 : 45 CLJ 8 ; *Fernandez*, 45 B 672 ; *Gulzarilal*, A 1923 C 164.

47. *Parsotam Das*, (1927) 6 P 504 ; *Nabu*, A 1926 SI : 26 Cr LJ 1554 (FB) ; *Rochiram*, A 1957 MP 210 ; *Amaresh*, A 1948 C 110 ; *Totaram*, A 1948 A 137.

Applicability to Presidency Magistrate.—A Presidency Magistrate is bound to question the accused generally on the case under the Second part of sub-sec. (1) but it is not obligatory to keep a record of the answers.⁴⁸

Applicability to Accused exempted under S. 205 from personal attendance.—The Calcutta High Court in a recent full bench decision,⁴⁹ where a Magistrate has permitted the accused to be represented by a pleader under S. 205 (1) or S. 540 by a majority *held*, that “it is clear that the Judicial Commissioner of Sind⁵⁰ and the Rangoon,⁵¹ Bombay,⁵² Madras,⁵³ Madhya Pradesh,⁵⁴ Orissa,⁵⁵ Allahabad⁵⁶ and Kerala⁵⁷ High Courts are all in favour of the view that the Magistrate may exercise his discretion in the matter of personal examination of the accused when the accused has been permitted to be represented by a pleader and the Magistrate is not compelled to examine the accused personally under S. 342 of the Code; only the Punjab High Court⁵⁸ has taken the opposite view” and overruled the contrary view taken in⁵⁹ which followed the view of Rankin, J., in *Pramatha Nath's* case⁶⁰ where Rankin, J., observed :—“The intention of the statute is that at a certain stage of the case the court should put aside all counsels, all pleaders, all witnesses, all representatives, and call upon an individual accused with the authority of the court's voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating.” The minority view followed Rankin, J.'s, observation. It is submitted, that the view taken by the minority Judges in *Prova Debi's* case⁴⁹ is the correct view as the majority view would render the provisions of S. 342 nugatory.

11. Time of examination.—A Magistrate is bound to examine the accused under S. 342 after all the prosecution witnesses have been examined and cross-examined.⁶¹ The duty of the Magistrate under S. 342 arises when the witnesses for the prosecution have been examined, cross-examined and re-examined.⁶² Section 342 does not lay down any particular moment of time but a period within which the examination can be held. A trial of a warrant case should be regarded as comprising not merely two stages, prosecution, further cross-examination of prosecution witnesses and defence.⁶³ The examination of prosecution witnesses under S. 540 is no part of the prosecution case and the accused need not be examined again under S. 342 unless fresh facts are disclosed.⁶⁴

48. *Vithal Tulsiram*, A 1956 B 123 ; 1956 Cr LJ 376 ; *Darabshah Bonaji*, A 1926 A 218.

49. *Sm. Prova Debi v. Mrs. Fernandez*, (1961) 66 CWN 577 FB at p 591 ; A 1962 C 203.

50. *Jamal Khatun*, 14 Cr LJ 272.

51. *Maung Po Nyain v. Haka Singh*, A 1927 R 73.

52. *Jaffar Cassim Mossa*, A 1934 B 212 ; 35 Cr LJ 1033.

53. *In re, G. M. Raghavan*, A 1950 M 816.

54. *Tara Chand Anand*, A 1957 MP 219.

55. *Rusi Biswal v. Nakhjatra Malund*, A 1954 Or 65.

56. *Ram Singh*, A 1959 A 623, *Contr. Ishardas v. Ghagaban Das*, A 1934 A 693 ; *Hikmat Ali*, 35 Cr LJ 784.

57. *Karanja v. Chellappa Pillai*, A 1960 Ker 383 ; 1960 Cr LJ 1597.

58. *Sadhuram v. Amar Kaur*, A 1959 Punj 228.

59. *Dudnath Shaw*, A 1958 C 431 and *Adeluddin*, 49 CWN 537 ; A 1935 C 482.

60. *Promothanath*, 50 C 518 ; 27 CWN 389 ; 24 Cr LJ 248 (2).

61. *Gulzarilal*, 49 C 1075 ; 24 CLJ 3 : 71 IC 51 ; AIR (1923) C 164.

62. *Promotho Nath Mukherjee*, (Servant Defamation case) 50 C 518 ; 27 CWN 389 ; 71 IC 792 : 24 Cr LJ 248 ; AIR (1923) C 470.

63. *Md. Newaz*, A 1938 L 543 ; 39 Cr LJ 781.

64. *Pal Mohammed*, A 1926 N 348 ; 27 Cr LJ 475 ; *Prayag*, 3 P 1015 ; *Ramchandra*, A 1937 P 246 ; *Gurbaksh Singh*, A 1938 L 631 ; *Shearam Idan*, A 1937 N 285 ; 38 Cr LJ 1058.

The Court can examine the accused as often as it thinks necessary.⁶⁵ There is a distinction between the accused being called upon to explain and his proving innocence on rebuttal of the *prima facie* case made out against him.⁶⁶ Where the accused has been examined under S. 342 and a fresh charge has been added and no further evidence has been adduced, he need not be examined again.⁶⁷ If a fresh witness is called in and examined, the accused must again be questioned according to S. 342.⁶⁸

After the witnesses for the prosecution have been examined and before he is called on for his defence.—Rankin, J., held :—“The word ‘examined’ includes examination-in-chief, cross-examination and re-examination. In my judgment the end of sub-sec. (1) of S. 342 indicates a perfectly definite stage, namely *after* the prosecution case is finished and before the defence case is begun”.⁶⁹ The examination of an accused person before all the witnesses for the prosecution have been examined is illegal.⁷⁰ Schwabe, C.J., in delivering the full bench judgment of the Madras High Court held :—“Under the section it must be *after* the prosecution witnesses have been examined and *before* the accused is called on for his defence. In my judgment ‘after the prosecution witnesses have been examined’ means when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include the cross-examination and re-examination of the prosecution witnesses, if there is any”.⁷¹ The Lahore High Court has held that although it may often be desirable that the accused should be examined, after the further cross-examination of witnesses for the prosecution recalled after the charge has been framed, omission is an irregularity cured by S. 537.⁷²

12. Written statement filed by the accused cannot dispense with the examination of the accused under this section.—An accused in a warrant case may file a written statement under S. 256 (2) of the Code.

The fact that the accused are asked to put in written statements is of no great moment for the purpose under S. 342. There is all the difference in the world between a written statement, presumably prepared, almost certainly revised, by the lawyers appearing for the defence, and a statement made by the accused himself so that the Magistrate can observe his demeanour and his manner while he makes it, and come to his conclusions as to the value of his evidence.⁷³ It is the universal practice in the Courts of the province of Bengal to file written statements. Such a written statement does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.⁷⁴ Beachcroft, J., of the Calcutta High Court in a later case has condemned the practice of putting in written statements.⁷⁵ The Patna High Court held that the trial was not vitiated by a non-compliance with the pro-

65. *Rusi Bismal v. Nakhyatramalini Dasi*, A 1954 Or 65 ; *Manar Pandey*, A 1942 P 77 ; 43 Cr LJ 48.

66. *Parshedi*, A 1955 A 443.

67. *Sitaram Singh*, A 1958 P. 462 ; 1958 Cr LJ 1082.

68. *Nataraja Mudaliar v. Doraslagamani Mudaliar*, A 1931 M 241 ; 32 Cr LJ 757 ; *Gone Acharya*, 1936 MWN 825.

69. *Dibakantha Chatterjee v. Gour Gopal Mukherjee*, (1923) 50 C 939 : 27 CWN 743 : 25 Cr LJ 27 : 75 IC 715 : AIR (1923) C 727 followed in *Nathu Kastur Chand Maruadi*, (1924) 50 B 42.

70. *Rameswar Singh*, (1920) 2 Pat LT 741 : 22 Cr LJ 259 : AIR (1922) P 299.

71. *Varisai Rowther*, 46 M 449 (FB) : 44 MLJ 567 : (1923) MWN 477 : AIR (1923) M 609 (FB) overruling *In re Maruda Mathu*, (1922) 45 M 820 : 23 MLJ 402 : (1922) MWN 601 : 24 Cr LJ 124 : AIR (1922) M 512.

72. *Byrne*, (1922) 4 L 61 : AIR (1924) L 84.

73. *Promotho Nath Mukherjee*, (1923) 50 C 923 (924).

74. *Amrita Lal Hazra*, (1914) 42 C 957 : 19 CWN 676 : 21 CLJ 331 : 16 Cr LJ 497 : 29 IC 513.

75. *Dwijendra Chandra Mukherjee*, (1915) 19 CWN 1043 (1054) : 16 Cr LJ 724 : 31 IC 164.

visions of this section when written statement was filed by the accused after the prosecution witnesses had been examined, cross-examined and re-examined and after the defence witnesses had been cross-examined and discharged.⁷⁶ A written statement filed by an accused person cannot take the place of his examination under this section.⁷⁷ The Madras High Court in *In re Nainamalai Konan*⁷⁸ and the Burma Chief Court in *Nga Po Mya*⁷⁹ and the Lahore High Court in *Harnama*⁸⁰ held the same view as in *Balkesar*,⁷⁷ but the Allahabad High Court in *Ansuiya*⁸¹ has doubted whether a written defence can be put in at the trial of cases before the Court of Session and held whether such a written defence can or cannot legally be put in and accepted by the Court, it most certainly cannot be allowed to take the place of the examination under S. 342.

There is no provision in the Code for filing written statements. It is only by courtesy that the courts receive such statements.⁸² The fact that an accused puts in a Written Statement does not absolve the Magistrate of the duty imposed upon him by this section.⁸³ It is no doubt true that S. 342 contemplates an examination in Court and the filing of written statements is to be deprecated. But that is not a ground for interference, unless prejudice is established.⁸⁴ The practice of filing written statement to be used at a Sessions trial by a jury has been deprecated.⁸⁵

13. Sub-section (1) "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him."—These words were new in the Code of 1882. See Commentary under the heading 'Legislative Changes'.

This clause governs both the parts of Cl. (1).

The sections dealing with statements by an accused person are Ss. 164, 209, 242, 244, 245, 255, 256 (2), 287, 289, 342, 364, 533. Under the Codes of 1861 and 1872 something in the nature of cross-examination was permissible but under the Code of 1882 it was held that the Court could not put questions in the nature of cross-examination to the accused while examining the accused nor force him to make incriminating statements.⁸⁶ A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under this section.⁸⁷ Where a Magistrate, before evidence taken for the prosecution put questions to the accused of the nature of a cross-examination, held that it could not be said that the questions were put for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence within the meaning of

76. *Mir Tilawan*, (1921) 1 P 31 : 23 Cr LJ 703.

77. *Balkesar Singh*, (1922) 3 Pat LT 322 : 23 Cr LJ 114 : 65 IC 546, following *Raghu Bhumji*, 5 PLJ 430.

78. 14 LW 418 : 23 Cr LJ 697.

79. 3 UBR (1917) 18 : 18 Cr LJ 944 : 42 IC 176.

80. (1921) 22 Cr LJ 276 : 60 IC 676 (L)

81. (1903) AWN 1 ; *Jamuna Singh*, A 1947 P 305 ; *Dwarka Singh*, A 1947 P 147 ; 47 Cr LJ 780.

82. *Samaresh*, A 1953 A 781 ; 1953 Cr LJ 1805 ; *Taraknath Baidya*, 39 CWN 1309 ; *Md. Anis*, A 1936 Oudh 405 ; *Nirmal Kumar Ghose*, A 1949 C 238 : 50 Cr LJ 468.

83. *Jagannath*, A 1942 S 102 ; 43 Cr LJ 799.

84. *Tilakeshwar Singh v. State of Bihar*, A 1956 SC 238 ; 1956 Cr LJ 441 ; *Dwarka Nath Vermah*, A 1933 PC 124.

85. *Sidheswar Ganguly v. State of West Bengal*, (1958) SCR 749 : A 1958 SC 143.

86. *Anon*, 3 MHCR App ii ; *Haider Ali Pradhania*, 17 CWN 345 (357).

87. *Basanta Kumar Ghatak*, 26 C 49, followed in *Yasin*, (1901) 28 C 689 (693) ; *Mohideen Abdul Kadir*, (1903) 27 M 238 (240) ; *Chinapayan*, (1906) 29 M 372 ; *Ganesh Gyi*, (1908) 4 L B R 244 : 8 Cr LJ 62 ; *Benunan*, 6 Cox 388. See *Nga Tun Hlang*, 1 R 759 : 2 Bur LJ 270 : AIR (1924) R 115 (F B) ; *Mahadeo Singh*, A 1923 N 403 : 27 Cr LJ 66.

this section.⁸⁸ Edge, C.J., held "It requires no knowledge of law to understand this section, and to understand that it is not for the purpose of ascertaining what witnesses the accused intends to call, or what evidence they will give, or what his defence is, that a Court is justified or authorised in examining an accused under this section. A Court is only authorised under S. 342 to examine an accused for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.⁸⁹ The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is not therefore in a fit position to understand the significance of a complex question.⁹⁰ An accused is questioned under S. 342 to explain any circumstance appearing in the evidence against him. It is not necessary to ask him to explain any inference that a Court may be asked to draw from the evidence on record. No direction can be put regarding a matter where there is no evidence about it.⁹¹ Because of the presumption of innocence the version of the accused should be accepted unless the prosecution can prove it to be false.⁹² Circumstances appearing against the accused should not be considered unless opportunity is given to him to explain them in his examination under S. 342.⁹³ Court should put to the accused all relevant questions but should not put to the accused persons detailed questions in the nature of cross-examination⁹⁴. When a certain circumstance appearing in the prosecution evidence is to be raised against an accused and certain inferences are intended to be drawn from it, that circumstance must be specifically put to the accused in order to elicit explanation if any from him.⁹⁵ It would be fallacious to contend that unless the circumstances make out a *prima facie* case against the accused he cannot be asked to explain the incriminating circumstances.⁹⁶ He must be questioned separately against each material circumstances which is intended to be used against him.⁹⁷ To put the question in a manner which makes the accused persons not understand the implications of the questions is also not a matter which was never intended by the Legislature when it framed S. 342 of the Code.⁹⁸ A Court should not try to force a prisoner to commit himself by making some incriminating admissions or statements and allow additional prosecution evidence to rebut the defence disclosed.⁹⁹ Where the accused in his examination under S. 342 admitted that he was in charge of the godown but denied that the rectified spirit was found in that godown, and

88. *Hawthorne*, (1891) 13 A 345.

89. *Hargobind Singh*, (1892) 14 A 242 (253); *Bhut Nath Ghose*, (1902) 7 CWN 345 (351).

90. *Tara Singh v. State*, 1951 SGR 729; A 1951 SC 441; 52 Cr LJ 1491; *Pagla Baba*, A 1957 Or 130; 1957 Cr LJ 769; *Krishna K.*, In re, A 1941 M 296; 42 Cr LJ 402; *Rangaswami Chettier*, A 1953 Tr Co 280.

91. *R. K. Dalmia v. Delhi Administration*, A 1962 SC 1821.

92. *Hate Singh Bagat Singh v. State of Madhya Bharat*, A 1953 SC 468.

93. *Twinghe Ariel v. State of Madhya Pradesh*, A 1954 SC 15; 1954 Cr LJ 230.

94. *Jai Dev v. State of Punjab* A 1963 S C 612 where *Hate Singh Bhagat Singh v.*

State of Madhya Bharat A 1953 S C 468; 1953 Cr LJ 433.

95. *Dakhi Singh*, A 1955 A 321; 1955 Cr LJ 884; *Anna*, A 1956 Hyd 99; 1956 Cr LJ 887; *Barendra Kumar Ghose*, 28 CWN 170; 25 Cr LJ 817 (FB) *Arjundas Khandelwal v. Basantlal*, A 1952 VP 16.

96. *Prashadi*, A 1955 A 443; 1955 Cr LJ 1125.

97. *Salig Ram*, A 1956 A 138; 1956 Cr LJ 186.

98. *Karuppa Valyan*, A 1960 Ker 238 (239); *Alimuddi Naskar*, 52 C 522; 16 Cr LJ 631; *Fattan*, A 1945 A 87.

99. In re *Ahmed*, A 1950 Mys 82; *Faquir Singh*, A 1929 L 382; 29 Cr LJ 769; *Narayan Chattiar*, A 1935 R 509.

that it was found outside the godown, *held* that the statement was not inculpatory and part exculpatory.¹

Accused must in his own interests explain the circumstances appearing in evidence against him.—The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him, it may however be injurious to him if no explanation or a false or unsatisfactory explanation is given.^{1a} In case of *circumstantial evidence*, it is both lawful and proper for the Court to consider the explanation of the facts put forward by the defence.²

14. Examination of accused—Power of Special Bench.—A Special Bench of the Calcutta High Court over-ruled the Defence objection that S. 342 was not applicable to a trial before a Special Bench constituted under Act XIV of 1908.³

15. Procedure.—The rules laid down in S. 364 are applicable to the examination of the accused under S. 342. The Magistrate should record in full the questions put to and the answers given by the accused and the whole must be made conformable to what the accused declares to be the truth, he must certify that his examination of the accused contains a full account of the statement made by the accused.⁴

In recording the examination of the accused, which was taken on two separate occasions, the Magistrate made the certificate required by S. 364 on the first page of the record of the examination, although the record of the examination taken on the first day alone extended over two pages and that taken on the second day was written entirely on the second page, *held* that the defect was cured by the *evidence* of the Magistrate.⁵

A Magistrate is bound to examine the accused under this section, after the examination, cross-examination and re-examination of all the prosecution witnesses. It is not a compliance with the section to examine the accused before he has the whole of the prosecution evidence in front of him or after the close of the defence evidence.⁶ Where an accused is undefended the tribunal may point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner a tribunal ought not to enter upon a lengthy examination of an accused person.⁷

16. Accused jointly tried—one giving explanation.—It is entirely in the discretion of the Magistrate to take another statement from the co-accused under S. 342.⁸

Where there are several accused, it is obligatory on the Court to put every piece of evidence against every one of the accused.⁹ Recording only a joint statement of all the accused is an illegality.¹⁰

1. *Virendrajit v. State of Bombay*, 1953 SC A 395 : A 1953 SC 247 : 1953 Cr LJ 1097.

1a. *Alimuddin Naskar*, 52 C 522 : A 1925 C 361 ; *Barendra Kumar Ghose*, 28 CWN 170 (FB) : A 1924 C 257.

2. *Amritlal Hazra*, 42 C 957.

3. *Nagendra Nath Sen Gupta*, (Musalmanpara Bomb case) 21 CLJ 396 (403).

4. *Nagar Purshotam*, (1902) 4 Bom LR 461.

5. *Rajani Kanta Koer*, (1903) 8 CWN 22.

6. *Promotho Nath Mukherjee*, (1923) 50 C

518 : 27 CWN 389 : 24 Cr LJ 248 : 71 IC 792 : AIR (1923) C 470.

7. *Panchu Chowdhury*, (1921) 3 Pat LT 649 : 23 Cr LJ 233 : 66 IC 73 : AIR (1923) P 91.

8. *Satyanarain Mahto*, (1928) 55 C 858 : 32 CWN 319 : AIR (1928) C 675.

9. *In re Arulananda*, A 1952 M 267 : 1952 Cr LJ 583 : *Nansadoba*, A 1938 N 283 : 40 Cr LJ 197.

10. *Bal Krishna Anant*, A 1931 B 132 : 32 Cr LJ 572.

Gambling Act being a special procedure over-rides the general law of procedure under S. 342.¹¹

Magistrate's Explanation.—The Magistrate's explanation must be accepted in preference to the statement in the petition about non-compliance of the provisions of S. 342.¹²

17. Distinction between statement recorded under this section and a confession under S. 164.—Under S. 164 the Magistrate is entitled to record any voluntary statement made by the accused person but he is not entitled to examine the accused person—that power is only given to him by S. 342.¹³

When a prisoner made a statement before the Committing Magistrate implicating his fellow prisoners and another person and he subsequently withdrew this statement and made another in which he endeavoured to exculpate himself it was held that this statement was not evidence against the other prisoners.¹⁴

It is undisputed that an accused person actually under trial cannot be sworn as a witness and that if two or three persons are being jointly tried, none of them is a competent witness for or against the others.¹⁵

18. Sub-section (2) 'The accused shall not render himself liable to punishment.'—An accused person does not render himself liable to punishment by refusing to answer questions put to him by a Magistrate and the same rule applies to his examination by a Police Patel.¹⁶

There is no law which confers upon an accused person immunity in respect of a false statement made in an affidavit tendered by him in support of an *application for transfer*, and that such statement can be the subject-matter of a charge for perjury.¹⁷

'May draw such inference from such refusal or answers as it thinks just.'—See S. 114, *ill. (h)*. Evidence Act I of 1872.

In case of a refusal to answer or a false answer the utmost that can be said is that the accused leaves the points against him unexplained.¹⁸

If the point which requires explanation has not been specifically put to the accused for an explanation, no adverse inference can be drawn against him.¹⁹ In case of circumstantial evidence where the circumstances point to the appellant as the probable assailant with reasonable definiteness, absence of explanation or false explanation would itself be an additional link which completes the chain.²⁰ The jury may draw such inference from the answers of the accused in statement made under S. 342. But to say that because the accused did not repeat the suggestions made by his counsel to the witnesses is a misdirection.²¹ Inference may be drawn against the accused on his

11. *Umersi*, 8 SLR 309 : 16 Gr LJ 447 : 29 IC 79.

12. *Sadagar Chaudhuri*, [1929] 49 CLJ 261.

13. *Gya Singh v. Mahomed Suliman*, (1901) 5 CWN 864.

14. *Novi Bux Kazi*, (1880) 6 C 279 : 7 CLR 385.

15. *Akhoy Kumar Mukherjee*, (1917) 22 CWN 405 (406) : 27 CLJ 91.

16. *Jayappa Nagappa Desai*, (1899) 1 Bom LR 435.

17. *Pir Quadir Baksh Shah*, (1924) 6 L 34 ;

Beddu Khan, AIR (1928) A 182.

18. *Md. Ilias* (1949) 1 C 49 ; *Danapula*, A 1937 R 83 (FB).

19. *Dwarakanath Barman*, 37 CWN P 514 : A 1933 PC 124 ; *Twinghe Ariel v. State of M. P.*, A 1954 SC 15 : 1954 Cr LJ 230.

20. *Deoanandas Mishra v. The State of Bihar*, 1955-2 SCR 570 : A 1955 SC 801 (806-7) : 1955 Cr LJ 1647.

21. *Madhusudan Sen Gupta v. State of West Bengal*, 61 CWN 856 : A 1958 C 25.

refusal to answer but not against his co-accused.²² An accused is to be given full liberty to explain the incriminating circumstances.²³

Sub-section (2).—If there are no circumstances appearing against the accused in the evidence then unquestionably the Judge shall not put to him any questions at all under S. 342.^{23a} If it is sought to be used as an admission the statement of accused must be read as a whole but where it consists of distinct and separate matter, there is no reason why an admission contained in the one matter should not be relied on without reference to the statement relating to other matters.^{23b}

It is open to the court to accept the statement of the accused so far as it relates to one fact, while reject another fact which is either proved to be false by the prosecution evidence or because of its inherent probability.^{23c}

Statements of accused under this section if privileged.—A full bench of the Madras High Court held that the statement of the accused under S. 342 although defamatory of one of the prosecution witness was absolutely privileged.²⁴

A false and defamatory statement in the examination of the accused if not absolutely privileged cannot be the subject-matter of his prosecution.²⁵ The Bombay High Court by a full bench decision²⁶ has held that a witness or accused cannot claim an absolute privilege in a statement under this section.

19. Sub-section (3)—‘May be taken into consideration.’—The answers given under S. 342 (3) may be taken into consideration at the trial and proper inferences may be drawn therefrom, and even in a subsequent trial for any other offence they may be still used as evidence for or against them.²⁷ Provisions of Ss. 287 and 342 (3) do not make the statement made by the accused before the Committing Magistrate and also in answer to the questions put by him in the Sessions Court, an affirmative evidence in the case but such statement must be taken into consideration with the prosecution evidence to see if any reasonable explanation consistent with the innocence of the accused has been made.²⁸ It is not necessary for the Sessions Judge to specifically repeat the statement under S. 287 when the accused admitted the statement.²⁹ If the accused voluntarily gives an answer which does not strictly follow from the question put to him, the Court sees no reason to disbelieve the answer and it is a matter which can be taken into consideration for deciding his guilt.³⁰ The words “may tend to show” indicate that the answer given in the one case must go to indicate or suggest that the accused had committed the offence of which he stands charged.³¹

22. *Yashimuddin Ahmed*, 44 CWN 396 (2) : 41 Cr LJ 563.

23. *In re Kanuya*, A 1960 AP 490.

23a. *Surabhaya*, A 1943 M 408 : 44 Cr LJ 541 ; *R. K. Dalmia v. Delhi Administration*, A 1962 SC 1821.

23b. *Karnail Singh v. State of Punjab*, 1954 SCR 204 : A 1954 : 1954 Cr LJ 580 : *Shiva Sharmangal*, A 1953 Bhopal 21 ; *Baguar*, A 1948 A 239 : 49 Cr LJ 264 ; *Muzaffar Hussain*, A 1944 L 97.

23c. *Jamunadas*, A 1963 MP 106 where *Hanumant Govind v. State of M. P.*, 1952 SCR 1091 : A 1952 SC 343 distinguished.

24. *In re Venkatta Reddy*, (1912) 36 M 216 (FB) overruled in 49 M 728 (FB) and

not followed in *Satis Chandra Chakravarti v. Ramdayal De*, (1920) 48 C 388 (SB) : 24 CWN 982.

25. *Murli Pathak*, (1927) 50 A 169 see *Colonel Bholanath*, (1928) 26 ALJ 1334.

26. *Baishanta v. Umrao Amir*, (1925) 50 B 162 (FB). *Kori Singh*, 40 C 433.

27. *Baldeo Kosi*, (1921) 6 Pat LJ 241 : 2 PLT 565 : 22 Cr LJ 433 : 61 IC 785.

28. *Papachan*, A 1960 Ker 153 ; *Holia Budhoo Gowara*, A 1949 Or 163 : 50 Cr LJ 465.

29. *Wasimkhan v. State of U. P.*, 1956 SCR 191 : A 1956 SC 400 ; 1956 Cr LJ 790.

30. *Banwarilal*, A 1956 A 341 ; 1956 Cr LJ 664.

31. *In re Nariah*, A 1959 AP 313 (315).

S. 342 (3) makes it quite clear that the answers given by the accused may be taken, not that they must be taken into consideration in such inquiry or trial.³² Conviction of the accused cannot be based merely on the statement of the accused recorded under S. 342 which cannot be regarded as evidence.^{32a} It is true that answer given by the accused may not be taken into consideration but what may be taken into consideration is only the explanation given of the circumstances appearing against him and not any fresh facts stated by him.³³

20. Sub-section (4) 'No oath shall be administered to the accused.'—“The accused” in Cl. 4 must be read as referring to the accused then under trial and examination by the Court.³⁴ By the ‘accused’ is meant a person over whom the Magistrate or other Court is exercising jurisdiction, and on the whole this restricted meaning best suits the context.³⁵ An accomplice if he is not an accused under trial in the same case, is a competent witness and may be examined on oath.³⁶ Under sub-sec. (4) as it stood before the recent amendment, no accused person was entitled to be administered an oath and thereby competent to testify in a case in which he was accused.³⁷ Where oath is administered to prosecution witnesses and their evidence is taken and they are subsequently made accused in the case there is no violation of S. 342 as they were not then accused.³⁸

21. What is a sufficient examination under S. 342.—“In my opinion the law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so. It may be that when a general question as to whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be no use asking him any further questions. If on the other hand, it does not appear that he would refuse to answer questions put to him, or it appears that he desires to respond, his attention should be called to the salient points appearing against him, so that an opportunity is really afforded to him to explain them if he can do so. In such examination every precaution should be taken not to entrap him to make incriminating answers and all questions in the nature of cross-examination should be avoided. In my opinion it is not impracticable to conduct the examination in the manner indicated above.³⁹ Newbould, J., did not concur in this view of the law enunciated by Mukerji, J.

342A. Accused person to be competent witness.—Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial :

Provided that—

(a) he shall not be called as a witness except on his own request in writing ; or

32. *Moral Majhi*, A 1958 C 616 : 1958 Cr LJ 1390.

32-a. *Virendrajit*, A 1953 SC 247.

33. *Sunil Chandra Roy*, A 1954 G 305.

34. *Gobind Balvant Leghate*, (1916) 18 Bom LR 266 : 17 Cr LJ 256 : 34 IC 976.

35. *Mona Puna*, (1892) 16 B 661 (668) followed in *Jhoja Singh*, (1896) 23 C 493 (494) case under S. 340.

36. *Banu Singh*, (1906) 33 G 1353 : 10 CWN 962 (965) : 4 Cr LJ 145.

37. *Om Prakash v. State of U. P.*, A 1957 SC 458.

38. *Bhim Bera*, 25 P 539 ; A 1947 P 284 ; *Akhoy*, 45 C 720.

39. *Per Mukherji J. in Alimuddin Nasker*, (1924) 52 C 253 : 29 CWN 431 : 41 CLJ 101 (125, 126).

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

SYNOPSIS

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| 1. Legislative Changes. | 5. writing. |
| 2. Section 324-A Corresponds English Law. | 5. Magistrate need not tell the accused of his right. |
| 3. 'Accused shall be a competent witness for the defence.' | 6. Proviso (b)—Failure to give evidence, not subject to comment. |
| 4. Proviso (a)—He shall not be called as a witness except on his own request in | 7. Cross-examination with regards to bad character of accused. |

1. Legislative changes.—This section was inserted by S. 61 of Act 26 of 1955. This section corresponds to the English Evidence Act 1898 (61 and 62 Vict C 36).

2. Section 342-A Corresponds to English Law.—Where under Criminal Evidence Act, 1898, the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. "The prisoner ought to be distinctly told by the Court of trial, that he has a right to give evidence on his own behalf. *R. v. Warren*, 2 Cr App 194; but failure to inform him does not itself necessarily invalidate the trial, *R. v. Saunders*, 68 LJQB 296; *R. v. Yaldham*, 17 Cr App R 18, though, where the trial is unsatisfactory in other respects, such a failure may lead to the conviction being quashed; *R. v. Graham*; 17 Cr App R 40. The words 'for the defence' allow a prisoner to give evidence for a co-prisoner who is indicted and tried 'jointly' with him; *R. v. Mc Donnell or Mc Donald*, 2 Cr App R 322."⁴⁰

Before the insertion of this section it was held by the Supreme Court in *Hate Singh v. State of M. B.*⁴¹ "It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. They may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and America he would be free to state in his own way in the witness box."

3. 'Accused shall be a competent witness for the defence.'—Prior to the insertion of this section the accused could not appear as a witness in his own defence as S. 342 (4) was a bar. The position has undergone a change since the enactment of S. 342-A which provides that he will be a witness at his written request.⁴²

4. Proviso (a)—He shall not be called as a witness except on his own request in writing.—The simple fact that the Code contains two sections namely 342 and 342-A is sufficient to indicate that if the accused chooses to examine himself as a witness on oath for the defence then what he says will be technically treated as evidence but if he does not so choose to examine himself it will not be technically evidence within the meaning of the word "evidence" in S. 3 of the Evidence Act.⁴³

40. *Archbold*, 33rd ed P 484-485.

41. A 1953 SC 468 (469-470); 1953 Cr LJ 1933.

42. *Subedar*, A 1957 A 396 where Art 20

(3) of the Constitution held applicable to the case.

43. *Moral Majhi*, A 1958 C 616; 1958 Cr LJ 1390.

Statement of an accused person recorded under S. 342 is the most important matter to be considered at the trial. The amendment of the Code by giving an option to the accused to give evidence on oath does not affect the question and has to be considered in the same manner as would have been the case if S. 342-A had not been enacted.⁴⁴

The Magistrate commits a grave error in examining an accused person without his request and against his protest as a Court witness to prove a fact which the prosecution should have established by other evidence. In the instant case, proceedings were not quashed as there was no prejudice to the accused.⁴⁵

5. Magistrate need not tell the accused of his right.—Under S. 342-A the accused has an option to examine himself as a witness. But the section nowhere impress upon the Magistrate the duty of explaining to the accused that he has a right to examine himself if he chose and it is no use of referring to English practices.⁴⁶

6. Proviso (b)—Failure to give evidence, not subject to comment.—This proviso corresponds to S. 342 sub-sec. (2). As under this section the accused can depose as a defence witness and will be subject to cross-examination by the prosecution, it is not advisable for him to depose unless he or his lawyer thinks that the accused should offer himself for examinations and would be able to demolish the prosecution case.

Where in a case of murder, evidence of forgery to show motive was given and the accused was cross-examined upon answers he had made in an inadmissible statement, *held* that the cross-examination was improper.⁴⁷ On the hearing at a trial of an objection to the admissibility in evidence of a statement by the prisoner on the ground that it was not a voluntary statement, the prisoner himself is entitled to give evidence, if the justice of the case makes it desirable.⁴⁸

7. Cross-examination with regard to bad character of accused.—Where the appellant was convicted in June 1961 of the murder on the night of October 28, 1960, of a young girl guide, the appellant gave evidence, and in explanation why he had first given a false *alibi*, he testified in examination-in-chief that he had previously been in trouble “over something else.” In the absence of the jury counsel for the prosecution cross-examined the accused with reference to this statement without mentioning rape or any offence or charge before the Court, *held*, the questions put in cross-examination, were not prohibited.⁴⁹ As to cross-examination of defendant and admissibility of evidence on previous charges, *see* 10 Halbury’s Laws (3rd Edn) 449-453, paras 828, 829, 831.

343. No influence to be used to induce disclosures.—Except as provided in Sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 2. No influence to be used to induce disclosure by accused. |
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44. *Narich, In re*; A 1959 AP 313; 1959 Cr LJ 689.

45. *John v. Sherthelu Municipality*, A 1959 Ker 323; 1959 Cr LJ 1180.

46. *Rameshwar Tarkit v. Mahabir Prasad Sevaka*, 60 CWN 1027; 1957 Cr LJ

126.

47. *R. v. Trenachey* (1944), 2 All ER 229.

48. *The King v. Cowell*, (1940) 2 KB 49.

49. *James v. Director of Public Prosecution*, (1962) 1 All ER 569.

1. Corresponding sections in former Codes.—The section corresponds to S. 203 of the Code of 1861 and S. 344 of the Code of 1872, S. 149 of Act IV of 1877 and is the same as that of the Code of 1882.

2. No influence to be used to induce disclosure by accused.—*See also* Ss. 24, 28 and 29 of the Indian Evidence Act.

A Magistrate acts without due discretion when, as a prosecutor, he holds out promises to prisoners as an inducement to them to confess.⁵⁰

It is not necessary for a Magistrate to caution a prisoner before receiving his or her statement.⁵¹

The accused person referred to in S. 343 is the same accused person as is specified in S. 342.⁵²

Bachelor, J., observed.—“This section does not declare what would be the consequences if an accused person did make a statement under inducement. But I will assume for the purposes of argument that such a statement will be wholly inadmissible.”⁵³ No Court has jurisdiction to compel one accused to produce another.⁵⁴ The State Government can give an assurance of amnesty to a witness before he makes a statement. There is nothing in this section against it.⁵⁵

344. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(1A) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Remand.—Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time :

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

50. *Ramdhun Singh*, (1864) 1 WR (Cr) 24.
 51. *Anon*, (1869) 5 MHCR App XI.
 52. *Mahadeo* (1926) 27 Cr LJ 807 : 95 IC 471.
 53. *Govind Balvant Laghte*, (1916) 18 Bom LR 266 : 17 Cr LJ 256 : 34 IC 976.

54. *Venkachala Naiaken v. The Panchayet Board, Ethapur*, A 1953 M 388 : 1953 Cr LJ 656.
 55. *Fakir Mohammad*, A 1930 L 953 : 32 Cr LJ 344.

Reasonable cause for remand. *Explanation.*—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Corresponding sections in former Codes. 2. Legislative Changes (1955). 3. State Amendments. 4. Report of the Joint Committee. 5. Effect of Amendment. 6. Scope.
—Power to postpone or adjourn proceedings
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—or any other reasonable cause to post- | <ol style="list-style-type: none"> pone or adjourn. —Trial of cross-cases. —adjournment for production of material documents. —Improper refusal to adjourn. 11. Insufficient cause for postponement. 12. 'On such terms as it thinks fit.'
—order for costs.
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—Distinction between Detention under S. 167 and Remand under S. 344. 14. Proviso 1. 15. Proviso 2. 16. Explanation. |
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1. Corresponding sections in former Codes.—This section corresponds to Ss. 224, 253, 269 and 377 of the Code of 1861 and to S. 194 paragraph I and explanation; S. 208, paragraph I and Ss. 219 and 264 of the Code of 1872; S. 66 of Act X of 1875; Ss. 86 and 124 of Act IV of 1877 and is the same as that of S. 344 of the Code of 1882.

2. Legislative Changes (1955)—Sub-sec. (1) has been added, sub-sec. (1-A) is sub-sec. (1) renumbered and a further proviso has been added by S. 62 of Act 26 of 1955.

3. State Amendments—

Madras.—In sub-sec. (2) the words "by a Court other than a High Court" have been omitted by Madras Act 34 of 1955.

East Punjab.—"Provided also that no adjournment or postponement shall be granted by reason of the absence of a witness other than a witness summoned by the Court, or of the pleader of the accused, unless the Court is satisfied that such absence is due to circumstances beyond the control of the accused, the witness or pleader and that adjournment or postponement is necessary for the ends of justice"—deemed to have been added by section 38 (1) of the East Punjab Safety Act, V of 1949.

4. Report of the Joint Committee.—"At present, owing to the frequent postponement of Criminal Trials which are often not held from day to day, considerable expenditure has to be incurred by all the parties concerned. The Committee consider that there is scope for reducing such unnecessary expense by speeding up the trials and avoiding postponements. The Committee, therefore, recommend that specific provision be made in this clause for conducting a trial from day to day unless there are good and sufficient reasons for the postponement. This clause has therefore been substituted".

5. Effect of Amendment.—The insertion of sub-sec. (1) by the Amendment Act 26 of 1955 is to avoid frequent postponement and to speed up trials as observed by the Joint Committee in their Report. This provision is in consonance with the object of the Amendment of the Code in 1955.

6. Scope—Power to postpone or adjourn proceedings.—It is most inexpedient for a Sessions trial to be adjourned. The intention of the

Code is that a trial before a Court of Session should proceed and be dealt with continually from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period.⁵⁶ The provisions of S. 344 must be strictly observed and a Magistrate is not entitled, on the ground of convenience, to infringe those provisions.⁵⁷ The High Court has an inherent power of staying proceedings and even apart from S. 561-A it can stay proceedings under Art. 227 of the Constitution.⁵⁸ A Magistrate trying a case has inherent jurisdiction to adjourn inquiry or trial in a pending case.⁵⁹ S. 344 is applicable to cases even before the issue of process under S. 204 and the Magistrate is entitled under S. 344 to postpone any inquiry or trial and to postpone the issue of process.⁶⁰

The words "on such terms as it thinks fit" do include the power to give costs, although such orders are rarely made.⁶¹

It was held in *Sunnasi* case⁶¹ that it was competent to the Magistrate under S. 344 to grant an adjournment conditional on the payment of costs by informant, although he was not a complainant under S. 200.

Section if applicable to Appellate or Revisional Court.—The provisions of S. 344 do not apply either to an Appellate Court or to a Revisional Court.⁶² In case of adjournment of appeal, an order imposing cost is not illegal.⁶³

Section if applicable to enquiries under Chapter VIII.—This section applies to proceedings under Chapter VIII principally because of S. 117 (2).⁶⁴

7. Sub-section (1)—"The proceedings shall be held as expeditiously as possible"—The provisions of the new sub-sec. (1) only give expression to the avowed policy of the Criminal Law that is to bring the accused to justice as expeditiously as possible so that if he is found guilty, he may be punished if not, he may be acquitted as early as can be.⁶⁵

8. Stay of proceedings pending disposal of Civil litigation.—Where the facts on which a criminal prosecution is based are issues in a civil suit filed previously by the *complainant himself* and the decision in the civil suit is likely to throw considerable light upon the decision in the criminal case, *held* the criminal proceedings should be stayed till the decision of the civil suit.^{65a}

Jenkins, C. J., (Woodroff, J., concurring) observed :—"Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings in which the same issues are involved. It is too well-known to need elaboration that criminal proceedings lend themselves to the un-

56. *Badri Prasad*, (1912) 35 A 63 (64) 10 ALJ 473 : 13 Cr LJ 861 : 17 IC 797.
 57. *Wadhwa Singh*, (1921) 22 Cr LJ 669 : 63 IC 461 (L).
 58. *Dhaneswar Kulita*, A 1952 Ass 78 See *Ram Saran Singh v. Nikhad Narain*, A 1925 P 619 : 26 Cr LJ 1179.
 59. *Framji Rustamji Wadia*, 30 Bom LR 962 ; 29 Cr LJ 1053 ; *Ram Golam v. Surat Chandra*, A 1929 C 281 ; 31 Cr LJ 262.
 60. *Ram Saran Singh v. Nikhad Narain*, A 1925 P 619.
 61. *Sunnasi Kudumbau v. Sivasubramania Kone*, (1917) 40 M 1130 : 33 MLJ

- 366 : (1917) MWN 566 : 18 Cr LJ 612.
 62. *Lakhpur Ram Sarma*, A 1953 A 76 ; 1953 Cr LJ 329.
 63. *State v. Sm. Rumpa*, A 1960 A 636.
 64. *Basudeo Ojha*, (1958) Cr LJ 988 ; A 1958 A 578.
 65. *Ponumart Janikama v. Chundura Appanna*, A 1957 AP 771 ; *Md. Ebrahim*, A 1942 C 219 ; *Ranbir Singh*, A 1961 EP 524.
 65a. *per Sir Shadilal CJ*, in *Linton*, (1927) 28 PLR 103 : 28 Cr LJ 326 : 10 IC 710 ; *Faiz Md. v. Abbas Jaffarali*, A 1935 S 187 ; *Channo Prasad Singh v. Sakhichand Sahu*, A 1942 P 13 : 42 Cr LJ 804.

scrupulous application of improper pressure with a view to influencing course of the civil proceedings; and beyond that there is this mischief, illustrated by this case of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigations of a civil court".^{65b}

Parker, J., *held* in the case of *Jehangir Pestonji Wadia v. Framji Rustomji Wadia*^{65c} as follows: "The mere pendency of a civil suit or appeal is not in itself a sufficient ground for staying criminal proceedings.^{65d} On the other hand, if the object of the criminal proceedings in a private prosecution is to prejudice the trial of the civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit, the criminal proceedings can be stayed till the decision of the civil suit.....The test in every case would be whether the accused is likely to be *seriously prejudiced* by the continuance of the criminal proceedings against him during the pendency of the civil litigation. The High Court has power to stay criminal proceedings during the pendency of civil proceedings".⁶⁶ Mirza, J., at 30 Bom L R 962 (1965) *held*: "The test seems to be whether the prosecution is public or private. Where it is public, the Court as a rule, in the exercise of its inherent jurisdiction would not stay criminal proceedings".^{65e} It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or enquiry should of necessity be stayed simply because a civil suit has been instituted between the parties in which some or all the matters materially in issue in the criminal case would have to be determined, until the civil litigation was finally decided.⁶⁷ Where after the institution of a civil suit on a promissory note the defendant was called upon to furnish security, and set up, as an answer, to the plaintiff's claim, a letter which was alleged to bear a forged signature and in respect of which criminal proceedings under Ss. 465 and 467 of the Penal Code were taken by one of the plaintiffs, *held*, that inasmuch as the letter was a necessary part of the defendant's case and the question of its genuineness a principal issue in the suit, the criminal proceeding ought to be stayed pending the decision in the civil suit.⁶⁸

Civil suit filed later.—In prosecutions under S. 82 of the Registration Act where the petitioner denied execution of a mortgage bond but on appeal the special Sub-Registrar held that the mortgage bond was a genuine document and then, under S. 195 of the Code as it stood before the amendment, gave *sanction* whereupon the petitioner brought a suit for declaring that the mortgage bond was a forgery, *held* that it was incumbent on the Magistrate to stay his hand until the decision of the civil suit.⁶⁹ Under the old Code S. 195 it was held in *Asrabuddin Sarder v. Kalidyal Mulik*⁷⁰ and in cases under S. 476 of the old Code, in.⁶⁹ "It appears to us that the proper procedure is to await the litigation and then to move the higher Courts to take action, if necessary, in the ends of public justice". It

65b. *J. M. Lucas v. Official Assignee of Bengal*, (1914) 24 CWN 418 (424, 425).

65c. (1928) 30 Bom LR 962 (1966).

65d. *In re Devji valud Bhavani*, (1883) 18 B 581; *In re Keshav Narayan*, (1912) 14 Bom LR 968.

66. *In re Srinarain Maharaj*, (1882) 16 B 729; *In re Balgangadhar Tilak*, (1902) 26 B 785 : 4 Bom LR 618; *Gobardhone Pramanik* (1900) 5 CWN 44; *Anna Ayyer*, (1900) 30 M 226.

67. *Brojobashi Panda*, (1908) 13 CWN 398, see also *Dwarka Nath Chaudhury*, (1904) 31 C 858 : 9 CWN cclxii.

68. *Shashi Bhusan Seal*, (1910) 38 C 106; see also *Gopeshwar Pall Choudhary*, (1906) 10 CWN ccxi.

69. *Gobordhone Pramanik v. Iswar Chandra Pramanik*, (1900) 5 CWN 44 see also *Ram Chandra Singh*, (1906) 5 CLJ 233 where no body showed cause.

70. 19 CWN i25.

was doubted in *Hem Chandra Roy v. Atul Behary Roy*,⁷¹ whether the High Court exercising civil jurisdiction has power to stay the criminal proceedings which view however was dissented from in the full bench decision of *Har Prosad Das*.⁷² The Allahabad High Court in *Raj Kumar Singh*⁷³ held that the High Court by its general powers of interference could order a stay and the same view was adopted in *Kanhaiyalal*⁷⁴, where the view in *Mathura*⁷⁵ which held that the decision of a Civil Court would not be evidence in the criminal case and would if tendered in evidence, be rightly rejected as inadmissible, was distinguished. Even if the Civil Suit is filed later the Criminal proceedings can not be stayed solely on the ground that some of the questions which arise for decision in a criminal complaint can be more appropriately tried by a Civil Court. The Court if it thinks just may order stay of Criminal proceedings. The Civil suit may be ordered to be tried expeditiously and liberty be reserved to the complainant to move the High Court for setting aside the stay order, if the Civil Suit does not progress favourably.⁷⁶

Civil suit started although after police report but without undue delay.—Campbell, J., sitting singly held where the subject matter in both a criminal proceeding was identical and the main questions for decision were the same, the criminal proceedings should be stayed, pending the decision of the civil suit if the same were brought without undue delay.⁷⁷ For the contrary view; see per Rampini J., in *Rajkumari Debi v. Bama Sundari*⁷⁸ Ghose, J., however observed as follows :

“No doubt in a case where the issues in the civil and criminal Courts are not identically the same, and the prosecution in the criminal Court is really the prosecution of the Crown, the judgment of the civil Court will not be admissible in evidence”.

The Madras High Court in⁷⁹ has held that there is no invariable rule that when the same issue is agitated both on the Civil and Criminal side, the Civil shall take precedence of the Criminal Court, although in the latest decision⁸⁰ it has held that under S. 344 a Sub-Divisional Magistrate can only adjourn a case from time to time but has no power to stay proceedings in his own Court. The Supreme Court has observed : “As between the Civil and Criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down, but we do not consider the possibility of conflicting decisions in the Civil and Criminal Courts is a relevant consideration. The Law envisages such an eventuality when it refrains from making the decision of one Court binding on other, or even relevant, except for certain limited purposes such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment. Another factor which weighs with us is that a Civil suit often drags on for years and it is undesirable that a Criminal

71. 34 C 848.

72. 40 C 477 FB.

73. 43 A 180.

74. (1925) 48 A 60 : 23 ALJ 956 : 26 Cr LJ 1485 : 89 IC 1053.

75. *Mathura Kunwar v. Durga Kunwar*, (1905) 2 ALJ 747 (748) : (1905) AWN 254.

76. *Dharamdas Hakmatrai*, A 1956 B 512 : 1956 Cr LJ 882; *Jhokorillal Vadilal v. Ambulal Bhikabai*, A 1942 B 330; 44 Cr LJ 100.

77. *Janki Das*, (1922) 38 PLR 192 : 4 LLJ ;

489 : 23 Cr LJ 595, following *Bhoja Ram*, 115 PLR 1912 : 13 Cr LJ 175 *Bishu Das*, 12 Cr LJ 50 and *Paras Ram* 12 Cr LJ 615.

78. (1896) 23 C 610.

79. *Chitrata Ramiah v. Natukula Ramiah*, (1926) 50 M 839 distinguishing *Khobhari Rai v. Bhagwar Rai*, (1927) 41 IC 147 (P). *Keshvimal*, A 1953 Raj 198; 1953 Cr LJ 1658.

80. *Murugan v. Rani Naidu*, (1927) 53 MLJ 455 : (1927) MWN 694.

prosecution should wait till every body concerned has forgotten all about the crime"⁸¹ There is no invariable rule that Criminal proceedings should be stayed pending the issue in a Civil suit. But if in the peculiar circumstances of the case, the Court thinks that the interests of justice will be served best by staying the proceedings, it should be done.⁸² Stay of Criminal proceedings can be allowed only on special and justifiable grounds.⁸³ Where the issues in a criminal case are likely to be included in the issues in a Civil Court which is ripe for hearing and there is a risk of a conflict of jurisdiction, it is better that the Criminal proceedings are stayed. In such a case the mere fact that it is a case of public prosecution does not decide that the Criminal proceedings should not be stayed.⁸⁴ One point of importance in exercising the discretion is to see whether the criminal complaint has been filed before or after the Civil Suit.⁸⁵

9. Can you move the High Court direct ?—No, unless you move the Magistrate in the first instance.⁸⁶

10. Sub-section (1-A) Adjournment : or any other reasonable cause to postpone or adjourn.—A prisoner arrested under a warrant should be brought promptly before a Magistrate, who has then no authority to further detain him in custody or to remand him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison.⁸⁷ "If, in the course of a trial, the Judge of the Court of Session is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the Magistrate in the absence of the accused, he should adjourn the trial under S. 264 (of the Code of 1872), and, under S. 351 (of that Code), summon such witnesses as he may deem material".⁸⁸ It is the duty of the Court to grant an adjournment to enable the accused to properly defend himself.⁸⁹ or to examine such witnesses as the accused might wish to produce on his behalf.⁹⁰ The term "reasonable cause" is not defined nor any such definition is possible. It all depends upon the circumstances of each case.⁹¹

Illness of the counsel for the accused is a good ground for adjournment,^{91a} but where in a Sessions Case in which a number of witnesses have been summoned and an application for adjournment is made on the ground of absence of a counsel for one of the accused, sufficient cause for adjournment is not made out.^{91b} If the accused wishes to have counsel to represent him, it is the duty of the Magistrate to allow time for counsel to appear and argue the matter before him.^{91c}

81. *M. S. Sharif v. State of Madras*, A 1954 SC 397.
 82. *Basviat v. Panchayet Board*, 1955 An WR 572; *Ranganaya Kalu*, A 1953 M 439; *Chikkanarasiah v. Venkatappa*, A 1957 Mys 70; 1957 Cr LJ 987.
 83. *Chikargrasiah v. Venkatappa*, A 1957 Mys 70; 1957 Cr LJ 987.
 84. *Sriksen Beriwalla*, A 1935 C 182; 37 Cr LJ 187.
 85. *Parameshwar Ram Bhandani*, A 1951 P 220; 51 Cr LJ 1578.
 86. *Aukamma v. Adribothlu*, 24 Cr LJ 640: AIR (1924) M 235.
 87. *Abdul Kadir Khan*, (1873) 20 WR (Cr)

- 23 : 11 Beng LR App 8 (18) followed in *Manikam*, 6 M 63.
 88. *Sagambur*, (1882) 12 CLR 120.
 89. *Haidar*, 12 CWN CXIII; *Esteves*, 4 Bur LT 213 : 12 Cr LJ 474 : 12 IC 82.
 90. *Keso Singh*, (1903) 7 CWN 714.
 91. *Penunarti Janikumma v. Chandra Appanna*, A 1957 AP 771.
 91a. *Bhagat Indar*, A 1952 Punj 53.
 91b. *Salag Ram*, A 1937 A 171 : 38 Cr LJ 416 (2) See *Contra Bhagat Indar*, A 1952 Punj 53.
 91c. *Jahangiri Lal*, A 1935 L 230; 35 Cr LJ 1180.

Trial of Cross-cases.—Where there is a case and a cross-case the Court is not in any way bound to adjourn the hearing of the case indefinitely, waiting for the results of the steps taken by the petitioner in the counter-case.^{91d} As regards trials of counter-case, each case has to be decided according to its requirements.⁹² It is always desirable that counter-cases arising out of the same transaction should be tried by one and the same Court.⁹³

Adjournment for production of material documents.—Where in a proceeding under S. 145, it appeared that a proper appreciation of the oral evidence in the case regarding possession was impossible in the absence of important documents and the Magistrate refused to grant an adjournment for the production of the documents, *held* that the order of the Magistrate was arbitrary and the final order should be set aside.⁹⁴

Improper refusal to adjourn.—Where at a Sessions trial, the defence counsel applied, after the examination-in-chief of the first prosecution witness, for postponement of the cross-examination of the witnesses till the next day, on the ground of his unpreparedness, but did not ask for an adjournment of the trial itself. *Held*, that the application was a reasonable one which the Judge under the circumstances, should have allowed. Though the accused is not entitled to such postponement as of right, the Court may, in a proper case, grant the indulgence.⁹⁵

11. Insufficient cause for postponement or adjournment.—A Magistrate is not at liberty arbitrarily or for any reason which he may think sufficient to adjourn the inquiry. Where there was no reasonable cause such as is contemplated by this section, the order of the Magistrate adjourning the inquiry was set aside by the High Court under S. 15 of the Charter Act.⁹⁶

Witness not called.—Where accused did not ask for fresh process after the witness failed to attend though served, adjournment was held to have been rightly refused.⁹⁷

Postponement sine die.—A Magistrate has jurisdiction to postpone *sine die* a proceeding drawn up under S. 145.⁹⁸ Adjournment *sine die* and not to any certain date is not contemplated by the section.⁹⁹

12. 'On such terms as it thinks fit.'—*Costs.* The words "on such terms as it thinks fit" in S. 344 are wide enough to entitle a Magistrate to grant an adjournment on one party paying the costs of another.¹

The Amending Act XVIII of 1923 having deleted reference to S. 344 from S. 526 (8) these cases¹⁰⁰ under the old Code under S. 526 (8) bearing on costs cannot be considered as good law. But the view in *Mathura* and

91d. *Ram Singh*, A 1935 P 214; 34 Cr LJ 714 (SB).

92. *Makhan Mapa v. Manindra Nath Bose*, A 1925 C 1260; 42 Cr LJ 53.

93. *Judhisthir Gope v. Sheikh Samir*, 27 CWN 700; 24 Cr LJ 940.

94. *Biswambhar Roy v. Aminuddi*, 25 CWN 602; 33 CLJ 507; 22 Cr LJ 335; 61 I C 63.

95. *Sadasiv Singh*, (1913) 41 C 299; *In re Putaswamy*, (1902) 4 Bom LR 939.

96. *Mathoor Nath Chackrabutty*, 17 WR (Cr) 55; 9 Beng LR 354 (364).

97. *In re Dervish Hussain*, 46 M 253; 44

MLJ 84; 24 Cr LJ 84; AIR (1923) M 185.

98. *Gurudas v. Weatheral*, (1900) 13 CWN 601.

99. *Rahmatali*, 45 CWN 819; *Md. Ebrahim*, 45 CWN 768; *Dharneswar Kalita*, A 1952 Ass 78.

1. *Chhaberaaj*, (1902) AWN 59; *Fattu*, 8 PWR 1911 (Cr) 12 Cr LJ 274; 10 IC 851; *Sunnasi Kudumban v. Siva Subramania Kone*, 40 M 1130; 33 MLJ 366; (1917) MWN 566; 18 Cr LJ 612.

other cases^{1a} that the Magistrate may allow costs of adjournment to the other side, or the view in *Sew Prasad v. The Corporation of Calcutta*, and other cases² that a Magistrate may in his discretion allow costs of an adjournment to the *accused* or the view in *Abdul Rahman*,³ that costs may be awarded only where the circumstances are exceptional, seems to be good law.

'As it thinks fit.'—The words 'as it thinks fit' empowers criminal courts to allow the costs of an adjournment.⁴

In a case of *prosecution by the Police* the complainant cannot be saddled with the costs incurred by the accused, at the time of granting an adjournment.⁵

Accused absent—order for costs cannot be made.—On the failure of the accused to appear on the day fixed for the hearing of the complaint against him the criminal courts have no authority to order him to pay costs of adjournment to the complainant.⁶

Adjournment of Appeal—Costs cannot be awarded.—S. 344 is not applicable to appeals. Costs cannot therefore be awarded on the adjournment of an appeal.⁷

'For such time.'—See the case of *Gurudas v. Weatheral*⁸ where in a proceeding under S. 145 postponement *sine die* was granted. The Magistrate has a discretion to adjourn for such time as he thinks proper.

13. Remand of the Accused.—Sub-section (1) uses the language "may by a warrant remand the accused if in custody" and the *proviso* enacts that such remand cannot exceed fifteen days at a time and the *Explanation* appended to S. 344 states what is deemed to be a "reasonable cause" for remand.

Old and new Codes.—It was held under the Codes of 1861⁹ and 1872¹⁰ that a Magistrate is not at liberty to detain an accused person in custody, except upon a proper remand made after taking sufficient evidence given on oath or solemn affirmation; but under the Code of 1898 which has not been amended so far as this section is concerned there is no necessity of taking evidence before remand.

Remand—meaning of.—To remand is to recommit to custody.¹¹

Distinction between Detention under S. 167 and Remand under S. 344.—The power of remand under S. 167 is given to detain prisoners in custody while the Police make the investigation, and in a proper case to commence the inquiry but the custody mentioned in S. 344 is quite different and is intended for undertrial prisoners.¹² A provision similar to S. 167 (4) does not find a place in S. 344. There is therefore no warrant for the argu-

1a. 28 A 207 : (1905) AWN 256 : 2 ALJ 831 ; *Raghuandan Prasad v. Ramdhan Singh*, 19 Cr LJ 6 : 42 IC 918 (P).

2. 9 CWN 18 ; *Gulzarilal v. Ganga Ram*, 9 A LJ 170.

3. 42 B 254 : 20 Bom LR 124 : 19 Cr LJ 326.

4. *Shuldham*, PR No 20 of 1904.

5. *Luxman Nath*, 24 Bom LR 380 : 23 Cr LJ 338 : 66 IC 994 : AIR (1922) B 239 (1).

6. *Budhara*, (1922) 20 ALJ 280 : 23 Cr LJ 243 : 66 IC 179 : AIR (1922)

A 184 (1).

7. *Suraj Bhan*, 29 PR 1919 Cr : 2 LLJ 79 : 21 Cr LJ 201 : 54 IC 985.

8. 13 CWN 601.

9. *Mahesh*, 4 Beng LR App 1 ; see *Suryaka*, (1868) 5 Bom HCR Cr Ca 31.

10. *Zuhuruddin Hussein*, (1876) 25 WR Cr 8.

11. 2 Weir 408 see also *Mahesh Chandra Banerjee*, 4 Beng LR App 1.

12. *Nagendra Nath Chakravarty*, 38 CLJ 388 (393).

ment that when the Magistrate other than the District Magistrate or Sub-divisional Magistrate remands an accused person in custody by a warrant issued under S. 344 the provisions of S. 167 (4) should be complied with.¹³ It is not necessary that a person arrested by the police without warrant must be released from custody on the expiry of 15 days mentioned in S. 167 (2). A Magistrate having jurisdiction to take cognizance may avail of the provisions of S. 344 without taking cognizance.¹⁴ There is no great significance in the case of the words 'detained in custody' as contrasted with the words 'remand to custody.'

Remand when to be ordered.—A remand to custody should not ordinarily be ordered under this section without first recording some evidence, where such is already available to show that a good ground exists for believing the accused person to have committed a non-bailable offence.¹⁵

Adjournment Costs.—In the absence of an accused on a day posted for trial an adjournment is inevitable and while proceedings can be taken against him for the forfeiture of his bail bond, it is not proper to order him to pay adjournment costs.¹⁶

The Court has the power for a reasonable cause to put the accused on terms and order him to pay costs provided he is present in Court, but if the accused is absent, the Magistrate has no power to award costs,¹⁷ although Magistrate can order costs of the opposite party to be paid. Though the Code makes express provisions for payment of costs in certain cases like S. 148 and the Code provides in S. 544 for payment of his reasonable expenses of the complainant or a witness by the State, the State Government should make rules and in the absence of such rules the Court is competent to direct that the costs be paid by the State.¹⁸

'May by a warrant remand the accused if in custody.'—"This section relates to proceeding in inquiries or trials, and has nothing to do with police-investigation, and it contemplates a remand to jail, and not to police custody¹⁹." This section does not empower the Magistrate to remand an accused person in custody of the Magistrate to Police custody for the purpose of obtaining information with regard to the offences which the accused may be alleged to have committed.²⁰ Accused can be remanded to custody from time to time under this section before submission of charge-sheet to enable prosecution to obtain further evidence.²¹ Whenever an accused is brought before the Court and the Court issues an order of remand, the Magistrate has complete freedom to remand the accused to whatever custody he thinks fit.²²

The words 'if in custody' are important and it follows that powers of

13. *In re , Kunjan Nadar*, A 1955 TC 74 ; 1955 Cr LJ 740.
14. *Dukhi*, A 1955 ; A 521 ; 1955 Cr LJ 1305 *Supdt. & Remembrancer of Legal Affairs v. Bidhindra Kumar Roy*, A 1949 C 143 ; 50 Cr LJ 261.
15. *Ahmed Ali*, 11 NLR 162 ; 16 Cr LJ 705 ; 30 IG 993.
16. *Laxminarain*, A 1952 N 1 ; 1952 Cr LJ 109 ; *Mohini Mohan Das*, A 1948 C 194 ; 49 Cr LJ 304 following *Ichab v. Khirode Kumar Ghose*, 48 GWN 684 ; 50 Cr LJ 491 ; *Budha*, A 1922 All

- 174 (1).
17. *Monoranjan Roy v. Gadadhar Mandal*, 65 CWN 905 ; A 1962 C 98.
18. *Jadumani Mungaraj v. Sarat Chandra Das*, A 1956 Or 209 ; 1956 Cr LJ 1419.
19. *Krishnaji*, 23 B 32.
20. *Rama*, 4 Bom LR 878.
21. *Supdt. & Remembrancer of Legal Affairs v. Bidhindra Kumar Roy*, 52 GWN 865 ; 50 Cr LJ 261.
22. *Venkataraman*, A 1948 M 100 ; 49 Cr LJ 41.

remand under S. 344 can only be exercised when the accused is in custody and that implies the presence of the accused.²³

“Every Magistrate, on receiving or resuming charge of his office, should inquire what accused persons are in detention under the orders of his Court, with a view to their being brought before him within the period allowed by law”.²⁴ The word ‘remand’ in the section means remand to custody in a Magisterial lock-up or jail during a postponement or adjournment or trial. The reasons to be stated as per S. 344 (1) are the reasons for the adjournment of the case and not the reasons for the remand.²⁵ Mere direction that the case may come up on the next day fixed is not proper compliance of this section and if there is no legal order remanding the accused to police custody, the detention would be questionable.²⁶

14. First Proviso.—The order of a Magistrate sanctioning the detention by the police of an accused person for an indefinite period is illegal. At the expiration of twenty-four hours from the time of arrest, the accused *must* be brought before a Magistrate, who can then remand for a period not exceeding fifteen days.²⁷ Under this section there is no limit for the total period of a series of orders of remand provided that no single order shall be for a period exceeding 15 days. The mere fact that the investigation may continue for a long time is no ground for releasing the accused on bail.²⁸ Under S. 167, a Magistrate on the mere perusal of the entries detains the accused in custody for a term not exceeding 15 days on the whole, and thereafter under S. 344 if it appears likely that further evidence may be obtained on remand and he should then under S. 497 (2) order release of the accused on bail if incriminating evidence is not forthcoming.²⁹

15. Second Proviso.—Was added by Act 26 of 1955.

16. Explanation.—The accused have, however a right to have the evidence against them recorded at as early a period as possible, and the fact that there is or may be a great body of evidence forthcoming against them is not a good ground for detention for an inordinate period.³⁰ When the accused are brought up after a remand, some direct evidence of the connection of the accused with the crime should be required to justify the Magistrate in refusing bail and with each remand the necessity for the production of implicating proof becomes more strong.³¹ The explanation in the section contemplates only one type of reasonable cause and there may be cases in which there is a reasonable cause for a remand when the circumstances are not those set out in the explanation as for example, the unavoidable absence of a witness.³² The explanation contemplates the obtaining of further evidence only after the police report is filed. If there is a chance of getting further evidence that would be a reasonable cause for remand.³³

Bail Application.—Where a charge sheet is submitted against the accused and they are remanded to judicial custody under this section, their

23. 2 Weir 409.

24. Bom HC Cir p 18.

25. *In re Kunjan Nadar*, A 1955 TC 74 : 1955 Cr LJ 740.

26. *Madhu Limaya*, A 1959 Punj 506 : 1959 Cr LJ 506.

27. *Nagendra Nath Chakravarty*, (1923) 38 CLJ 388.

28. *Sooba*, 53 A 729 ; 32 Cr LJ 1045.

29. *Jamini*, 36 C 174 ; *Narendra Lal Khan*,

36 C 166.

30. *Manikam*, 6 M 63.

31. *Ponnusami*, 6 M 69 followed in *Ahmed Ali*, 11 NLR 162 : 16 Cr LJ 705 and *Nagendra Nath Chakravarty*, (1923) 38 CLJ 388.

32. *Sundar Ram*, A 1933 C 752 (2).

33. *Artaran Mohasuxa*, A 1956 Or 129 : 1956 Cr LJ 909.

proper remedy is to move for bail before the appropriate Court and not to move the High Court for a writ of *habeas corpus*.³⁴

Magistrate is liable for damages for improper remand.—A Deputy Magistrate, who, without reasonable cause delays proceeding with the trial of persons whom he keeps in Jail, is liable, notwithstanding Act XVII of 1850 to an action in damages if the prisoners are eventually acquitted.³⁵

See Chapter XXXIX for Bail.

345. Compounding offences.—(1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour . .	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House trespass	448	
Criminal breach of contract of service.	491	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman.	498	
Defamation	500	
Printing or engraving matter knowing it to be defamatory.	501	The person defamed.
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	

34. *In re Kunjan Nadar*, A 1955 T C 74; 1955 Cr LJ 740.

35. *Sahoo*, (1869) 11 WR (Cr) 19.

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt	325	Ditto.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Ditto.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining for 10 or more days.	344	Ditto.
Wrongfully confining a person in secret.	346	Ditto.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Theft, where the value of property stolen does not exceed two hundred and fifty rupees.	379	The owner of the property stolen.
Theft by clerk or servant of property in possession of master, where the value of the property stolen does not exceed two hundred and fifty rupees.	381	Ditto.

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Criminal breach of trust, where the value of the property does not exceed two hundred and fifty rupees.	406	The owner of the property in respect of which the breach of trust has been committed.
Criminal breach of trust by a carrier, wharfinger, etc., where the value of the property does not exceed two hundred and fifty rupees.	407	Ditto.
Criminal breach of trust by a clerk or servant, where the value of property does not exceed two hundred and fifty rupees.	408	Ditto.
Cheating	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	418	The person cheated.
Cheating by personation	419	Ditto.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Ditto.
Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	421	The creditors who are affected thereby.
Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	422	Ditto.
Fraudulent execution of deed of transfer containing false statement of consideration.	423	The person affected thereby.
Fraudulent removal or concealment of property.	424	Ditto.
Mischief by killing or maiming animal of the value of ten rupees or upwards.	428	The owner of the animal.
Mischief by killing or maiming cattle, etc., of any value or any other animal of the value of fifty rupees or upwards.	429	The owner of the cattle or animal.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	The person to whom the loss or damage is caused.

Offence	Sections of the Indian Penal Code applicable	Persons by whom offence may be compounded
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	Ditto.
Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it was intended to insult or whose privacy was intruded upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5A) A High Court acting in the exercise of its powers of revision under Section 439 may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(7) No offence shall be compounded except as provided by this section.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 9. Sub-section (2). |
| 2. Legislative Changes. | 10. Time for such permission. |
| 3. Report of Select Committee (1923). | 11. Persons mentioned in the third column. |
| 4. Effect of 1923 and 1955 Amendments. | —aggrieved person. |
| 5. Scope. | 12. Sub-section (4). |
| 6. Distinction between withdrawal under S. 248 and composition. | 13. Sub-section (5). |
| 7. Burden of proof on accused. | 14. Sub-section (5-A). |
| 8. Sub-section (1). | 15. Sub-section (6). |
| | 16. Sub-section (7). |

1. Corresponding sections in former Codes.—This section corresponds to S. 271 of the Code of 1861, S. 188 of the Code of 1872 and excepting sub-sec. (5) which was new in the Code of 1898, the Code of 1882 was similarly worded as that of the Code before it was amended in 1923.

Sub-section (2) of the Code ran as follows :—

(2) The offence of causing hurt and grievous hurt, punishable under S. 324, S. 325, S. 335, S. 337 or S. 338 of the Indian Penal Code, may with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

2. Legislative Changes.—Amendments have been made in this section *vide* Act 18 of 1923, Act 26 of 1955 and Act 36 of 1957.

3. Report of the Select Committee (1923).—“We have added offences under Ss. 417, 418, 419, 420, 482, 483, 486 and 494 of the Penal Code to the offences which may be compounded with the permission of the Court.

We understand that an amendment of sub-sec. (4) of S. 345 is necessitated by the fact that its provisions have at times been grossly abused where the person competent to contract has compounded an offence in which he was to some extent implicated himself. We think however, that the new sub-sec. (3-A) which the Bill introduces is likely to create great difficulties. The reference to S. 198 is unsuitable because that section deals with a very small class of offences, whereas sub-sec. (4) as it stands applies to all cases which are lawfully compoundable. Further the words ‘may be compounded by any other person who would be competent to file a complaint on his or her behalf’ lead to nothing definite because under S. 198 any person will be competent who obtains the leave of the Court. In cases other than those referred to in Ss. 198 and 199, any person is competent to file complaints, and in such cases the Bill would enable any person to compound an offence. We think that the most satisfactory solution is to retain sub-sec. (4) as it is, but to make the permission of the Court necessary. We have substituted the words under the age of 18 years, for the words ‘a minor.’ We have further provided by a new sub-section that a High Court acting in the exercise of its powers of revision may allow offences to be compounded.”

4. Effect of the 1923 Amendment.—The word “*specified*” substituted for the word “*described*” in sub-sec. (1) makes it more explicit that offences mentioned in the two columns and no other offences are compoundable. Section 508 I. P. C., has also been included in the first column.

Sub-section (2) as substituted by S. 90 of the Amending Act XVIII of 1923 brings within its purview more offences than were compoundable under the Code as it stood before the amendment.

The *object* of the amendment introduced in sub-sec. (4) by the said Amending Act is "...the permission of the Court is required to the compounding of a case on behalf of a minor, idiot or lunatic by any person lawfully entitled to the care and custody of his person or property"—*Statement of Objects and Reasons*.

Sub-section (5-A), is altogether new. There was a conflict of decisions under the unamended Code. The Allahabad High Court in the case of *Ramchandra*³⁶ held that the High Court in revision had no power to allow composition of an offence and Tudball, J., in *Nagi Ahmad's* case³⁷ doubted the contrary view of Knox and Karamat Hussain, J.J., in *Ram Piyari's* case.³⁸ The Calcutta High Court held that the parties to a criminal case had no *locus standi* to ask the High Court on its revisional side to consider a compromise effected by them out of Court.³⁹ The Punjab Chief Court in *Harnam Singh*⁴⁰ held the same view as in *Ramchandra's* case,³⁶ although in an earlier decision⁴¹ it held the same view as in *Ram Piyari's* case.³⁸

The Legislature by inserting sub-sec. (5-A) has adopted the view in *Ram Piyari's* case³⁸ and the contrary view has been impliedly superseded. The High Court, acting in its revisional powers, may allow any person to compound any offence which he is competent to compound under this section.⁴²

The words "*with whom the offence has been compounded*" added to sub-sec. (6) have the effect of superseding *Chandra's* case and other cases⁴³ which held that the effect of composition with one of the accused on whom process had been served meant an acquittal of others mentioned in the petition of complaint against whom process had not issued but restore the contrary view expressed in *Ramkishan* and other cases,⁴⁴ where *Chandra's* case⁴³ has been dissented from, and the Lahore High Court in⁴⁵ has observed that *Chandra's* case⁴³ is out of date.

A Magistrate from whose file the District Magistrate had called for record has no jurisdiction to pass an order under S. 345 after the order under S. 435 has been made.⁴⁶

Effect of 1955 Amendment.—It has enlarged the list of offences compoundable with the permission of the Court by including offences under Ss. 379, 381, 406, 408, 421, 422, 428, 429 of the Indian Penal Code.

5. Scope.—"The compounding of an offence signifies that the person against whom the offence has been committed has received some gratifica-

36. (1914) 37 A 127 : 13 ALJ 630 : 16 Cr LJ 586 ; *Rambaran Singh*, 42 A 474.

37. 11 ALJ 13 : 14 Cr LJ 46 : 18 IC 270.

38. 32 A 153 : 7 ALJ 103 : 11 Cr LJ 203.

39. *Adhar Chandra v. Subodh Chandra*, 18 CWN 1212 : 15 Cr LJ 728 : 26 IC 176.

40. 35 PR (Gr) 191 : 20 Cr LJ 87.

41. PLR 252 of 1904.

42. *Brij Bihary Lal*, (1923, Sep.) 46 A 91 ; *Titam Pramanik v. Chintan Pramanik*, (1928) 55 C 1190.

43. 7 CWN 176 ; *Saroj Kumar*, 23 Cr LJ 432.

44. 1 L 169 : 121 PLR 1920 : 56 IC 229 ; *Muthia Naik*, 41 M 383 : 19 Cr LJ 176 ; *Alibhai Abdul*, (1920) 45 B 346 : 22 Bom LR 1221 : 22 Cr LJ 55 ; *Chandan*, 43 A 483 : 19 ALJ 374 : 22 Cr LJ 353 ; *Akhoy Singh v. Rameshwar Bagdi*, 43 C 1143 : 20 CWN 1171 ; *Sankar Rangayya v. Sankar Ramayya*, 39 M 604 : 29 MLJ 621 : 16 Cr LJ 750 ; *Audhi Rai*, 3 PLT 458 : 23 Cr LJ 80.

45. *Mahna*, (1926) 7 L 344.

46. *In re Maruti Vithu*, (1924) 27 Bom LR 350.

tion, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution".⁴⁷ The scope of S. 345 is exhaustive and the same cannot be enlarged by reference to a general provision such as that contained in S. 423 (d).⁴⁸ There is no proposition of law which forbids the compounding of offences for an apology, in particular in case of defamation or abuse.⁴⁹

Offences created by special laws, not being specified in these two subsections are not compoundable.⁵⁰ Compounding of an offence other than those made compoundable by this section is illegal as such compounding is a thing prohibited by sub-sec. (7).⁵¹

Where the agreement to terminate the criminal proceeding otherwise than under S. 345 it is lawful but it falls within the mischief of S. 23 of the Contract Act.⁵² The scope of this section cannot be enlarged by reference to a general provision such as that contained in S. 423 (1) (d).⁵³ A criminal complaint cannot be referred to arbitration.⁵⁴

6. Distinction between withdrawal under S. 248 and composition.—"Compromise" is a word which in itself contemplates an arrangement to which there are two parties, "withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under S. 248 without the consent of the accused.⁵⁵

An agreement to compound an offence compoundable without the permission of the Court is lawful. But in the case of a non-compoundable offence, the agreement is unlawful.⁵⁶ Where the offence is non-compoundable the settlement must be deemed to be invalid.⁵⁷ It is not necessarily unlawful to agree to withdraw a Criminal complaint of a non-compoundable offence, because the complainant had very little chance to succeed in establishing his case.⁵⁸

7. Burden of proof on accused.—"It is for the accused who raises an objection to the jurisdiction of the Magistrate to show that there was a composition valid in law".⁵⁹

For the section applicable instead of this section to hill tribes to which the Kachin Hill Tribes Regulation, 1895 (I of 1895), and the Chin Hills Regulation, 1896 (V of 1896) have been applied, see Notifications Nos. 14 and 15, respectively, dated 30th June, 1898, *Burma Gazette*, 1898, Pt. I, P. 322. See also *Burma Code*.

8. Sub-section (1).—The opening words of sub-sec. (1) make it clear that offences punishable under laws other than the Indian Penal Code cannot come within the purview of this section and as such cannot be compounded under this section.

47. *Murray*, 21 C 103 followed in *Mahmed Kanni v. Pattami Mazothula Sahib*, 39 M 946 : 16 Cr LJ 803.

48. *Akhoy Singh v. Rameswar Bagdi*, 43 C 1143 : 20 CWN 1071.

49. *John*, 45 A 145 : 24 Cr LJ 758.

50. *Trikamdas Udeshi v. Bombay Municipal Corporation*, A 1954 B 427.

51. *London and Lancashire Insurance Co. Ltd. v. Binoy Krishna Mitra*, A 1945 C 218.

52. *Meenakshi Sundaramnal v. Subramania Aiyar*, A 1955 M 309.

53. *Akshoy Singh v. Rameswar Bagdi*, 20

CWN 1071 ; 17 Cr LJ 339.

54. *Malka v. Sardar*, A 1929 L 394 ; *Ramhinga Aiyar v. Budda Varadarajuhi Aiyar*, A 1925 M 1210 ; 20 Cr LJ 1594.

55. *Boyan Ali*, (1916) 20 CWN 1209 (1211).

56. *Chandmal v. Ram Krishnayya*, A 1942 M 173 ; 43 Cr LJ 734.

57. *Saktay Shah v. Mahadin*, A 1930 L 196.

58. *Sudho Kanda v. Mt. Jhinka Kuer*, A 1929 A 456.

59. *Murray*, 21 C 103.

Under sub-sec. (1) as soon as the parties have arrived at a compromise, the Magistrate has nothing more to do except to record a formal judgment of acquittal.⁶⁰ There can be a composition of an offence under S. 341, I. P. C., before a complaint has been filed in Court as no permission of the Court is necessary.⁶¹

The offences under Ss. 147 and 148, I. P. C., are not compoundable and therefore no acquittal can be granted by reason of compromise.⁶² The Court should first see whether the offence is compoundable or not.⁶³ Complaints are often exaggerated, the sworn statement, if it discloses minor offence which is compoundable, the Magistrate will allow compounding of the offence.⁶⁴ Determination of whether or not the offence is compoundable depends on offence directly charged in complaint.⁶⁵

Composition cannot be withdrawn.—Composition once effective cannot be withdrawn.⁶⁶ In law, a composition once arrived at between the parties is complete and it has the effect of acquittal even though one of the parties later on resiles from the compromise.⁶⁷

9. Sub-section (2).—Is new. The old section included only hurt and grievous hurt: see *Sultan Singh*⁶⁸ where it was held that it was not competent to the survivors to compound the case with their assistants in respect of the injuries caused to the person deceased.

May with the permission of the Court.—The offences contemplated in this second column which though non-compoundable have now been made compoundable with the permission of the Court.

In cases governed by sub-sec. (2) the Magistrate has to perform the judicial act of deciding whether in the interests of justice the parties should be allowed to compromise and unless and until the Court has given its sanction, the so-called compromise arrived at between parties outside the Courts is of no legal effect.⁶⁹

Where the case was important between the parties but when they had compounded the case, the Court should not refuse permission, regard being had to the serious consequences which would ensue to the accused. It is highly improper for the Court to seek the opinion of the Investigating police officer for the offence being compounded.⁷⁰ There must be pending prosecution and permission of Court should be obtained.⁷¹

60. *Nawang Rai v. Kider Nath*, (1928) 9 L 400 (406); *Ram Bai v. Mt. Chandra Kumari Devi*, A 1940 N 181; 41 Cr LJ 257.

61. *Torpay*, (1927) 49 A 484.

62. *Gurunarayan Das*, A 1948 P 58.

63. *Hanumant Srinivas*, A 1929 B 375; 31 Cr LJ 375.

64. *Kalianna Goundan v. Sethia Goundan*, A 1946 M 80.

65. *Saktay Shah v. Mahadin*, A 1930 Oudh 196 following *Md. Ismail v. Samad Ali*, 20 CWN 946—Civil case.

66. *Jhangtoo Barai*, 52 A 254; 31 Cr LJ 1215 following *Kusumy*, 3 CWN 322; *Md. Kanji*, 39 M 946; *Murray*, 21 C 103; *Kanni Rowther v. Pattani Innothelu Sahib*, 41 M 685 and *Ram Richpal v. Matadin*, A 1925 L 159; *Godfrez Meeus*

v. Simon Dular, A 1950 N 91; 51 Cr LJ 75.

67. *Dharicharan Singh*, A 1939 P 141; 40 Cr LJ 460.

68. (1909) 31 A 606.

69. *Naurang Rai v. Kider Nath*, (1928) 9 L 400, where *Kanni Rowther v. Pattani Inuzothallu Sahib*, (1917) 41 M 685 was referred to.

70. *E. M. Burnett v. L. M. Thakur*, A 1956 N 161; 1956 Cr LJ 755; *Dharicharan Singh*, A 1939 P 141; 40 Cr LJ 460; *Parprasad Hiralal*, A 1938 N 39; 39 Cr LJ 120; *Pratap Singh Bhairon Singh*, A 1937 N 114.

71. *Ponnaswamy Ayyar, In re*; A 1937 M 825; 39 Cr LJ 133; *Kuchibhotla*, A 1942 M 602.

Offence of theft where the value does not exceed Rs. 250 is compoundable. In the case of theft of crops from land belonging to complainant's wife, composition by complainant's son after his death is not maintainable. The questions as to who was in actual possession before theft is immaterial for the purpose of S. 345 (2). In such a case the wife is entitled to apply in revision against the order of acquittal as she has no right of appeal under S. 417 (3).^{71a}

10. Time for such permission.—A case may be compounded under this section at any time before the judgment is pronounced, and a Magistrate cannot refuse a compromise petition on the ground that it was presented when the judgment was being written.⁷²

In a *Civil case* it has been held that an agreement the consideration of which is the compounding of a compoundable offence is not forbidden by law and is valid, but an agreement to compound a non-compoundable offence is in valid in law.⁷³

11. Person mentioned in the third column.—Although compounding of an offence with a person not entitled to compound may have the effect of acquittal such acquittal is no bar to a subsequent prosecution.⁷⁴

This sub-sec. (2) requires permission of Court as a condition precedent to the compounding of offences mentioned in this column.

The view in *Harbans Singh*⁷⁵ which held that it is not competent for a Magistrate to allow the composition of a non-compoundable offence, can hardly be maintained as the second schedule has been amended.

Aggrieved person.—Under the old Code it was held that an offence punishable under S. 325, I. P. C., was compoundable by the person to whom the hurt was caused.⁷⁵

12. Sub-section (4).—See "Report of the Select Committee." The view in *Shib Singh*,⁷⁶ that a minor husband cannot compound an offence under S. 498, I. P. C., has now been modified in this way that a guardian of such minor husband may *with the permission of the Court compound*.⁷⁸

An appeal being a continuation of the proceedings the appellate Court shall be deemed to be a Court dealing with the original proceedings and it has no jurisdiction to refuse to allow the parties to compound the offences under sub-sec. (1) of this section.⁷⁷ The words "before which the appeal is to be heard" have reference to the Court which is to hear the appeal and not to the state of the appeal.⁷⁸ A compromise arrived at after the hearing of the appeal does not come within S. 345.⁷⁹ Under this clause a High Court in the exercise of powers under S. 439 may allow any person to compound an offence.⁸⁰

13. Sub-section (5).—Contemplates the power of the appellate Court to allow composition.

71a. *Panchanan Pudh*, A 1961 Or 47.
72. *Aslam Mea*, 45 C 815 : 22 CWN 744 : 23 CLJ 261 : 19 Cr LJ 752.
73. *Ahmed Hussain*, (1928) 30 Bom LR 885 : AIR (1928) B 305.
74. *Dajiba Ramji Patel*, (1927) 51 B 512.
75. (1880) 3 A 283 ; *Rahamat*, 37 A 419 : 13 ALJ 630.
76. *Bhaiyalal*, A 1929 N 278.

77. *Biswanath Chakraborty v. Haripada De Dhara*, A 1959 C 443 : 1959 Cr LJ 831.
78. *Bharwad Rana Kana*, A 1951 Sau 42 : 52 Cr LJ 714.
79. *J. M. Chatterjee*, A 1933 A 434 : 34 Cr LJ 926.
80. *Baij Bhahari*, A 1924 A 209.

A Court of revision can accept a compromise under Cl. (5-A) but that does not mean that the Court should accept a compromise in every case.⁸¹

14. Sub-section (5-A).—It would not be competent for the High Court to allow a compromise to be recorded unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded.⁸² The power under sub-sec. (5-A) can be exercised only during the pendency of the revision.⁸³

Sub-sec. (5-A) is new and allows the High Court in revision to sanction compromise. See "Effect of Amendment" *supra*.

15. Sub-section (6).—See also "Effect of Amendment". The effect of composition is an acquittal of the accused *with whom the offence has been compounded*.

A complainant can enter into a compromise with one of the accused and the Magistrate can acquit that accused.⁸⁴ Compromise with one of the two accused is no obstacle in convicting the other.⁸⁵ The composition of an offence which is compoundable has the effect of acquittal of the accused with whom the offence has been compounded once the accused is acquitted, he can not be tried again. Section 403 is a bar.⁸⁶ Where one offence *e. g.* Ss. 323 and 504, I. P. C., which are compoundable and the other *e. g.* S. 330 I. P. C., is not compoundable and where it was alleged that the compromise was under coercion held the trial for the non-compoundable offence would not be barred under S. 403.⁸⁷

Order of acquittal is appealable under S. 417.⁸⁸

16. Sub-section (7).—Says that offences mentioned or *specified* in this section only can be lawfully compounded.

346. Procedure of State Magistrate in cases which he cannot dispose of.—(1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

81. *Jumna Sher Khan*, A 1934 S 122; 36 Cr LJ 210 relied on in *Gurunarayan Das*, A 1948 P 58; 48 Cr LJ 433; *Gouatra Vishnaji*, A 1952 Kutch 60.

82. *Baburali Sardar v. Kalachand Bepari*, A 1939 C 728; 41 Cr LJ 125.

83. *Ramlal*, A 1953 A 525; 1953 Cr LJ 1264.

84. *Phillipose Phillif v. Thomas George*, A 1951 TC 248; 1952 Cr LJ 65.

85. *Thiramalai Naiaken v. R. Elumalai*, 1933 MWN 222 (1); *Makhan Lal v. Sakhi*, 37 CWN 319; 34 Cr LJ 1063; *Mohan*, 7 L 344; 27 Cr LJ 576.

86. *Md. Mansoor v. Hira Singh*, A 1959 A 627; 1959 Cr LJ 1135.

87. *Mangilal*, 1957 Cr LJ 158 (Raj).

88. *State v. Honnur Sah*, A 1960 Mys 325; 1960 Cr LJ 645.

SYNOPSIS

1. Corresponding sections in former Codes.
2. State Amendments.
—Bombay.
—Saurashtra.
3. Scope.
4. Splitting up of offence.
5. Evidence partly recorded by a Magistrate having no jurisdiction.
6. Sub-section (2).
7. Superior Magistrate's power to refer the case back to the Magistrate submitting it.
8. Trial must be *de novo*.

1. Corresponding sections in former Codes.—This section corresponds to S. 461, paragraphs 1 and 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. State Amendments.

Bombay.—In sub-sec. (1) (i) for the words 'outside the presidency-towns' the words 'outside Greater Bombay' were substituted; (ii) after the words 'District Magistrate', the words 'or Sessions Judge as the case may be', were substituted by Bombay Act 23 of 1951.

Saurashtra.—In sub-sec. (1) after the words 'District Magistrate', the words 'or Sessions Judge as the case may be', were inserted by Saurashtra Act 4 of 1952.

3. Scope.—Section 346 does not entitle a Magistrate of the first class holding an enquiry in regard to an offence triable only by a Court of Session, to make over the case after taking all the evidence to the Deputy Commissioner, specially empowered under S. 30 Cr. P. C. to try such cases.⁸⁹ This section is wide enough to comprehend cases of want of local or territorial jurisdiction. In all cases of defective jurisdiction, local, territorial or otherwise whatsoever, action can be taken provided that the other conditions mentioned in this section are or can be satisfied.⁹⁰ In cases of absence of territorial jurisdiction what the Magistrate concerned should do is to act under S. 201. To apply sub-sec. (1), evidence recorded during the course of an enquiry or trial must warrant a presumption that the case is one which should be tried or committed by some other Magistrate. It is not known how even before recording the evidence in the case it will be proper for a Magistrate to report under S. 346 (1).⁹¹

4. Splitting up of offence.—No Magistrate is entitled to cut down an offence from that which is established by the evidence in order to give himself jurisdiction.⁹² Where however the accused was charged under S. 193 and the evidence established an offence under S. 194 it was held that the Magistrate could convict the accused under S. 193.⁹³ The reference contemplated by sub-sec. (1) is not limited to the stage at which the Magistrate takes cognizance on the filing of the complaint. Where after the trial has started and in the course of the examination of a witness, the Magistrate becomes aware of the more serious offence, it is his duty to make a reference to the Superior Magistrate who has jurisdiction to try the case.⁹⁴

5. Evidence partly recorded by a Magistrate having no jurisdiction.—Where part of the evidence was recorded by a Magistrate who had

89. *Amir Khan*, (1902) 7 CWN 457.

90. *Amarendra Nath v. Raghunath Wandan*, 56 CWN 107; 1952 Cr LJ 1736 followed in *Vithal Rao Mudaliar v. Sundaraghavan*, A 1958 M 584; *Employees' State Insurance Corporation v. M. Haji Md. Ismail Shabib*, A 1960 M 64 (FB) : (1959) 2 MLJ 521.

91. *State v. Pakkar*, A 1959 Kar 53 (FB) : 1959 Cr LJ 194.

92. *Chunder Seekor v. Dhurra Nath*, 1 CLR 434; *Bishu Shaik v. Sabar Mollah*, 29 C 409, see *Gundya*. (1889) 13 B 502 (505).

93. *Ayyan*, (1901) 24 M 675; *Sammukh Singh Tej Singh*, A 1945 S 125; 47 Cr LJ 37; *Picha Kudanpan v. Servai Kara Thevan*, 1930 MWN 770.

94. *Vithal*, ILR (1959) M 166; A 1958 M 584.

no jurisdiction and part of the evidence by a Magistrate who had jurisdiction, conviction was held to be bad in law.⁹⁵

6. Sub-section (2).—Section 346 contemplates that the Magistrate to whom the case is submitted shall either try it himself or refer it to some other competent Subordinate Magistrate for such purpose or commit the accused for trial.⁹⁶

Where a case which has been partly heard by one officer is transferred to another officer for trial, the latter should examine all the witnesses in the case before deciding it.⁹⁷

Where a Second Class Magistrate, who was not competent to try a case, submitted it to a superior Magistrate under S. 346, and the latter passed an order of discharge merely after hearing arguments on the evidence already taken by the inferior Magistrate, *held* the superior Magistrate could not be said to have tried the case himself within the meaning of sub-sec. (2).⁹⁸

Section 532 has no sort of application to the case of an accused committed to the Court of Session under S. 346.⁹⁹

7. Superior Magistrate's power to refer the case back to the Magistrate who submitted it.—The terms of sub-sec. (2) are sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it.¹

8. Trial must be de novo.—As the exception to S. 350 is expressly made not applicable in the case of transfer under S. 346 (2), the Court is bound by the general rule to try the case afresh.^{1a} Passing orders on evidence taken by another Magistrate cannot be considered to be 'trying the case himself'.² The Sub-divisional Officer to whom the case is submitted can commit without taking evidence.³

347. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.—(1) If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained.

95. *Budhu Tatwa*, (1927) 55 C 65 : 47 CLJ 122 ; *Framji Bamanji*, (1925) 28 Bom LR 391.

96. *Muhammed*, (1905) 91 PLR : 2 Cr LJ 369.

97. *Gapinath Sahi v. Konuram*, (1870) 14 WR (Cr) 3 ; *Gomer Sirda*, (1898) 25 C 863 ; *Goopa*, A 1943 L 27 : 43 Cr LJ 925.

98. *Paravu China Venku Naidu*, (1922) 24 Cr LJ 413 : 72 IC 525. *Narayana Reddy*, In re ; A 1955 AP 48 ; 1955 Cr LJ 383.

99. *Kamani Baurini v. Fakir Chand Sarkar*, (1907) 12 GWN 136.

1. *Polur Reddi v. Munaswami Reddi*, 56 M 16 (FB) : 31 Cr LJ 1010 ; *P. S. Narayan*

Iyar v. Subramania Iyar, A 1960 Ker 167. Contra *Haidarsha Lalsha Pathan*, A 1942 B 84 : 43 Cr LJ 562.

1a. *Pannalal*, A 1952 A 657 ; 1952 Cr LJ 112 ; *Sasthi Gopal Sammi v. Haridas Bagdi*, 42 CWN 508 ; 39 Cr LJ 606 (2) ; *Jagat Raj* 1956 A 117 ; 1956 Cr LJ 179 ; *Ramniranjan*, A 1955 A 506 ; *Manikanda Satyanarayana*, A 1955 AP 44 : 1955 Cr LJ 353.

2. *Chinna Venku*, A 1923 M 327 : 24 Cr LJ 413.

3. *Kamini Baruini v. Fakir Chand Sarkar*, 12 CWN 136 see contra *Ram Narayan Chinna Venku*, A 1955 A 506 : 1955 Cr LJ 1230.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under Section 346.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 8. 'Ought to be tried.' |
| 2. Legislative Changes. | 9. Counter-case. |
| 3. State Amendment.—Madras. | 10. 'Under the provisions hereinbefore contained.' |
| 4. Rules. | 11. Cross-examination of prosecution witnesses cannot be disallowed. |
| 5. Effect of the Amendment. | 12. Commitment Local investigation. |
| 6. Scope. | 13. Joint Summons and Warrant-Case. |
| 7. 'At any stage of the proceedings.' | |

1. Corresponding sections in former Codes.—This section corresponds to S. 256 of the Code of 1861, S. 461, paragraph 3, Ss. 221, 436, paragraph 3 of the Code of 1872, S. 127 of Act IV of 1877 and the Code of 1898 was similarly worded as that of 1882.

2. Legislative Changes.—The words "stop further proceedings" after the word 'shall' in sub-s. (1) were omitted by S. 91 of Act XVIII of 1923.

"Clause 79 of Bill III of 1914 is designed to bring S. 374 into line with S. 208"—*Statement of Objects and Reasons*.

3. State Amendment.

Madras.—In sub-s. (1) the words 'or High Court' have been omitted by Madras Act 34 of 1955.

4. Rules.—In cases triable by a Magistrate or by the Court of Session the accused person should be committed for trial only when the Magistrate finds, from aggravating circumstances, that a higher punishment is required than he can award—Cal HC Cr 5, 1865.

5. Effect of the Amendment.—The words "stop further proceedings" having been omitted the decision in *Phanindra Nath Mitra*⁴ which held that S. 347 is not to be read subject to S. 208 (2) seems to have been superseded, and the following decisions⁵ which held that these words meant 'to stop proceedings with the case as a trial and commit the case to the Court of Session' has been restored. The Legislature perhaps thought the above words in the section to be redundant and as such deleted them and seems to have amended the section to bring it in conformity with S. 208 *supra*.

6. Scope.—It is competent to a Magistrate to commit a case to the Court of Session even though he can himself impose the maximum sentence provided by law for the offence, if in his opinion, the case is one which for other reasons ought to be tried by the Court of Session⁶ or if he is of opinion that the sentence he is empowered by law to pass would be inadequate.⁷

Though this section authorises a Magistrate before signing his judgment to commit a person to Sessions, it will not enable him to ignore the provisions of Chapter XVIII causing prejudice to the accused. A Magistrate in trying warrant cases is entitled to commit the accused without taking *de novo* proceedings under Chapter XVII, but he must conform to the provisions of S. 208⁸ or S. 207-A.

4. (1909) 36 C 48 : 12 CWN 1014.
5. *Sessions Judge of Coimbatore v. Kangaya*, 36 M 321 : 23 MLJ 368 : 13 Cr LJ 778, where *Ahmadi*, (1898) 20 A 264 and *Muhammad Hadi*, (1904) 26 A 177 were distinguished.

6. *Bhagavathi*, 42 M 83 : 35 MLJ 559 : (1918) MWN 870 : 19 Cr LJ 997.
7. *Krishnaji*, (1929) 31 Bom LR 602 (605).
8. *Ummadi Pulla Reddi*, A 1956 AP 17.

The provisions contained in Ss. 346, 347 and 349 are generally applicable to all inquiries and trials, obviously, therefore they apply to trials of summons cases under Chapter XX, as also to trials of warrant cases under Chapter XXI, similarly they are applicable to summary trials under Chapter XXII.⁹

7. **'At any stage of the proceedings.'**—*i. e.* before signing judgment,¹⁰ for after judgment, S. 403 would be a bar to trial by the Court of Session as was held in *Sellandi's* case.¹¹

8. **'Ought to be tried.'**—This section cannot be read subject to the provisions of S. 254. A Magistrate has power to commit an accused to Sessions though he is competent to try the case and also adequately punish the accused,¹² but committing a case on the mere ground that the counter-case has been committed to Sessions is irregular.¹³

A Magistrate is not bound to commit a case to the Court of Session merely because the evidence disclosed another offence triable exclusively by Sessions Court.¹⁴ Offences which are triable both by a Magistrate and a Sessions Court should ordinarily be tried by the Magistrate, he should state reasons why he commits the accused to a Court of Session.¹⁵

9. **Counter-case.**—Where the offence disclosed is triable by a Second Class Magistrate and it is not stated that he cannot adequately deal with it, the fact that the case is counter to preliminary register case which has to be committed to Sessions is not a sufficient reason for treating it also as a preliminary register.¹⁶ When a case is committed to Sessions, the counter-case should also be committed though the Magistrate is competent to try the counter-case.¹⁷

10. **"Under the provisions hereinbefore contained."**—Where a Magistrate decides in the course of a trial in which the warrant case procedure is being followed that the case is such that the accused ought to be committed to Court of Session, the duty of the Magistrate is to hear the evidence once again under the provisions of Chapter XVIII.¹⁸ A Magistrate committing the accused to the Court of Session under S. 347 has to follow the provision of Chapter XVIII.¹⁹ The words 'under the provisions hereinbefore contained' have been the subject of decision by a number of High Courts, and the High Courts are unanimous that they mean that if the Magistrate decides at some stage of the trial to commit the accused, he has to follow the provisions contained in Chapter XVIII. When a Magistrate makes up his mind to commit a case not exclusively triable by a Court of Session under the powers given to him under S. 347 (1) he has to follow the provisions contained in Chapter XVIII. It is the duty of the Magistrate to intimate to the accused that he has made up his mind to commit in

9. *Matoley*, A 1948 A 1 (FB); *Ghani Yakub*, A 1929 S 55.
10. *Kudratulla*, 3 C 490. See referred to a Full Bench by Suhrawardy and Jack, J. J. in *Grish Chandra Kundu*, Cr Ref 1 of 1929.
11. *In re Kora Sellandi*, (1913) 38 M 552; 15 Cr LJ 188; *Panchanan*, A 1930 C 666; 32 Cr LJ 243, *Dulap*, A 1954 A 163; *Ashgar*, 58 A 671; A 1930 A 134; *Kathan Maistry v. Muthuvera Maistry*, A 1953 M 998; 1953 Cr LJ 186, *Matoley*, A 1948 A 1 (FB).
12. *Ummadi Pulla Reddi, In re*; A 1956 AP

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13. *Ummadi Pulla Reddi, In re*; A 1956 AP 17; *Majji Paidanna*, 1934 MWN 272 (1).
14. *Ishitaq Ahmed*, 27 A 69.
15. *Sheomangal Pande*, A 1940 Oudh 15; 40 Cr LJ 903.
16. *Gonna Mudali*, (1940) MWN 530; 42 Cr LJ 86.
17. *Ghulam Hussain Manik*, A 1943 S 112; 44 Cr LJ 631.
18. *Santi Jiban v. Braja Nath*, 60 CWN 82.
19. *K. R. Bhat*, A 1931 B 517; 32 Cr LJ 68.

view of the provisions of S. 347 (1) and then proceed in the manner indicated above.²⁰

This section empowers a Magistrate to pass an order of commitment only on his being satisfied that it is a fit case for commitment. If he rejects a prayer for commitment, but subsequently on the advice of the higher Court passes the order, *held*, that the order is without jurisdiction.²¹

11. Cross-examination of prosecution witnesses cannot be disallowed.—Where the application for cross-examination of the prosecution witnesses has been made before framing of the charge and the Magistrate's decision is to commit the accused, such application cannot be rejected.²²

12. Commitment—Local investigation.—Where after a local investigation and without recording its result, a Deputy Magistrate has put himself in the position of a witness, a commitment by him of the case to the Sessions, will meet the ends of justice inasmuch as he will be liable to be called as a witness.²³

13. Joint Summons and Warrant-Case.—The committal of a summons case would be more wide and not illegal in the least arising out of the same transaction together with a warrant case.²⁴

348. Trial of persons previously convicted of offences against coinage, stamp-law or property.—(1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if any Magistrate in the district has been invested with powers under Section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under sub-section (6) of Section 207A, or Section 209.

20. *Chhidimalal Jain v. State of U. P.*, A 1960 SC 41.

21. *Choley*, A 1951 A 714.

22. *Jyotsna Nath Sikdar*, (1923) 51 C 442.

23. *Fazer Ali v. Maharullah*, 16 CLJ 45 : 13 Cr LJ 688.

24. *Ghani Yakub*, 21 Cr LJ 791 (S).

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. grounds for committing the accused. |
| 2. Statement of Objects and Reasons. | 6. 'Is competent to try the case.' |
| 3. State Amendment—Madras. | 7. Conviction and subsequent Commitment is bad. |
| 4. Scope. | 8. Sub-section (2). |
| 5. Is satisfied that there are sufficient | |

1. Corresponding sections in former Codes.—This section corresponds to S. 315 of the Code of 1872, S. 128 of Act IV of 1877.

2. Statement of Objects and Reasons.—"Clause 80 provides that when any person is committed to the Court of Session or High Court under S. 348, another person accused jointly whom the Magistrate believes to be guilty, shall be similarly committed. Identical treatment will thus be accorded to all the accused".

3. State Amendment.

Madras.—In sub-sec. (1) the words 'or High Court as the case may be' have been omitted and in sub-sec. (2) the words 'or High Court' have been omitted by Act 34 of 1955.

Chapter XII I. P. C. relates to 'Offences relating to Coins and Government Stamps' and Chapter XVIII I. P. C. to 'Offences against Property.'

4. Scope.—S. 75 I. P. C. provides for an enhanced punishment on a second conviction but although the present section does not so provide, as was provided under the Codes of 1872 and 1882, the offender should not be committed to the Sessions unless he is an 'habitual offender', because the Magistrate might be of opinion that he is competent to try the case. It was held in *Rajcoomar Bose's* case²⁵ and that of *Eshun Chandra Dey*²⁶ that unless the previous convictions were set out in the charge under S. 221 (7) they could not be used for the purpose of enhancing the sentence.

In committing a case under this section the Committing Magistrate should consider whether in the circumstances of the case, his powers enable him to try and pass an adequate sentence. If they do not, and if he is unable to pass a deterrent sentence, he should commit the case. S. 348 has been enacted in order to aid the requirements of S. 75 I. P. C.²⁷ It is true that the latter part of this section is mandatory but that would come into play only when the Magistrate feels that the circumstances of the case warrant the commitment of the accused to the Court of Sessions. It does not contain any invariable rule that in all cases governed by S. 75 Penal Code, a committal to the Sessions will follow.²⁸ S. 348 deals with the special procedure to be followed in cases against persons accused of offences falling under Chapter XII or Chapter XVII of the Penal Code and who have been previously convicted for a similar offence.²⁹

5. Is satisfied that there are sufficient grounds for committing the accused.—A case should be committed to the Court of Sessions under S. 348 only when the Magistrate is satisfied that there are sufficient grounds for committing it.³⁰

6. 'Is competent to try the case.'—These words are new and taken with the words "*if the Magistrate, for committing*

25. (1873) 19 WR (Cr) 41.

26. (1874) 21 WR (Cr) 40.

27. *Piyarelal Jahawarlal*, A 1957 MP 213 : 1957 Cr LJ 1403.

28. *Public Prosecutor v. Pulapati Ram Krishnaiah*, A 1955 AP 190 : 1955 Cr

LJ 1235.

29. *State v. Joseph*, A 1960 Ker 16 (17) : 1960 Cr LJ 71.

30. *Rang Bahadur Rai*, A 1949 P 317 : 50 Cr LJ 664.

the accused" make it clear that the Magistrate will not commit to the Sessions where he can pass an adequate sentence and where he does not think that sufficient grounds exist for committing the accused.

7. Conviction and subsequent Commitment is bad.—A Magistrate acting under this section ought merely to frame a charge and then commit the accused to the Sessions but need not find the accused guilty before commitment.³¹ It is illegal and *ultra vires* for a Magistrate acting under this section, when he thinks he cannot pass adequate sentence, to submit the case with a finding of guilt.³²

8. Sub-section (2)—Was inserted by S. 92 of Act XVIII of 1923. The amendment is in the lines of S. 415A and provides equal treatment to all the accused in a case. The modification suggested by the Legislature is that he is not bound to commit the case of an accused whom he thinks he should discharge under S. 209 of the Code.

349. Procedure when Magistrate cannot pass sentence sufficiently severe.—(1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law :

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under Sections 32 and 33.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. State Amendments—Bombay—Saurashtra. |
| 2. Legislative Changes. | 4. Effect of the Amendment. |

31. *In re Kora Selladi*, (1913) 38 M 552 : 15 Cr LJ 188.

32. *Po Yin*, 9 Bur LT 913 : 34 IC 313.

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| 5. Scope. | more severe. |
| 6. Second and third class Magistrates—whether can frame a charge—having jurisdiction. | 9. Sub-section (1-A). |
| 7. Is of opinion. | 10. Sub-section (2)—Further Evidence. |
| 8. Punishment different in kind from or | 11. Transfer. |
| | 12. Shall pass judgment. |

1. Corresponding sections in former Codes.—This section corresponds to S. 277 of the Code of 1861 and S. 46 paragraphs 1 and 2 of the Code of 1872 and in the Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative changes.—Sub-sec. (1-A) was inserted by S. 93 of Act XVIII of 1923. This was the identical language as was proposed in Cl. 81 of Bill III of 1914.

3. State Amendments.

Bombay.—In sub-sec. (1) for the words 'to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate' the words 'to a Magistrate of the first class specially empowered in this behalf by the State Government in consultation with the High Court' were substituted; (ii) in sub-sec. (1-A) for the words 'the District Magistrate or Sub-Divisional Magistrate' the words, brackets and figures 'the Magistrate empowered under sub-section (1)' were substituted by Bombay Act 23 of 1951.

Saurashtra.—Same as in Bombay, *vide* Saurashtra Act 4 of 1952.

4. Effect of the Amendment.—If the Magistrate refers the case of one of the accused to the superior Magistrate he is now bound to refer the case of all the accused and not as under the Code as it stood before the amendment to refer the case of those accused whom he could not punish adequately, see *Ragava Naiko*.^{32a}

5. Scope.—The action of the Sub-Magistrate in sending up only one accused under S. 349 where there were two other accused was held to be illegal.^{32b} The two circumstances under which the Magistrate may send up records under this section are (1) the punishment to be inflicted must be different in kind from that which he is empowered to inflict, (2) the punishment must be more severe than that which he can inflict.³³

6. Second and Third Class Magistrates—whether can frame a charge.—A Second or Third Class Magistrate acting under this section is fully competent to frame a charge against an accused person.³⁴ Such Magistrates, if of opinion that the accused should be bound down under S. 106, must refer the whole case to Sub-Divisional Magistrate without himself having passed any sentence.³⁵

A trying Magistrate, forwarding an accused person to another Magistrate for passing a severe sentence under S. 349, need not record a conviction against the accused for any offence. If however the Magistrate records a conviction, it may be treated as a surplusage and a legal nullity, and need not be formally quashed.³⁶

"Having jurisdiction".—The jurisdiction to deal with proceedings under S. 349 was conferred upon District and Sub-Divisional Magistrates and on no others³⁷ but surely these words mean that a First Class Magistrate cannot act under this section.

32a. (1892) Weir II 428; *Nachian*, (1894) Weir II 429.

32b. *Murgasi Kundan*, (1928) MWN 72.

33. *In re P. R. Joseph*, A 1953 M 574: 1953 Cr LJ 1079.

34. *Po Yin*, 9 Bur LT 213: 34 IC 313.

35. *Rohimuddin Howladar*, (1905) 35 C 1092.

36. *Narayan Dhaku*, (1928) 30 Bom LR 620: AIR (1928) B 240.

37. *Vinayak*, 38 B 719: 16 Bom LR 598: 16 Cr LJ 273.

"Jurisdiction" contemplated is to hold an enquiry and commit for trial.³⁸ Evidence recorded by a 2nd Class Magistrate having no jurisdiction to try the case cannot be legally considered by the Magistrate having such jurisdiction and to whom the case is ultimately transferred.³⁹

7. **"Is of opinion"**—A Magistrate deciding to act under this section should record his opinion that the accused is guilty and that he ought to receive a punishment different in kind from or more severe than that which he is empowered to inflict. The section does not require him to write a judgment.⁴⁰ The Magistrate cannot use the expression 'convicted the accused', but that expression would not render the reference illegal.⁴¹

8. **'Punishment different in kind from or more severe than that which such Magistrate is empowered to inflict'**.—The words were introduced by S. 7 of Act XI of 1874 while amending the Code of 1872. An order under S. 562 cannot be said to be a 'punishment'.⁴² Whipping (now abolished) and sending Children to different schools under the Madras Children Act for youthful offenders are punishments different in kind from imprisonment or fine.⁴³

9. **Sub-section (1-A)**.—Was inserted by S. 93 of Act XVIII of 1923. See "Effect of the Amendment" *supra*. Under this sub-section only the case of those accused, who are in the opinion of the Magistrate guilty, can be forwarded to the Sub-Divisional Magistrate.⁴⁴

Whether applies when accused dealt with under S. 562.—Sub-section (1-A) was intended to secure identity of treatment to all accused persons and to prevent conflict of jurisdiction. There is nothing in that section which would prevent a Magistrate acting under S. 562 to send up all the accused persons.⁴⁵ Section 349 applies only to cases where punishment 'different in kind' is sought to be inflicted, a case under S. 562 cannot be governed by it. Cases where provisions of S. 562 are sought to be applied are governed by S. 380.⁴⁶

10. **Sub-section (2) : Further Evidence**.—The general rule is that the Magistrate who hears the evidence is competent to decide whether the accused is guilty or not guilty. But this section creates an exception to the general rule.⁴⁷ The Magistrate to whom the case is referred, may examine the parties, recall witnesses and take "further evidence."

11. **Transfer**.—The Magistrate to whom the case is referred under S. 349 cannot transfer it to another Magistrate but must dispose of it himself.⁴⁸ S. 528 has no application to proceedings under this section.⁴⁹ He cannot return it to the referring Magistrate on the ground that the latter has jurisdiction to pass adequate sentence.⁵⁰

38. *Abdul*, 13 C 305.

39. *Budha Tatwa*, (1927) 55 C 65 : 47 CLJ 122.

40. *Khoda Bux Mal v. Ohadali Mal*, A 1949 C 308 : 52 CWN 576 ; *Rang Bahadur*, A 1949 P 317 ; 50 Cr LJ 664.

41. *Pagla Kahar*, A 1946 P 412 ; 47 Cr LJ 1016.

42. *Baba*, 24 Cr LJ 738 : 74 IC 66 ; *Public Prosecutor v. Gurappa Naidu*, A 1933 M 728 : 34 Cr LJ 1045.

43. *In re P. R. Joseph*, A 1953 M 574 : 1953 Cr LJ 1079.

44. *Sultan Muhammed Khan*, (1925) 24 ALJ 80.

45. *K. Achi v. K. Madhu Shudn Patra*, A 1953 Or 227 : 1953 Cr LJ 1243 Contra *Pirananayaga Pundaram*, A 1943 M 390 : 44 Cr LJ 568.

46. *In re P. R. Joseph*, A 1953 M 574 ; 1953 Cr LJ 1079.

47. *Baba*, 24 Cr LJ 738.

48. *Anon*, 5 MHCR App XIII ; *Valuadam*, 4 M 233 ; *Viranna*, (1886) 9 M 377 ; *Thakur Dayal*, 26 A 344.

49. *Vinayak Narayan Arie*, (1914) 38 B 719 : 28 IC 321.

50. *Dula Faqueer v. Bhagirat Sircar*, (1880) 6 CLR 276 ; *Ponnuswamy Nadan*, (1911) 36 M 470 : 13 Cr LJ 16.

12. 'And shall pass such judgment as is according to law'.
Order.—The use of the expression 'order' is meant to provide for the disposal of the case otherwise than by acquittal or sentence.⁵¹

350. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.—(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; Provided that if the succeeding Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) Nothing in this section applies to cases in which proceedings have been stayed under Section 346 or in which proceedings have been submitted to a superior Magistrate under Section 349.

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

SYNOPSIS

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|---|--|
| 1. Corresponding sections in former Codes. | —not applicable to Judges. |
| 2. Legislative changes.
—1923 and 1955. | —to proceedings before Special Judges. |
| 3. State Amendments.
—Bombay.
—Saurashtra. | —in Warrant Cases not applicable before charge is framed. |
| 4. Effect of 1955 Amendment. | —if applicable to cases of transfer. |
| 5. Object. | 12. Evidence recorded by Successive Magistrates. |
| 6. Scope. | 13. 'Ceases to exercise jurisdiction.' |
| 7. Any Magistrate. | 14. Death of Magistrate. |
| 8. Hearing the whole or any part of the evidence. | 15. Part-heard case. |
| 9. In an inquiry or Trial. | 16. 'Or he may resummon witnesses.' |
| 10. May act on the evidence so recorded. | 17. Magistrate pronouncing a judgment of his predecessor. |
| 11. Applicability of section.
—to proceedings under Chapter VIII.
—If applicable to Summary Trials.
—not applicable to bench of Magistrates. | 18. 'May when the second Magistrate recommences his proceeding.' |
| | 19. Proviso. |
| | 20. Sub-section (2). |
| | 21. Sub-section (3). |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 328, 329 of the Code of 1872, S. 156 of Act IV of 1877 and the Code of 1898 before amendment was similarly worded as that of the Code of 1882.

2. Legislative Changes (1923—1955).—The words "or in which proceedings have been submitted to a superior Magistrate under S. 349" in

51. *Abdulla*, 4 B 240 FB; *Chinnimarigadu*, (1876) 1 M 289 FB.

sub-sec. (2) were added, and sub-sec. (3) inserted, by S. 4 of Act XVIII of 1923.

(1955).—The words ‘or he may resummon the witnesses and recommence the inquiry or trial’ which occurred after the words ‘partly recorded by himself’ and sub-sec. (1) and the proviso has been substituted for the old provisos (a) and (b) which read as follows :—

“Provided as follows :—

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard ;

(b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial”.

The words of the section in the Code of 1898 are slightly different from the words of the corresponding sections of the Codes of 1872 and 1882. The alteration might have been made with a view to include cases of transfer.⁵² It was further pointed out in this case⁵² that the earlier rulings are still good law.

3. State Amendments.—

Bombay—The amendment to the old proviso by Bombay Act 23 of 1951 must be deemed to have been superseded by the substitution of the said proviso by the Amending Act 26 of 1955.

Saurashtra—Amendment of the old proviso (b) to sub-sec. (1) by Saurashtra Act 4 of 1952 will be deemed to have been superseded in view of the substitution of the said provisos (a) and (b) by the Criminal Procedure Amending Act 26 of 1955.

4. Effect of 1955 Amendment.—In order to provide a speedy trial which is the object of the amendment of the Code the Legislature has taken away the valuable right of the accused to claim as of right a *de novo* trial enjoyed by him, which was enshrined in the judgments of the different High Courts. The new proviso which has been substituted for the old proviso gives the Magistrate an option of resummoning any witness and discharging him after further cross-examination and re-examination as he may permit. The Amendment has put the accused in a disadvantageous position.

5. Object.—“It is only in view of the necessarily frequent changes in the office of Magistrate the Criminal Procedure Code provides specially that a Magistrate may pronounce judgment on evidence partly recorded by his predecessor and partly by himself, but there is no such provision in the case of Sessions Judges”.⁵³ The object of the provision no doubt is that a man shall not without his consent be convicted on evidence which has not been recorded in the presence of the Magistrate with whom the final decision of the case rests.⁵⁴ Section 350 was enacted to meet the case of transfer of Magistrates from one district to another.⁵⁵

52. *Deputy Legal Remembrancer v. Upendra Kumar Ghose*, (1906) 12 GWN 146 (144).

53. *Tarada Baldu*, (1881) 3 M 112 (113).

54. *Bahib Din*, (1922) 3 L 115 : 23 Cr LJ 330.

55. *Hardwar Singh*, (1863) 20 C 870.

6. Scope.—This section covers all cases of change of trying Magistrates whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chapter XLIV of the Code.⁵⁶

Section 350 an exception.—“It is I think a general principle that judgment must be delivered by the Judge who has heard the evidence”.⁵⁷

This section is intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular Magisterial post, and that officer ceases to exercise jurisdiction in that post, and is succeeded by another officer.⁵⁸

The section as amended applies to pending cases.⁵⁹ The amended Criminal Procedure Code does not make it obligatory on the part of the succeeding Magistrate to hold a *de novo* trial and not to proceed to judgment on the evidence recorded by his predecessor.⁶⁰ It is for the Court to exercise its option either of acting on the evidence recorded by the previous Court or to resummon the witnesses and recommending the inquiry or trial. The proviso to this section which gives the accused a right to demand that the witnesses or some of them may be resummoned and reheard applies only when the Court exercises the first option of acting on the evidence recorded by the other Court. It cannot apply if the Court selects the other option of recommencing the inquiry or trial and the resummoning of the witnesses.⁶¹

7. Any Magistrate.—This section applies to a ‘Magistrate’ and not to a Sessions Judge.⁶² This section has no application to a Bench of Magistrates.⁶³ This view⁶³ has been modified by the insertion of S. 350-A.

8. Hearing the whole or any part of the evidence.—These words were inserted in the Code of 1882 in consequence of the decision in *Raghunath Das’s case*.⁶⁴

9. In an inquiry or trial.—‘Inquiry’ referred to in this section is defined by S. 4 and does not include a reference to the police.⁶⁵

10. “May act on the evidence so recorded”.—The proceedings held before a Magistrate are not wiped off merely by the intention of the succeeding Magistrate to resummon the prosecution witnesses and recommence the trial and where the case is transferred to a third Magistrate it is open to such Magistrate to continue the proceedings from the stage at which they were left by the first Magistrate.⁶⁶ After the 1955 amendment the succeeding Magistrate is to act on the evidence recorded by his predecessor and may

56. *Deputy Legal Remembrancer v. Upendra Kumar Ghose*, (1906) 12 GWN 140 (144); *Palaniandy Gounden*, (1908) 32 M 218.

57. *Rughoonath*, (1875) 23 WR (Cr) 59 (60); *Sahib Din*, (1922) 3 L 115 (121); see also *Nga Paik v. Nga Saw Hlaing*, 3 UBR (1918) 118; 20 Cr LJ 336; 50 IC 672.

58. *Radhe*, (1889) 12 A 66, not followed in *Kudrattulla*, (1912) 39 C (780) 785.

59. *Raghunath Prasad v. State of U. P.*, A 1959 A 345; 1959 Cr LJ 671 following *Annanta Gopal Shastry v. The State of Bombay*, A 1958 SC 915.

60. *Kartik Chandra Ghosh v. Pannalal Chatterji*, A 1958 C 140; 1958 Cr LJ

371.

61. *Salig Ram*, A 1956 A 138; 1936 Cr LJ 186.

62. *Tarada Baldu*, (1881) 3 M 112 (113); *Raghunath*, 23 WR (Cr) 59; *Buta*, PR 1890; *Sakharam*, 26 B 50.

63. *Giridhari*, (1921) 2 L 237; 22 Cr LJ 740; *Abdul Ghani*, (1921) 1 PLR 1922; 22 Cr LJ 511; *Italia*, (1916) 8 LBR 463; 18 Cr LJ 96; *Damri Thakur v. Bhowani Sahoo*, (1895) 23 C 194.

64. (1875) 23 WR (Cr) 53.

65. *Sadagopacharayar v. Ragava Charayar*, (1886) 9 M 282.

66. *Banarsidas*, A 1953 A 58; 1953 Cr LJ 222.

summon a witness under the proviso for his decision and the exercise of that provision is entirely within his discretion.

11. Applicability of section—Section whether applies to proceedings under Chapter VIII.—A full bench of the Madras High Court has held that S. 350 (1) proviso (a) applies to proceedings under S. 107 and the accused in a security case can claim a trial *de novo* on the Magistrate being transferred.⁶⁷ Newbould, J., *held*:—“We have no doubt that the intention of the Legislature was to limit the application of proviso (a) to criminal trials and not to extend that proviso to enquiries which are also covered by the first portion of the section”.⁶⁸

It does not apply to a case when the Sessions Judge acts under S. 123 (2).⁶⁹

This section is in terms wide enough to cover any trial or inquiry under the Cr. P. Code and is applicable to a proceeding *under* S. 145.⁷⁰

Section if applicable to summary Trials.—In a summary trial conviction by the Magistrate based on the notes of the evidence of witnesses examined by his predecessor is not in order.⁷¹

Section does not apply to a Bench of Magistrates.—This section is not applicable to a trial by a Bench of two Magistrates.⁷² Under the U. P. Government Rules this section applies to Benches of Magistrates.⁷³

Section is not applicable to Judges.—A Sessions Judge cannot act on evidence recorded or partly recorded by his predecessor.⁷⁴ It was doubted in *In re ; Ibrahim Ali*, whether in all cases where a Sessions Judge acts upon the evidence recorded by his predecessor, the proceedings are void and shall be set aside by the High Court without regard to the question of prejudice.⁷⁵

Applicability to proceedings before Special Judges.—Section 8 of the Criminal Law Amendment Act 1952 was amended by S. 4 of the Criminal Law Amendment Act 2 of 1958 by which S. 350 was made applicable to the proceedings before a Special Judge. In the instant case judgment not being based on the evidence wholly recorded by him, the trial had been violated.⁷⁶

In warrant cases—not applicable before Charge is framed.—S. 350 (1) (a) cannot be applied to proceedings in a warrant case before the charge has been framed. At that stage the proceeding is not a trial but is merely an enquiry.⁷⁷

Section if applicable to cases of transfer.—The section applies to cases transferred from the file of one Magistrate to another.⁷⁸

67. *Yeluchuri Venkatachinnaya*, 43 M 511 : 38 MLJ 37 : 56 IC 50 FB ; *Buroda Kant Roy v. Karimuddin Monshee*, (1879) 4 CLR 452.

68. *Sadek Raza v. Sachindra Nath*, 37 CLJ 128 ; 24 Cr LJ 569 : 73 IC 265.

69. *Rasul Rux*, A 1942 S 122 : 37 Cr LJ 983.

70. *Anu Sheikh*, 37 C 812 ; *Ali Mahomed v. Taruk*, 13 CWN 420. *Surya Rao*, A 1948 M 510.

71. *Munshi*, A 1954 A 356 ; *Heman Deo Singh*, A 1936 S 40 ; *Surat Borough Municipality v. Nagindas Megnli*, A 1953 B 29 : 1953 Cr LJ 159 ; *Raj Narmada*

Shiv Shankar, A 1953 Sau 81.

72. *Abdul Hakim*, 62 C 286 ; 36 Cr LJ 857, *Abdul Ghani*, A 1922 L 127.

73. *Har Narain*, A 1943 A 20 : 44 Cr LJ 203.

74. *Balwant Singh*, A 1950 MB 48 ; 51 Cr LJ 1131 ; *Bashir*, A 1950 L 173 ; *Ram Chandra Naik*, A 1947 P 428.

75. A 1960 AP 355, 1960 Cr LJ 882.

76. *Sethuraman*, A 1960 AP 151 ; 1960 Cr LJ 307 following *In re Fernandez*, A 1958 M 571 FB.

77. *Ramnathan Chettier*, (1922) 46 M 719 : 24 Cr LJ 192.

78. *Nanhua*, (1914) 36 A 315.

"It is argued that the transfer was under S. 528, and that S. 350 has no application, but we think that this is now concluded by the authorities we have cited".⁷⁹

12. Evidence recorded by two successive Magistrates—conviction by third Magistrate is legal.—A conviction by a Magistrate, acting upon evidence recorded partly by one predecessor and partly by another is valid.⁸⁰ It is doubtful whether in framing S. 350 the possibility of a case being dealt with by more than two successive Magistrates was contemplated.

13. 'Ceases to exercise jurisdiction'.—The words "ceases to exercise jurisdiction" means 'in the inquiry or trial' and not, as the Allahabad ruling⁸¹ would imply, in the incumbent of a particular post.⁸²

This view and similar views expressed in the cases noted below⁷⁹ has not been adopted by the Legislature in sub-sec. (3) inserted by Act XVIII of 1923.

This section is applicable to a case which has been transferred from the Court of one Magistrate to that of another. It is not restricted to cases in which Magistrates succeed each other in their offices.⁸³

Where prosecution witnesses were not examined at the *de novo* trial under S. 350 but cross-examined; held that the trial was vitiated.

14. Death of Magistrate.—Where on the death of a Magistrate empowered under S. 30 the District Magistrate being the only Magistrate empowered under that section took upon his file a case which was being tried by the deceased; held the District Magistrate must be referred as having succeeded the deceased within the meaning of S. 350 (1) of the Code.⁸⁵

'Is succeeded by another Magistrate.'—"These words have however been read as importing that the first Magistrate must have left his post, but it has been held in two rulings of this Court, *Mohesh Saha*,⁸⁶ and *Ali Mahomed Khan*,⁸⁷ that the word 'succeeded' should not be construed in the narrow sense".⁸⁸

Section 350 is obviously intended to meet the case of transfer of Magistrates from one district to another.⁸⁸

15. Part-heard case.—The succeeding Magistrate may proceed with the trial from the point at which he had arrived as such Magistrate.⁸⁹

Sections 287 and 350.—Where the Magistrate who has recorded the statement of the accused at the inquiry, was succeeded by another Magis-

79. *Kudrutulla*, (1912) 39 C 781 (786); *Mahesh Chandra Saha*, (1903) 35 C 457: 7 CLJ 488; *Palaniandy Gounden*, (1918) 32 M 218 followed in *Ram Das*, (1918) 40 A 307; *Ganga Chetty*, (1918) 12 Bur LT 55: 20 Cr LJ 496.

80. *Govindan Nair v. K. K. Krishnan Nair*, (1923) 47 M 245: 45 MLJ 808: (1923) MWN 815.

81. *Radhe*, (1889) 12 A 66.

82. *Kudrutulla*, (1912) 39 C 781: 12 Cr LJ 218.

83. *Akbar Ali*, (1918) 20 Cr LJ 41: 48 IC 681 (N).

84. *Sobhnath Singh*, 12 CWN 138: 6 Cr LJ 431, referred to in *Hnin Yin*, 9 LBR 92: 19 Cr LJ 321; *Daroga Chowdhury*, (1919) 20 Cr LJ 638 (P): 52 IC 398.

85. *Gorakal*, (1917) 19 Cr LJ 705: 46 IC 289.

86. (1908) 12 CWN 416.

87. (1908) 13 CWN 420.

88. *Kudrutulla*, (1912) 39 C 781 (785).

89. *Sri Ahobalamatam Jeer*, (1898) 22 M 47.

trate who committed the case for trial, *held* that in view of S. 350 the statement was rightly admitted in evidence under S. 287.⁹⁰

'the Magistrate may act.....partly recorded by himself.'—These words read with proviso (a) imply that the Magistrate may act on such evidence only if the accused do not claim a *de novo* trial.

16. 'Or he may resummon the witnesses and recommence the inquiry or trial'.—Discharge illegal.—The nature or stage of an inquiry is not modified by a recommencement thereof under S. 350. A charge once framed cannot therefore be cancelled by reason of the recommencement under S. 350 and the only order which the Magistrate can pass is that of acquittal under S. 258 and not discharge under S. 253 (2) of the Code.⁹¹

When the case was heard *de novo* by the Magistrate to whom it had been transferred, one of the witnesses whose statement had been recorded by the first Magistrate was dead; *held* that his evidence could not be relied on as he could not be resummoned.⁹²

17. Magistrate pronouncing a judgment of his predecessor.—A Magistrate may date and deliver a judgment written and signed by his predecessor in office or hold a *de novo* trial; such a Magistrate pronouncing a judgment of his predecessor is not the mouthpiece of the latter and he is deemed to have adopted the judgment as his own.⁹³

The Calcutta High Court has held a contrary view in *Mahomed Rafique*.⁹⁴

Judgment written by a Magistrate can be pronounced by his Successor.⁹⁵

18. 'May, when the second Magistrate recommences his proceedings demand etc.'—"It will be noticed that the primary, and in one sense, the governing words of the proviso are 'in any trial' and in my opinion, when the proviso speaks of the second Magistrate commencing his proceedings it must mean his proceedings upon that trial".⁹⁶

19. Proviso.—The proviso has been substituted by Act 26 of 1955 for old provisos (a) and (b) printed, *Supra*.

Can there be any waiver on the part of the accused?—Where a case is transferred from the file of a Magistrate who is not competent to try it under S. 346, there must be a trial *de novo* of the whole case. In such a case the accused have no power to waive their right to a trial *de novo*.^{96a}

Proviso (b) 'subordinate'.—A Magistrate of the first class is within the meaning of S. 437 (436) of the Code "subordinate" to the Magistrate of the District.^{96b}

20. Sub-section (2).—Evidence recorded by a Magistrate having no

90. *Ghulam Jannat*, (1925) 7 L 70 following, *The Sessions Judge of Managalore v. Malinga*, (1907) 31 M 40.

91. *T. Sriramalu v. Nalam Krishna*, (1914) 38 M 585 : 15 Cr LJ 673, followed in *Simhadri Naidu*, 17 Cr LJ 1 : 32 IC 129.

92. *Lekal*, (1927) 8 L 570.

93. *In re Savarimsthu Pillai*, (1916) 40 M 108 : 32 MLJ 81 : 17 Cr LJ 196.

94. (1925) 43 CLJ 100, following *Baisnab*

Charan Dey v. Amin Ali, (1922) 50 C 664 : 38 CLJ 202.

95. *Parasram v. Laxminarayan*, A 1961 MP 8 : 1961 (1) Cr LJ 88 (2) ; *In re ; Gediraju Narayan Raju*, A 1952 M 790.

96. *Gomer Sirdar*, (1898) 25 C 863.

96a. *Ambica Singh*, (1918) 5 PLW 40 : 19 Cr LJ 625.

96b. *Laskri*, (1885) 7 A 853 ; *Opendra Nath Ghose v. Dukhini Bewa*, (1886) 12 C 473 (FB).

jurisdiction to try the case cannot be legally considered by the Magistrate having such jurisdiction and to whom the case is ultimately transferred.⁹⁷

A Magistrate to whom an accused is sent up under S. 349 need not hold a *de novo* trial.⁹⁸ Sub-section (2) makes it clear that nothing in S. 350 applies to cases in which proceedings have been stayed under S. 346. The Magistrate is bound to hold a *de novo* trial.⁹⁹

21. Sub-section (3).—Is new and gives effect to *Kudrutulla* and other cases.¹

An order of transfer takes effect as soon as it is passed.^{1a}

The transfer contemplated under sub-sec. (3) is a transfer in a pending trial. The Appellate Court could not direct the case to be tried by some other Magistrate from the stage when the charge had to be framed and on the prosecution case that was on the Record.² When a case has been sent for retrial by the appellate Court even if it is only from a particular point in the Trial, sub-sec. (3) will be applicable.³

350A. Changes in constitution of Benches.—No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under Sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

SYNOPSIS

1. Report of Joint Committee (1922).
2. Scope.

3. Non-compliance with section—Effect.

1. Report of Joint Committee (1922).—This section is new and was inserted by S. 95 of Act XVIII of 1923.

In the Bill of 1921 it was suggested that sub-sec. (4) should be added to S. 350. But this clause did not meet with the approval of the Joint Committee who said in their report:—

“We think, however, that the new sub-sec. (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far, and we have substituted for it a new section after S. 350 which in our opinion gives effect to the law as laid down by the High Courts. Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates *all of whom have heard the proceedings throughout.*”—*Report of the Joint Committee (1922).*

2. Scope.—This section does not say in what circumstances a judgment shall be held valid. It says that in certain circumstances it shall be valid.

97. *Budhu Tatwa*, (1927) 55 C 65 : 47 CLJ 122.

98. *Dado*, A 1926 S 48 ; 26 Cr LJ 1363.

99. *Jagat Raj*, A 1956 A 117 ; *Sashti Gopal Samut*, A 1938 C 415 : 39 Cr LJ 569.

1. *Mordan*, A 1950 A 478 : 51 Cr LJ 1281.

1a. 39 C 731 ; *Mahesh Chandra Saha*, 35 C 457 ; *Ram Das*, 40 A 307.

2. *Sasadhar Sarkar*, 50 CWN 485 : 1952 Cr LJ 1436.

3. *Sheomal*, A 1941 S 144 ; *Akbar Ali*, A 1918 N 142 : 20 Cr LJ 41.

It refers only to a case where the whole constitution of a Bench has been changed during the time when the trial was pending.⁴ S. 350-A is intended to apply to only such cases where one or more Magistrates drop out altogether and the remaining Magistrates pass the judgment.⁵ The section sets out those cases and those cases only in which judgments or orders are to be saved from invalidity.⁶

3. Non-compliance with section—Effect.—Where prosecution extending into several hearings was presided over by a Bench of Honorary Magistrates (consisting of three) only one of whom was present throughout; held that as the quorum of the Bench consisted of two, the trial was bad under this section.⁷

In order to save the order or the judgment of the Bench from being invalid the Magistrates constituting the Bench ought to have been present through out the proceedings.⁸ The question whether in any particular case a substantial failure of justice has been occasioned is a question of fact and not of law.⁹

351. Detention of offenders attending Court.—(1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Scope. |
| | 3. Sub-section (2). |

1. Corresponding sections in former Codes.—This section corresponds to S. 206 of the Code of 1861 and S. 104 of the Code of 1872 and is similarly worded as that of the Code of 1882, excepting that the words “inquiry into or trial” have been substituted for the word “examination.”

2. Scope.—Section 351 deals with a state of things not covered by S. 190 and is complete in itself and independent of Ss. 190 and 191.¹⁰

The effect of the section is that the preliminary procedure of issuing processes under S. 204 of the Code is dispensed with.¹¹ This section does not

4. *Har Narain*, A 1948 A 20 : 44 Cr LJ 203 ; *Kalicharan*, A 1955 A 711.
 5. *Dasarath Rai*, A 1934 A 144 ; 36 Cr LJ 38 ; *Kesri*, A 1947 A 123 : 48 Cr LJ 431 *Ram Khalwan*, A 1932 A 191.
 6. *Kesri*, A 1947 A 123.
 7. *Banwari*, (1926) 7 L 122 : AIR (1926) L 304, followed in *Suraj Bali*, (1927) 4 CWN 1240 : AIR (1928) Oudh 212 ; *Nago*, A 1932 N 93 : 33 Cr LJ 559 ; *Chitteshwar Dube*, A 1932 A 131 ; 33 Cr

LJ 200, *Quaborl*, A 1948 A 411.
 8. *Jai Ram*, A 1953 A 137 : 1953 Cr LJ 379 ; *Ommum Pankajakhy v. Kuthy Dakshayani*, A 1952 TC 175 : 1952 Cr LJ 869.
 9. *Jafar Khan*, A 1935 A 814 ; 36 Cr LJ 907.
 10. *Sakhia*, (1909) 10 Cr LJ 303.
 11. *Suchandra Kumar Samanta*, A 1950 C 138 ; 51 Cr LJ 636.

make it a condition that the Court passing the order for detention must itself take cognizance.¹²

Refusing to take action against a person does not amount to a discharge of that person so as to operate as a bar under S. 403.¹³

A Magistrate is empowered to take cognizance of an offence against a person attending his Court, who, though not sent up for trial, appears to him to be implicated in a case under trial before him.¹⁴

The wording of this section which is a disabling section which differs materially from S. 190.¹⁵ Where during trial of one accused the Magistrate detains another person who is present in the Court and makes him co-accused, this section applies and not S. 190 (1) (c).¹⁶

3. Sub-section (2).—This section refers generally to inquiries and trials but there is no difficulty in limiting the meaning of the word 'Trial' if other provisions of the Code so require.¹⁷

352. Courts to be open.—The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them :

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Proviso. |
| 2. Courts to be open. | 4. Trial in jail—Legality of. |
| | 5. Exclusion of Police Officer. |

1. Corresponding sections in former Codes.—This section corresponds to S. 279 of the Code of 1861, S. 187 of the Code of 1872, S. 150 of Act X of 1875, S. 132 of Act IV of 1877 and is similarly worded as that of the Code of 1882.

2. Courts to be open.—The section contemplates that the inquiry or trial should be in a public place but the *proviso* gives a discretion to the Magistrate or Judge to order at any stage of the case exclusion of the public generally or any particular person.

In *Surendra Nath Banerjee's* case¹⁸ the Calcutta High Court condemned the practice of holding Court at the private residence of the Magistrate.

12. *Komaleshwar Banerjee*, 53 CWN (2 DR) 71.

13. *Brahmadutt*, A 1950 A 483 : 51 Cr LJ 636.

14. *Lalu*, 4 SLR 258 : 12 Cr LJ 399.

15. *Mir Fateh Khan*, A 1942 S 101.

16. *Maung That v. Maung Chit Kywe*, A 1941 R 30 : 42 Cr LJ 244.

17. *Fateh Khan*, A 1942 S 161 : 44 Cr LJ 137.

18. 10 CWN 1062.

It is well-established in England that every Court of justice is open to every subject of the King and that a right to an open trial is one of the cherished rights of the subject.¹⁹ The use of the word 'ordinarily' in Rule 63 of Calcutta High Court Criminal Rules and Orders, which provides that the Magistrates should do their judicial work in public court-houses makes it clear that in extraordinary circumstances a Magistrate may do judicial work in places other than the public court-house. The embarrassment that a witness feels due to her high place in society or because of her being a Brahmin lady can not justify the holding of the Court at some place other than the court-house. That the witness has not been in good health for some time may be a reason for adjourning her examination but not for holding the Court elsewhere.²⁰ He should also record reasons when he holds the Court at any other place.²¹

3. Proviso.—Under the proviso the Magistrate has a discretion to exclude the public generally or any particular person from the room where the trial is heard, but he must record his reasons.^{21a}

4. Trial in jail—Legality of.—The whole trial held in jail is not illegal when there is nothing to show that admittance was refused to any one who desired it or that the prisoner was unable to communicate with his friends or counsel, but such trials are usually undesirable.²²

Section 352 probably contemplates that a Magistrate can hold his Court anywhere he likes. The discretion to exclude the public generally or at any stage of any enquiry or trial must be judicial discretion. He may hold the trial in jail but must record reason for excluding the public.²³

There may be circumstances in which for reasons of security for the accused or for the witnesses or for the Magistrate himself or for any valid reason the Magistrate may think it proper to hold Court inside a jail building or some other building and restrict the free access of the public.²⁴ Where the public have access to the Court room and the trial is conducted in open view the holding of the trial within the jail compound will not be illegal merely because it relates to an offence committed within the jail premises, where the trying Magistrate is in no way connected with the jail department.²⁵ Where the Magistrate decides to hold the trial in jail he must pass a formal order.²⁶

5. Exclusion of Police Officer.—The power to exclude any person makes no exception in the case of a police officer, when accused objects.²⁷

19. *Kailash Nath Agarwal*, A 1947 A 436 (440); 48 Cr LJ 868 following *Scott v. Scott*, 1913 AC 417 (440).

20. *Kumar Purendra Nath Tagore v. Kalipada Dutt*, A 1956 C 513; 1956 Cr LJ 1196.

21. *Prasanta Kumar Mukherjee*, 55 CWN 619; A 1952 C 91; 1953 Cr LJ 82.

21a. *Kailash Nath Agarwalla*, A 1947 A 436; 48 Cr LJ 868; *Hakamat Rai*, A 1943 L 14.

22. *Sahai Singh*, 21 PWR 1917 (Cr); 18 Cr LJ 852, In re: *T. R. Ganesan*, 1950 MWN 924; A 1950 M 696.

23. *Kailash Nath Agarwalla*, A 1947 A 436; 48 Cr LJ 868; *U. Khemeim*, A 1940 R 72; 41 Cr LJ 497.

24. *Prasanta Kumar Mukherjee*, A 1952 C 91; 1953 Cr LJ 82.

25. In re *T. R. Ganesan*, A 1950 M 696 overruling In re; *M. R. Venkataraman*, A 1950 M 441; 51 Cr LJ 1632.

26. *U. Khamin*, A 1940 R 72; 41 Cr LJ 497.

27. *Nathu Singh*, A 1925 N 296; 26 Cr LJ 1130.

CHAPTER XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

353. Evidence to be taken in presence of accused.—Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | of Accused. |
| 2. Scope. | —Cross-complaint. |
| 3. "Except as otherwise expressly provided." | 5. "Or when his personal attendance is dispensed with." |
| 4. Recording of Evidence in the Absence | —in presence of his pleader. |

1. Corresponding sections in former Codes.—This section corresponds to S. 194 of the Code of 1861, S. 191, paragraph I of the Code of 1872, S. 83, paragraph I of Act IV of 1877 and is similarly worded as that of the Code of 1882.

2. Scope.—Except in cases mentioned in this section a trial is vitiated by failure to examine the witnesses in the presence of the accused person.²⁸

3. "Except as otherwise expressly provided".—Barring the exceptions in Ss. 205, 428, 509, 510, 512 and 540-A of the Code, Ss. 32 and 33 Evidence Act and S. 17 Extradition Act all evidence in any inquiry or trial shall be taken in the presence of the accused.²⁹ Apart from Ss. 205 and 540-A, by implication S. 353 empowers a presiding officer whether he be a Magistrate, a Sessions Judge or a Judge of the High Court to dispense with the personal attendance of the accused.³⁰

4. Recording of Evidence in the Absence of Accused.—This section lays down that all evidence shall be taken in the presence of the accused *i.e.* the evidence for the defence as well as for the prosecution. Contravention of this rule is not curable.³¹

S. 353 in itself does not empower a Court to record evidence in the absence of an accused person except when his or her presence has been dispensed with under Ss. 205 and 540-A.³²

It is illegal for a Magistrate trying a Criminal Case to take the depositions in the case and have them copied and used in the other case,³³ even with the consent of the accused.³⁴

Cross-complaint.—In the trial of two cross-complaints, one being the prosecution evidence in one and defence in the other, the procedure violates

28. *Bigan Singh*, (1927) 6 P. 691.

29. *Ram Singh*, A 1951 EP 178; 52 Cr LJ 99.

30. *Anand Martand v. Anant Pandowang*, A 1956 MB 13.

31. *Nga Po Shein*, UBR (1912) 152: 19 IC 719.

32. *Indra Devi v. Sarnapat Singh*, A 1955 Punj 81: 1955 Cr LJ 695.

33. *Mazhar Ali*, 27 CWN 99; 24 Cr LJ 198; *Mohammad Khan*, A 1928 L 34; *Siddiq Ali*, A 1950 A 110: 51 Cr LJ 422.

34. *Thakar Singh*, A 1927 L 781; 28 Cr LJ 771; *Bijan Singh*, 6 P 691; 29 Cr LJ 260; *Abdul Gaffur v. Govind Prasad*, A 1928 R 284.

this section,³⁵ and it is almost inevitable that in such cases, there must be prejudice to the accused.³⁶

See S. 512 *infra* which provides for recording of evidence in the absence of absconding accused.

5. 'Or when his personal attendance is dispensed with, in presence of his pleader.'—See sec. 205.

The Calcutta,³⁷ Punjab³⁸ and Nagpur³⁹ High Courts have held that this section does not confer power on the presiding officer to dispense with the personal attendance of an accused person.

The Allahabad,⁴⁰ Bombay,⁴¹ Madras⁴² and Madhya Bharat,⁴³ Mysore,⁴⁴ Pepsu⁴⁵ High Courts have held a contrary view.

A Sessions Judge has power to dispense with the personal attendance of a *purda* lady at the trial.⁴⁶

Under this section *High Court can dispense* with the attendance of an accused during his trial before the High Court on the ground of his ill health.⁴⁷

Where evidence in previous proceedings was admitted with the pleader's consent but one of the accused was not a party to the previous proceeding; *held* that the admission of such evidence is bad and it could not be said that the particular accused was not prejudiced.⁴⁸

354. Manner of recording evidence outside presidency-towns.—In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

SYNOPSIS

1. Corresponding sections in former Codes. (1) Bombay.
2. State Amendments. (2) Madras.
3. "In the following manner."

1. Corresponding sections in former Codes.—This section corresponds to S. 332 of the Code of 1872 and is similarly worded as that of the Code of 1882.

See Commentary on the next section.

2. State Amendments—(1) Bombay.—The words 'outside Presidency Towns' in the marginal note to this section were deleted by Bombay Act 32 of 1948.

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| <p>35. <i>Allen</i>, (1923) 4 L 376 : LLR 103 : 25 Cr LJ 68; <i>Taqi Mohamed v. Haji Mohamed Jan</i>, A 1938 Oudh 253; 40 Cr LJ 1 : <i>Debi Dayal</i>, A 1942 Oudh 444; 43 Cr LJ 781.</p> <p>36. <i>Khair Mohammad</i>, A 1940 L 466 : 42 Cr LJ 151.</p> <p>37. <i>Kalidas Banerjee</i>, A 1954 C 576.</p> <p>38. <i>Indra Devi v. Sarnagat Singh</i>, A 1955 Punj 81 : 1955 Cr LJ 698.</p> <p>39. <i>Madho Rao Ghatate v. Iswardas Bagdi</i>, A 1949 N 334 : 50 Cr LJ 932.</p> <p>40. <i>Sultan Singh Jain</i>, A 1951 A 864 (FB) <i>Aditya Prasad Bagchi v. Jogendra Nath Moitra</i>, A 1948 A 393.</p> | <p>41. <i>King</i>, 14 Bom LR 236 : 13 Cr LJ 464.</p> <p>42. <i>In re Ummal Hasnath</i>, A 1947 M 433; 48 Cr LJ 874 following <i>Kandamani Devi</i>, 45 M 359.</p> <p>43. <i>Anand Mertrand v. Anant Pandurang</i>, A 1956 MB 13 : 1956 Cr LJ 64.</p> <p>44. <i>Kardsedji Wookerji Bananji</i>, A 1954 Mys 181.</p> <p>45. <i>Krishan</i>, A 1954 Pepsu 36.</p> <p>46. <i>Kandamani</i>, (1922) 45 M 359.</p> <p>47. <i>King</i>, 14 Bom L R 236 : 13 Cr LJ 464 : 15 I C 96.</p> <p>48. AIR (1928) R 284.</p> |
|---|---|

(2) **Madras.**—Same as the Bombay Amendment *vide* Act 34 of 1955.

3. **“In the following manner”.**—The expression ‘the evidence of the witnesses shall be recorded in the following manner’ as used in S. 354 has a technical meaning and that technical meaning is to be gathered from S. 355. The provision is unlike the provision contained in either S. 262 or 264.⁴⁹

355. Record in summons-cases and in trials of certain offences by first and second class Magistrates.—

(1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of Section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under Section 514 (if not in the course of a trial) the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same ; and such memorandum shall form part of the record.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Sub-section (2). |
| 2. Scope | 5. Sub-section (3). |
| 3. ‘Memorandum’. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 267 of the Code of 1861, Ss. 222 and 333 of the Code of 1872 and with the modifications that S. 260 (m) is substituted for 260 (k) and the words “and in all proceedings” under S. 514 (if not in the course of a trial) added after the words “the first or second class Magistrate” in sub-sec. (1) in the Code of 1898, it is the same as that of the Code of 1882.

2. Scope.—The provisions of Ss. 263 and 264 are not controlled by S. 355.⁵⁰

Proceedings under Chapter XXXVI cannot be conducted as in a summary trial under Chapter XXII but the evidence taken must be recorded as provided by S. 355.⁵¹

In summary trials under S. 260 the Magistrate is not required to make any memorandum of evidence at all. If he does not try the accused under provisions of S. 260 but in the ordinary course, he is required under this section to make a memorandum.⁵²

49. *Surat Borough Municipality v. Nagindas Mangalal*, A 1953 B 29 ; 1953 Cr LJ 189.

50. *Mantoo Tewari*, (1926) 25 ALJ 140, dissenting from the contrary view in *Satish Chandra Mitra*, (1920) 48 C 280 : 32 CLJ 451.

51. *Kali Dassi v. Durga Charan Naik*, (1892) 20 C 351 ; *Maung Po Saw*, A 1935 R 106 : 36 Cr LJ 892 ; *Mantoo Tewari*, A 1927 A 124.

52. *Hafiz Mohammad Rafiq Ahmad*, A 1936 A 219 ; 37 Cr LJ 710.

S. 488 (6) lays down that the evidence under that section shall be recorded in the manner prescribed in summons-cases.⁵³

3. **'Memorandum'.**—S. 355 does not require a Magistrate to record the evidence of the witnesses, but only to make a *memorandum* of the substance of each witness as it proceeds⁵⁴ or to read over the evidence of the witness in a summary trial.⁵⁵

4. **Sub-section (2)—Record not signed by the Magistrate vitiates trial.**—Where the record prepared by the Magistrate was very careful and complete but was not signed, *held* that the error vitiated the trial.⁵⁶

5. **Sub-section (3).**—“He shall record the reason of his inability to do so”, *i.e.*, to record a memorandum. In such a case want of time is no valid excuse. Pressure of work by the Magistrate cannot be pleaded as an inability within S. 356, sub-cl. (4) to making memoranda of evidence.⁵⁷

356. Record in other cases outside presidency towns.—(1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court either by the Magistrate or Sessions Judge with his own hand or from his dictation in open Court or in his presence and hearing and under his personal direction and superintendence and the evidence so taken down shall be signed by the Magistrate or Sessions Judge and shall form part of the record.

Evidence given in English.—(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in writing in that language from his dictation in open Court, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

53. *Jafar*, 52 C 668.

54. *Gopal Goundan*, (1896) 19 M 269 (270): 6 MLJ 134.

55. *Mahomed Ishaq*, (1922) 23 Cr LJ 120 : 651 C 552 (P).

56. *Balkeshar Singh*, (1922) 3 PLT 322 : 23 Cr LJ 114; *Conta Sk. Mohshin*, A 1940 p. 272.

57. *Jaga Mohan Singh*, A 1937 Oudh 126 ; 38 Cr LJ 150.

Memorandum when evidence not taken down by the Magistrate or Judge himself.—(3) In cases in which the Magistrate or Sessions Judge does not either take down the evidence with his own hand or cause it to be taken down in writing from his dictation in open Court, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. 'In all other trials'. |
| 2. Legislative Changes 1923 and 1955. | 7. In the language of the Court. |
| 3. State Amendments (1) Bombay (2) Madras. | 8. Sub-section (2). |
| 4. Effect of 1955 Amendment. | 9. Sub-section (2A). |
| 5. Scope. | 10. Non-compliance with the provisions of the section.
—Effect |

1. Corresponding sections in former Codes.—This section corresponds to S. 195 of the Code of 1861 and S. 334 of the Code of 1872, and excepting sub-sec. (2A) inserted by S. 96 of Act XVIII of 1923, is the same as S. 356 of the Code of 1882.

2. Legislative Changes (1923).—Sub-sec. (2A) was added in 1923.

“Section 356 does not provide for evidence being taken down in any other language than that of the court or if the language of the court is not English. The result is certain a loss of accuracy whenever evidence is given in a third language as it has to be translated into, and taken down in, the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation”—*Statement of Objects and Reasons*.

Evidence recorded by Forest-officers under the Burma Forest Act, 1902 (Bur. Act IV of 1902), in accordance with S. 355, 356 or 357 of the Code is admissible in subsequent trials before Magistrates—see S. 53 of that Act; under the Madras Forest Act, 1882 (Mad. Act V of 1882), S. 59, Mad. Code. Under the Forest Act, 1878 (VII of 1878), General Acts, Vol. II, such evidence, recorded under cl. (d) of S. 71 of that Act, is admissible in any subsequent trial before a Magistrate, provided it is taken in the presence of the accused person.

Legislative changes (1955).—In sub-sec. (1) after the words “writing in the language of the Court” the word ‘either’ and the words ‘with his own hand from his dictation in open Court’ after the words ‘Sessions Judge’ and the words “the evidence so taken down” after the words ‘superintendence and’ and the words ‘and shall form part of the record’ after “Sessions Judge” and at the end of sub-sec. (1).

In sub-sec. (2) the words “or cause it to be taken down in writing in that language from his dictation in open Court” after the words “may take it down in that language with his own hand”.

In sub-sec. (3) the words 'In cases in which the Magistrate or Sessions Judge does not either take down the evidence with his own hand or cause it to be taken down in writing from his dictation in open Court' were substituted for the words "In cases in which the evidence is not taken down in writing by the Magistrate or the Sessions Judge" by Act 26 of 1955.

3. State Amendment

(1) **Bombay.**—In the marginal note the words 'outside the Presidency Towns' were omitted by Bombay Act 32 of 1948.

(2) **Madras.**—Same as in Bombay, *vide* Madras Act 34 of 1955.

4. Effect of 1955 Amendment.—The amendment enables the Magistrate or the Sessions Judge to take the assistance of a stenographer for recording evidence.

5. Scope.—The provisions of sub-sec. (1) are *imperative*.⁵⁸ The direction contained in this section is mandatory. The recording of evidence therefore in a language which is not the language of the Court is not merely an irregularity but an illegality which vitiates the trial.⁵⁹ The provisions of S. 356 apply only to cases to which the provisions of S. 355 do not apply.⁶⁰

6. 'In all other trials'.—*See* S. 117 (2) which says that evidence should be recorded as in summons-cases and it follows that this section applies.

This section also applies to inquiry under S. 145 ; *see* the full bench decision of *Narendra Pal*.⁶¹

This section prescribes the manner in which evidence is to be recorded in warrant-cases.⁶²

7. 'In the language of the Court.'—*See* section 588.

When the Magistrate did not record the statement in vernacular, the irregularity vitiated the trial.⁶³

8. Sub-section (2).—Must be governed by S. 357. The Government of Bengal has empowered Courts of Sessions to record evidence in English language.⁶⁴

9. Sub-section (2A).—is new. *See* Statement of Object and Reasons quoted at the beginning of the Commentary to this section.

Where the evidence is given in Tulu language which has no script of its own and was recorded in English and interpreted to the witness in Tulu, *held*, the procedure was in accordance with this sub-section.⁶⁵

10. Non-compliance with the provisions of this section.—Non-compliance with the provisions of sub-sec. (1) vitiates the trial.⁶⁶

Non-compliance with S. 356 (3) is a mere irregularity which does not prejudice the accused when it has been taken down in the presence and

58. *Sadananda Mandal*, 42 C 381 : 19 CWN 124 : 16 Cr LJ 192.

59. *Janki Prasad*, 19 Cr LJ 235 : 43 IC 827 (P).

60. *Hafiz Mohammad Rafiq Ahmad*, A 1936 A 319 : 37 Cr LJ 710.

61. 52 C 721 FB: 29 CWN 701 ; *Sadananda Mandal*, 42 C 381.

62. *Sanatan Bhattacharjee*, (1925) 41 CLJ 352.

63. *Udit Narain*, 17 ALJ 1146 : 21 Cr LJ 28 : 54 IC 172.

64. *Nabi Rasool*, A 1943 C 32 ; 44 Cr LJ 388.

65. *In re Raja Shetty*, A 1960 Mys. 48.

66. *Janki Prasad*, 29 Cr LJ 235, *Lauram Chandramani Singh*, A 1959 Manipur 46; *Ujgar Singh*, A 1949 C 302 : 50 Cr LJ 560.

personal direction of the Magistrate.⁶⁷ Where the evidence in a proceeding under S. 145 was not taken down in vernacular or under the Magistrate's superintendence *held*, it is curable irregularity.⁶⁸

357. Language of record of evidence.—(1) The State Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in Section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the State Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

Corresponding sections in former Codes.—This section corresponds to S. 196 of the Code of 1861, S. 335 of the Code of 1872 and is similarly worded as that of the Code of 1882.

358. Option to Magistrate in cases under Section 355.—In cases of the kind mentioned in Section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 356, or, if within the local limits of the jurisdiction of such Magistrate the State Government has made the order referred to in Section 357, in the manner provided in the same section.

Corresponding sections in former Codes.—This section corresponds to S. 268 of the Code of 1861, S. 336 of the Code of 1872 and is similarly worded as that of the Code of 1882.

359. Mode of recording evidence under Section 356 or Section 357.—(1) Evidence taken under Section 356 or Section 357 shall not ordinarily be taken down, in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

67. *Md. Aziz*, A 1950 L 123 : 51 Cr LJ 1022 ; *Susman Singh*, A 1928 Oudh 117.

68. *Kallu v. Bashiruddin*, 53 A 172 ; A 1931 A 3.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.
3. Sub-section (2).

1. Corresponding sections in former Codes.—This section corresponds to S. 198 of the Code of 1861, S. 338 of the Code of 1872 and is similarly worded as that of the Code of 1882.

2. Scope.—It is the duty of a Judge to take care that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the Jury any evidence save that which has been legally put in, in the particular case which is under trial.⁶⁹

If questions are put and extracts included from depositions during the trial of a case, it must be obvious that the evidence has been admitted by the Judge and it must form part of the record.⁷⁰

3. Sub-section (2).—Where the cross-examination is irrelevant and unnecessarily lengthy Magistrates are justified in disallowing questions. When a question disallowed is important it may be useful for the Magistrate to note it and the reasons for disallowing it so that the Superior Court may see whether the ruling was justified. Party should put in an application stating that such and such questions were put and disallowed.⁷¹

360. Procedure in regard to such evidence when completed.—(1) As the evidence of each witness taken under Section 356 or Section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.
3. "Shall be read over."
4. 'In the presence of the accused or his pleader.'
5. Effect of not reading over deposition to witnesses.
6. Sub-section (3).

1. Corresponding sections in former Codes.—This section corresponds to S. 198 of the Code of 1861, S. 339 of the Code of 1872 and is similarly worded as S. 360 of the Code of 1882.

69. *Zoolfar Khan*, (1871) 16 WR (Cr) 36.

70. *Molla Khan Kabuli*, 37 CWN 1061; 35

Cr LJ 601 (SB).

71. *Dewan Singh Maftoon*, A 1940 L 527; 42 Cr LJ 284.

2. Scope.—This section, although inserted in the Code of 1861 did not come into prominence before the decision of Mukerjee, J., in *Hiralal Ghose's* case and other cases⁷³, although the Calcutta High Court in the case of *Jogendra Nath Ghose*⁷³, and *Mahendra Nath Missir*⁷⁴, and the Madras High Court⁷⁵, or the Punjab Chief Court⁷⁶, held in cases of 'perjury' that the deposition not read over cannot be used in prosecutions under Sec. 191 I.P.C.

See in this connexion the case of *Taj Mahomed*⁷⁷, decided after the Privy Council decision in *Abdur Rahaman's* case.⁷⁸

In *Taj Mahomed's* case⁷⁷ the decision in *Mayadeb Gossain*⁷⁹ and cases^{73, 74, 75} and ⁷⁶ were followed.

Their Lordships of the Judicial Committee in *Abdul Rahaman's* case⁷⁸ has distinguished *Subramaniya Aiyer's* case⁸⁰ and held that non-compliance with the provisions of this section is curable by S. 537 of the Code. It is useless therefore to discuss the numerous decisions which had been made by the different High Courts before the Privy Council decision in *Abdul Rahaman's* case.⁷⁸

3. 'Shall be read over.'—The essential feature in verifying that a deposition has been read over and interpreted to a witness is the certificate signed by the presiding officer.⁸¹

4. In the presence of the Accused—If the accused is in attendance the evidence must be read over in his presence, it is only when he appears by a pleader that reading over of the evidence in the presence of the pleader is sufficient.⁸²

5. Effect of not reading over depositions to witnesses.—Where the certificate of the Committing Magistrate endorsed on the deposition sheet states that the deposition was read out to the witness and that the witness admitted it to be correct, the Court is bound to accept that as correct under S. 80 of the Evidence Act until it is proved to be untrue. The duty of displacing the statutory presumption lies on the person who questions it. Even if it is true that the deposition was not read over, that would only amount to a curable irregularity and in the absence of prejudice which must be disclosed in an affidavit which shows exactly where the record departs from what the witness actually said, the objection cannot be sustained.⁸³

It is incumbent to read over the deposition of each witness.⁸⁴ The reading over of depositions by the Bench clerk while the Court is recording the examination of other witnesses is not a compliance with the provisions of S. 360.⁸⁵

72. 52 C 159 : 28 CWN 968 : 41 GLJ 224 and *Dagalu*, 52 C 499; see *Shamsher Ali Hazi*, (1925) 53 C 129 ; *Kuppu Mudali*, (1925) 49 M 71 ; *Kasim Ali*, (1924) 30 CWN 336.

73. (1915) 42 C 240 ; *Jyotish Chandra Mukherjee*, (1909) 36 C 955.

74. (1908) 12 CWN 845.

75. *Kamatchinathan Chetty*, (1905) 28 M 308.

76. *Karter*, 12 PR (1917) Cr : 39 IG 847.

77. *Taj Mahomed*, (1927) 29 PLR 14: AIR (1928) L 125.

78. 54 IA 96 : 5 R 53 : 31 CWN 271 PC :

28 Cr LJ 259.

79. 6 C 762 ; see also *Ramesh Chandra Das*, (1919) 46 C 895.

80. 25 M 61 (PC).

81. *Vitho Raghoji*, A 1938 N 487: 40 Cr LJ 388 ; *Bhagwan Singh v. The State of Punjab*, A 1952 SC 214.

82. *Kasim Ali*, 30 CWN 226 : 27 Cr LJ 508.

83. *Bhagwan Singh v. The State of Punjab*, (1952) SCR 812 : A 1952 SC 214 (218).

84. *Amritlal Hazra*, 42 C 957.

85. *Adiluddi*, A 1936 C 423.

The object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say.⁸⁶

6. Sub-section (3).—There is nothing in this sub-sec. (3) which shows that it requires that the deposition should be first read over as recorded in English and then be translated into the language in which the witness has deposed.⁸⁷

Sub-section (3) has to be read subject to sub-sec (1).⁸⁸

The distinction between Ss. 360 and 361 is very marked.⁸⁹

361. Interpretation of evidence to accused or his pleader.—(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. 'Any Evidence.' |
| 2. Difference between Ss. 360 and 361. | 5. 'Interpreted to him in open Court in a language understood by him.' |
| 3. Section does not apply to cases of deaf and dumb persons. | 6. Sub-sections (1) and (2) are not mutually exclusive. |

1. Corresponding sections in former Codes.—This section corresponds to S. 200 of the Code of 1861, S. 340 of the Code of 1872 and is the same as that of the Code of 1882.

2. Difference between Ss. 360 and 361.—It is dangerous in cases of criminal law to accept equivalents and except in cases where reading over deposition to the witness would be absurd, as for example with a deaf person, the provision should be complied with.⁹⁰

3. Section does not apply to case of deaf and dumb persons.—A deaf and dumb man can understand by signs and signatures. Signs and signatures do not form a language. This section therefore does not apply to the case of a deaf and dumb accused.⁹¹

4. 'Any Evidence.'—Means oral evidence.⁹²

5. 'Interpreted to him in open Court in a language understood by him.'—The language of S. 340 of the Code of 1861 was—when the

86. *Abdul Rahman*, 54 IA 96 : 31 CWN 271 : 28 Cr LJ 259 (PC).

87. *Harinarayan Chaudry*, (1927) 46 CLJ 368 : AIR (1928) C 27.

88. *Deo Rao*, A 1940 N 321 : 47 Cr LJ 918.

89. *Abdul Rahman*, 54 IA 96 : A 1927 PC

44.

90. *Abdul Rahman*, 54 IA 96 : 31 CWN 271 : A 1927 PC 44 approving Jyotish, 36 C 955.

91. *In re Oomayan*, A 1960 M 20 : (1960) 1 MLJ 83.

92. *Amiroddeon*, 15 WR Cr 25 (27).

evidence is given in a language not understood by the accused, it should be interpreted to him in open Court in a language which he does understand. See *Mudun's case*.⁹³ Hence the decisions under that Code are still good law.

An omission to make the memorandum of evidence as required by S. 199 of the Code of 1861 corresponding to this section renders the evidence illegal.⁹⁴

6. Sub-sections (1) and (2) are not mutually exclusive.—Where certain witnesses at the original Trial give evidence in English, translation of such evidence should be made ; for the first two paragraphs are not mutually exclusive.⁹⁵ Even if it is considered that Cls. (1) and (2) are mutually exclusive, the duty cast by S. 361 (1) cannot be avoided when the pleader is engaged by the Court, for the pleader who is referred to in Cl. (2) as the pleader by whom the accused appears must be one who has been engaged by him and is competent to represent him and not a pleader who has been engaged by the Court.⁹⁶ In the instant case⁹⁶ the doctor's evidence was not interpreted in a language understood by the accused, *held* that prejudice was caused to the accused.

The interpreter must be a person other than the witness whose evidence is to be interpreted.⁹⁷

362. Record of evidence in Presidency Magistrates' Courts.—(1) In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2A) In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

(3) Sentences passed under Section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence unless they are sentences of imprisonment ordered to run concurrently.

(4) In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

93. 16 WR (Cr) 61.

94. *Issur Raut*, (1867) 8 WR (Cr) 63.

95. *Erappa*, A 1930 M 186 : 31 Cr LJ 827.

96. *Mathai Thommen*, A 1959 Ker 241 : 1959 Cr LJ 1069.

97. *Ragzan Chhodop*, A 1948 L 97.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 7. Record of evidence in appellable cases. |
| 2. Legislative Changes. | 8. Sub-section (2-A). |
| 3. Report of the Select Committee. | 9. Sub-section (3). |
| 4. Effect of Amendment. | 10. Sub-section (4) Recording of Evidence by Presidency Magistrate. |
| 5. Scope of Old Section. | |
| 6. Application of the section to Proceed- | |

1. Corresponding sections in former Codes.—This section corresponds to S. 198 of the Code of 1861, S. 115 of Act IV of 1877 and the Code of 1898 was similarly worded as that of 1882.

2. Legislative Changes.—Certain amendments were introduced by S. 97 of Act XVIII of 1923. Clause 84 of Bill III of 1914 proposed sub-sec. (2A) and the amendment of sub-sec. (3) as adopted but the Select Committee had also inserted sub-sec (4).

“It is intended to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases. It is further provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence which *determines* the applicability of S. 312”—*Statement of Objects and Reasons*.

3. Report of the Select Committee.—“We are inclined to agree with those critics who point out that the re-draft proposed by sub-cl. (i) in sub-sec. (1) of S. 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of the Ss. 263 and 264 and we would therefore, retain this sub-clause.

“In order to meet difficulties that have arisen we have introduced a sub-section laying down that Presidency Magistrates in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new clause making a consequential amendment in sub-sec. (4) of S. 364.

“The non-official members who constituted a majority in the Committee expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates and in particular with regard to this clause, would have liked to see Presidency Magistrates required, in warrant cases at all events, to keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status, powers and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small Committee to undertake the investigation.”

4. Effect of the Amendment.—The amendment introduced in sub-sec. (1) makes it clear that evidence should be recorded in appealable cases only, and sub-sec. (2-A) should also be read in this connection. Sub-sec. (3) as amended provides that sentences under S. 35 shall be

considered as one sentence unless the sentences are ordered to run concurrently. Sub-section (4) provides that in non-appealable cases it shall not be necessary to record either evidence or frame a charge.

5. Scope of the Old Section.—"Section 362 of the Code prescribes that the evidence in appealable cases, that is, in which a Presidency Magistrate imposes a fine exceeding Rs. 200/-or imprisonment for a term exceeding six months, shall be duly recorded"⁹⁸. This view has been adopted by the Legislature in amending sub-sec. (1). The view in *Ah Foong*⁹⁹, has been modified. A Presidency Magistrate is bound under S. 362 to record evidence of witnesses in a case where he imposes a sentence of imprisonment exceeding six months, even though that sentence is imposed for detaining the accused in a reformatory.¹

6. Application of the section to Proceedings under S. 110.—S. 362 does not apply to cases under S. 110 where the accused has failed to furnish security and has been detained in prison, pending reference to the High Court under S. 123 (2)^{1a}.

7. Record of evidence in appellable cases.—Where appellate sentence has been passed but the Magistrate did not record evidence under S. 362 (1), *held* the trial is bad and a *de novo* trial was ordered².

The Magistrate is bound in a case which comes under S. 362 to take a note of all the material facts appearing either in the course of the examination-in-chief or in the cross-examination³.

8. Sub-section (2-A).—The failure by the Magistrate to comply with the provisions of sub-sec. (2-A) is fatal. Where the order-sheet shows that the accused was examined under S. 342 but the printed sheet used for recording such examination is blank and there are signatures of both the Magistrate and the accused therein, that it contained full and true account of the statement by the accused, this was held to be an example of gross carelessness on the part of the Magistrate and the omission vitiates the trial⁴.

This sub-section requires the Presidency Magistrate to make a memorandum of the substance of the Examination of the accused in cases referred to in sub-sec. (1) *i. e.* appealable cases⁵.

9. Sub-section (3).—Ss. 35 (3) and 362 (3) do not take very much further than the words used in S. 411 except to this extent that where two sentences of imprisonment were passed on two different counts in the same trial it is the aggregate of the sentence which count for the purpose of appeal⁶.

10. Sub-section (4)—Recording of Evidence by Presidency Magistrate.—A Presidency Magistrate is not bound to record evidence in any summons-cases or warrant-cases or cases in which enquiries have to be made as in summons-cases or warrant-cases, except where he may impose a fine exceeding two hundred rupees or imprisonment for a term exceeding

98. *Emaman*, (1904) 31 C 983 (988) : 8 CWN 839.

99. 22 CWN 834 : 28 CLJ 105.

1. *Mohamed Roshan*, (1924) 26 Bom LR 1232.

1a. *Nepal Shikari*, (1908) 13 CWN 318 : 9 CLJ 439.

2. *In re K.G. Mohadevan*, A 1948 M 162

(2) : 48 Cr LJ 50.

3. *Ah Foong Chinaman*, 46 C 411 : 20 Cr LJ 24.

4. *Madan Mohan Das*, 60 CWN 36 : A 1956 C 25.

5. *Bideshi*, 50 CWN 373.

6. *Md. Shafi*, A 1954 C 301.

six months.⁷ S. 362 does not mean that in the cases excepted a Magistrate can act arbitrarily and record nothing by way of evidence. The exception gives him merely a discretion to take down the evidence or not; in other cases to which the exception does not apply he is bound to record the evidence⁸.

In non-appealable cases tried by a Presidency Magistrate it will not be necessary for the Magistrate to record the evidence or frame a charge⁹. Failure to frame a proper charge in a case where 15 accused were charge-sheeted under Ss. 147 and 323 I. P. C. was held likely to cause a failure of justice. The desirability of amending this section by doing away with the distinction in procedure between Magistrates in mofussil and those in the city were pointed out in¹⁰. A Presidency Magistrate is bound to frame a formal charge in an appealable warrant case, but not in a non-appealable case¹¹. Under this section it is not necessary for a Presidency Magistrate to record evidence in cases which are not appealable and the High Court has no jurisdiction to require him to do what sub-sec. (4) says, it is not necessary for him to do¹². He is not required to record evidence in a case under S. 488.

363. Remarks respecting demeanour of witness.—When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Appreciation of Evidence by Appellate Court. |
| 2. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 249 of the Code of 1861, S. 341 of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope.—This section empowers a Magistrate to record such remarks, if any, as he thinks material respecting the demeanour of such witness whilst under examination¹³.

This section makes it incumbent on a Magistrate to record remark about the demeanour of a witness¹⁴. The findings of fact by the trial Court which sees the witnesses, hears their evidence and observed their demeanours should not be set aside by the appellate Court unless they are manifestly wrong and there is no evidence at all on record to support them¹⁵. The Court is free to make relevant comments on the evidence of public servants but the Court must be very careful before it makes remarks which gravely affect honesty, reputation and good name of a witness¹⁶. To note the

7. *Shaikh Babu*, (1906) 33 C 1036.
 8. *Harish Chandra*, (1907) 10 Bom. LR 201 (202).
 9. *Vithal Tulsiram*, A 1956 B 123 : 1956 Cr LJ 376.
 10. *In re Yalpanothan*, A 1952 M 50 : 1952 Cr LJ 135 ; *Sambandam*, A 1954 M. 785.
 11. *Raghibir Kalhar*, 36 CWN 791 : 33 Cr LJ 828.
 12. *D'Souza*, 56 B 200 : 33 Cr LJ 400 ;

Iris Chandrabala, A 1955 B 45 : 1955 Cr LJ 125.
 13. *Golam Bari Gazi v. Yar Ali Khan*, (1924) 29 CWN 316.
 14. *Sikander Lal Puri*, A 1928 L 975 : 30 Cr LJ 129.
 15. *In re M.S. Mohiddin*, A 1952 M 561 : 1952 Cr LJ 1245.
 16. *Ghumanmal Godhumal*, A 1944 S 133 : 46 Cr LJ 88.

demeanour of a witness is one thing but to give out while the witness is being cross-examined that he is a liar and that the Court is not going to believe him is to give out the mind of the Court with regard to the credibility of the witness. This is not covered by the terms of S. 363. This may constitute a strong ground for transfer of the case¹⁷.

3. Appreciation of Evidence by Appellate Court.—In a jury trial the appellate Court found that inadmissible evidence had been admitted but there was overwhelming evidence against the accused, retrial had to be ordered on the ground that it is, at all times, a difficult matter for a Court of appeal to assess the evidence on record, for it is deprived of the advantage of hearing and watching the witnesses¹⁸.

364. Examination of accused how recorded.—(1) Whenever the accused is examined by any Magistrate, or by any Court other than High Court, not being a Court of the Judicial Commissioner the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English : and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language ; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under Section 263 or in the course of a trial held by a Presidency Magistrate.

17. *Harbans Singh v. Daroa Singh*, A 1957 P 661.

18. *Nimoo Pal Majumdar*, A 1955 C 559:

1955 Cr LJ 1358; *In re M. S. Mohiddin*, A 1952 M 561.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Corresponding sections in former Codes. 2. Legislative Changes. 3. Effect of the Amendment. 4. Distinction between Ss. 164 and 364. 5. Scope. 6. 'accused'. 7. 'Is examined'. 8. 'Including every question in the language of the Court'. 9. Confession.
—Meaning of.
—Incriminating questions. 10. 'Accused shall be at liberty to explain | <ol style="list-style-type: none"> or add to his answers'. 11. Sub-section (2).
—'shall be signed by accused'. 12. Refusal to sign by him, offence under s. 180 I. P. C.
—'Signed by Magistrate or Judge'.
—'In his own hand'. 13. Admissibility of Accused's statement. 14. Secondary Evidence of Confession. 15. Sub-section (3). 16. Sub-section (4). 17. Provisions of this section whether mandatory ? |
|---|---|

1. Corresponding sections in former Codes.—This section corresponds to S. 205 of the Code of 1861, S. 346 of the Code of 1872, Ss. 84 and 123 of Act IV of 1877 and the Code of 1882 was similarly worded as that of the Code of 1898 unamended.

2. Legislative Changes.—The words '*unless he is a Presidency Magistrate*' which occurred in sub-sec. (3) after the words 'he shall be bound' were omitted by S. 2 of the Code of Criminal Procedure (Second Amendment) Act 1923 (XXXVII of 1923) and the words '*or in the course of a trial held by a Presidency Magistrate*' in sub-sec. (4) were substituted by the said section and Act for the words 'or Section 362 sub-section (2A)' which were inserted by S. 98 of Act XVIII of 1923.

3. Effect of the Amendment.—The amendment makes it clear that the section does not apply to an examination of the accused in the course of a trial by a Presidency Magistrate.

In *Panchkauri's* case¹⁹ it was pointed out that in spite of the alteration that the Code has undergone by the amendment introduced by Act XVIII of 1923, S. 164 does not apply to confessions recorded by a Presidency Magistrate.

4. Distinction between Ss. 164 and 364.—S. 164 contemplates the power to record statements and confessions before trial *i.e.* at the stage of investigation, whereas this section provides for the examination of the accused in a trial by the Magistrate or any Court than the High Court. Ss. 209 and 342 contemplate the examination of the accused by the Magistrate but the record of such examination is made under S. 364.²⁰

A defect in a confession cannot be remedied.²¹

5. Scope.—Ss. 164, 342 and 364 are not exhaustive²² This section and S. 164 should be read together with S. 533. It applies to inquiries and trials. It does not govern investigations.²³

See S. 533 as to "Non-compliance with the provisions of S. 164 or 364."

This section deals with all statements of the accused whether confessional or not²⁴ and S. 164 provides for the recording of statements of an accused

19. (1924) 52 C 67 : 29 CWN ; see also *Visram Babaji*, (1895) 21 B 495.

20. *Chumman Saha*, (1878) 2 CLR 317 (318).

21. *Empress v. Hari Kisto Biswas*, (1879) 5 CLR 209 (210).

22. *Barindra Kumar Ghose*, (1909) 37 C 467 : 14 CWN 1114 : 11 Cr LJ 453.

23. *Bai Ratan*, (1873) 10 Bom HCR 166.

24. *Viran*, (1886) 9 M 224.

which are or purport to be confessions and relates to a stage of the case, namely the police investigation.²⁵

Examination of the accused is made at the stages indicated in S. 207-A(6), S. 209, Ss. 251-A(2), 253 and 342.

Confessional statements not made in an inquiry or trial cannot be treated as one under S. 364.²⁶ S. 364 requires that the Magistrate should note that the statement was made in his presence and that such a note should be signed by the Magistrate. S. 242 of the Code enjoins that particulars of the offence should be explained to the accused and his answer thereto recorded. As far as possible the plea may be recorded in his own words. If these important provisions have not been followed, the omissions vitiate the trial.²⁷

Sub-section (2) of S. 164 provides that 'such confessions shall be recorded and signed in the manner provided in S. 364.' On the matter of construction Ss. 164 and 364 must be looked at and construed together and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves.²⁸ It is not proper to reject the statement of an accused recorded under S. 364 merely on the ground that the provisions of Rule 85 were not strictly followed.²⁹

The view is now made clear by the amendment of sub-sec. (4).

6. 'Accused'.—An admission or confession made before a Magistrate carrying on an inquiry under S. 202 is not a statement recorded under S. 164 or 364 of the Code and is therefore not admissible in evidence against the accused without further proof.³⁰

7. 'Is examined'.—The examination referred to in S. 364 is subject to the purpose referred to in S. 342 and the power to put questions to the accused is not given to force an accused to make criminating admissions.³¹

8. 'Including every question.....in the language of the Court or in English'.—The omission of a Magistrate to record in the vernacular the question asked in the examination of the accused person does not necessarily render that examination inadmissible as evidence.³² The law requires that ordinarily such a statement should be recorded in the language of the person making it, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation of what was said.³³ Where an interpreter is employed the examination of the accused should be recorded in the language in which it is communicated to the Court by the interpreter.³⁴ The confession of an accused person was made in Bengali, but the language in which the accused was examined was recorded in English. The committing Magistrate in his evidence in Court, said that he could not write Bengali well, and that there was no mohurrir with him at the time when the confession was recorded, *held* that the provisions of S. 364 had been sufficiently complied with.³⁵

25. *Bhairab Chandra Chackerbutty*, (1898) 2 CWN 702.

26. *Rishi*, A 1955 p. 425 : 1955 Cr LJ 1371.

27. *Gangappa v. State of Mysore*, A 1956 Mys 63 : 1956 Cr LJ 1418, Contra, *Satnarain*, 32 C 1085.

28. *Nazir Ahmed*, 63 IA 372 : 40 CWN 1221 ; A 1936 PG 253 (2).

29. *In re Nagendra Bhagrathar*, A 1950 M 484 : 51 Cr LJ 1137.

30. *Satnarain*, 32 C 1085.

31. *Rangi*, 10 M 295 (315).

32. *Titu Miya*, (1877) 1 CLR 1 (FB) : 8 C 618.

33. *Naini*, (1924) 41 CLJ 50 (54) ; *Jagannath Shao*, A 1937 Oudh 425.

34. *Vaimblu*, 5 C 826 ; see *Sagal Samba Sajao*, (1893) 21 C 642.

35. *Razai Mia*, (1895) 22 C 817, distinguishing *Jagat Narayan Rai*, 17 C 870.

The prosecution is to prove the impracticability.³⁶

9. Statement—Confession—Meaning.—S. 164 distinguishes sharply between statements of witnesses and confessions of accused persons. A “statement” cannot be used as a “confession” that is, as an admission of the truth of the facts, set out in it, in a criminal prosecution based on these facts, either against the person making it or against the person with whom he may be jointly tried.³⁷

Provisions regarding record of confessions are mandatory. Every question put to accused and every answer given by him must be recorded in full.³⁸

Incriminating questions.—In examining an accused the Magistrate should make no attempt to induce him to incriminate himself.³⁹ A Magistrate in examining an accused under S. 364 can ask him only to explain the circumstances appearing against him, but cannot put any question which may elicit a confessional statement.⁴⁰ The examination of the accused conducted by putting a long composite question is irregular and not in accordance with law.⁴¹

10. ‘He shall be at liberty to explain or add to his answers’.—Under this section the accused is entitled to explain or add to his statement when they are shown to him.⁴²

11. Sub-section (2), ‘shall be signed by the accused’.—The confession of an accused person recorded by a Magistrate having no jurisdiction to commit or try him, is imperfect if not signed by the accused person or attested by his mark and is not admissible in evidence.⁴³

A thumb mark affixed to a confession by an accused able to write his name is not a ‘signature’ within the meaning of S. 3 (52) of the General Clauses Act or S. 164 of the Code.⁴⁴

The attestation required by S. 346 of the Code of 1872 is unnecessary when a confession is made in Court to the officer trying the case at the time of the trial.⁴⁵

12. Refusal by the accused to sign the record—offence under S. 180 I. P. C.—The refusal by the accused to sign his statement recorded under S. 364 and admitted by him to be correct amounts to an offence under S. 180 I. P. C.⁴⁶

‘Signed by the Magistrate or Judge’.—See *Jai Narain*.⁴⁷

A confession recorded under this section in order to be admissible in evidence must strictly comply with the provisions of the law.⁴⁸

‘Under his own hand’.—The certificate required under S. 255 need

36. *Jagat Narain Rai*, 17 C 870.

37. *Re Ramanu Jamma*, (1916) 39 M 977 : 34 IC 307.

38. *Bhawar Lal*, A 1951 MB 36 ; *Bhinappa Saibanna*, A 1945 B 484.

39. *Haider Ali Pradhania*, (1912) 17 CWN 354 (357) : 14 Cr LJ 129 : 18 IC 881 ; *Hosseini Buksh*, (1880) 6 C 96 (102) : 6 CLR 421.

40. *Tufana Sheikh*, (1911) 15 CLJ 323 : 13 Cr LJ 283 : 14 IC 667.

41. *Hasni*, (1927) 103 IC 847 : AIR (1927)

L 650.

42. *Fakir Singh*, AIR (1929) L 382.

43. *Bai Ratan*, (1873) 10 Bom HCR 166 FB ; *Motilal*, A 1935 A 652 : 36 Cr LJ 1098.

44. *Sadananda Pal*, (1905) 32 C 650.

45. *Chumman Shah*, (1878) 3 C 756.

46. *Umar Khan*, (1917) 39 A 399 : 15 ALJ 291 distinguishing *Sirsapa*, (1877) 4 B 15.

47. 17 C 862 (870).

48. *Lal Skeikh*, (1899) 3 CWN 387.

not be in the hand-writing of the presiding officer, but may be under his hand only *i.e.* signed by him.⁴⁹

It is the statement in the confession and not the verification of the statement which affords the evidence that the accused is guilty.⁵⁰

13. Admissibility of Accused's statement.—Where there was no certificate in compliance with the requirements of S. 255 of the Code of 1861 (present S. 364), *held* the confession was not admissible in evidence.⁵¹

Statements put forward by the accused by way of his defence are admissible notwithstanding that they are shown by other evidence to be inconsistent with truth.⁵²

14. Secondary evidence of confession.—No evidence can be given of the terms of a confession except the record, if any, made under S. 364. S. 533 has no application to a case where no record whatever has been made of such a confession.⁵³

15. Sub-section (3).—‘*Memorandum*’.—It is not necessary that the memorandum in English referred to in paragraph 3 of this section should be made in respect of confessions recorded under S. 164.⁵⁴

No doubt under S. 164 read with S. 364 the Magistrate has to make a memorandum of the confession in his own handwriting but his failure to do so is cured by the provisions of S. 533(1).⁵⁵

16. Sub-section (4).—The words ‘*or in the course of a trial held by a Presidency Magistrate*’ are new. See the ‘Effect of Amendment.’

This sub-section refers to a summary trial in Court where there is no appeal (S. 263). There the record of examination of accused is not required to be taken under this section.

The Patna High Court in the case of *Parshotam Das*^{55a} has held that in summary trial the examination of the accused need not be recorded in detail.

17. Provisions of this section whether mandatory?—The Calcutta High Court has held that this section is mandatory and omission to comply with the requirements of this section vitiates a trial.⁵⁶ The Punjab Chief Court in *Balmokund*⁵⁷ has held that the procedure of recording questions and answers in full is of no great importance and a confession is not vitiated by the want of this formality and in *Shuldham*⁵⁸ that the defect in recording statement in the form prescribed by the section may be cured by the evidence of the Magistrate who recorded the confession.

Where the effect of the certificate of the statement recorded by the Magistrate made subsequently before the Sessions Court was that the very statement which was made before the Magistrate was again read over to the accused, the lacuna from which the confessional statement before the

49. *Razza Hossein*, (1867) 8 WR Cr 55 (56).

50. *Ram Naresh*, A 1939 A 242 : 49 Cr LJ 559.

51. *Radhoo Jama*, (1869) 12 WR 44 (45).

52. *Kangal Mal*, (1905) 41 C 601 : 15 Cr LJ 713.

53. *Gullabu*, (1913) 35 A 260 : 11 ALJ 256: 19 IC 307.

54. *Fekoo Mahto*, (1887) 14 C 539.

55. *Chavandeppa Punjari*, A 1945 B 292.

55a. (1926) 6 P 506 : AIR (1927) P. 369 (2).

56. *Messer Bepari*, (1925) 29 CWN 939.

57. (1914) 17 PR (1915) Cr : 246 PLR (1915).

58. (1908) 222 PLR (1908) FB.

Magistrate suffered had been cured by the certificate.⁵⁹ The provisions of Ss. 164 and 364 are to be strictly followed by the Magistrates otherwise the statements recorded by them cannot be admitted in evidence.⁶⁰

365. Record of evidence in High Court.—Every High Court, not being a Court of the Judicial Commissioner shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

Legislative changes (1923).—The word ‘shall’ was substituted for ‘may’ and the words ‘and the evidence shall be taken down in accordance with such rules’ by Act 18 of 1923.

CHAPTER XXVI

OF THE JUDGMENT

366. Mode of delivering judgment.—(1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

- (a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and
- (b) in the language of the Court, or in some other language which the accused or his pleader understands :

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defects in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of Section 537.

59. *Olankar Saura*, A 1958 Or 251 ; 1958 Cr LJ 1335.

60. *Ram Singh*, A 1959 A 518.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Corresponding sections in former Codes. 2. Mode of delivering judgment.
—Sub-section (1).
—what is a judgment.
—in every trial. 3. Applicability—Sections 366 and 367 do not apply to inquiries under Chapter VIII or XII.
—proceedings under S. 195. | <ol style="list-style-type: none"> 4. —dismissal of complaint or discharge. 5. Judgment of Appellate Courts. 6. 'shall be pronounced'. 7. Judgment not written when sentence is passed. 8. Sub-section (2). 9. Sub-section (3)
—Irregularity curable under S. 537. 10. Sub-section (4). |
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1. Corresponding sections in former Codes.—This section corresponds to paragraph 3 of S. 211 and S. 462 of the Code of 1872, and except the words “*or he is acquitted*” after the words “fine only” and the words “*either of*” after the word “in” in sub-sec. (2), inserted in the Code of 1898 it is the same as that of the Code of 1882.

S. 366 must be read together with S. 367.

2. Mode of delivering judgment.—Sub-section (1) Judgment.—The word “judgment” has not been defined in the Code. This section deals with the mode of delivering judgment of the trial Court.

What is a judgment.—“As I understand a ‘judgment’, it means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments”.⁶¹

By the word ‘Judgment in Criminal proceeding’ is meant an order in a trial terminating in the conviction or acquittal of the accused.⁶² As there is no definition of the word ‘judgment’ in the Criminal Procedure Code it will be proper to adopt the explanation of the word as understood in the English Courts, namely that by the word ‘judgment’ is meant an order in a trial terminating in the conviction or acquittal.⁶³ A judgment is the final decision of the Court intimated to the parties and to the world at large by formal ‘pronouncement’ or delivered in open Court.⁶⁴ Ss. 366 and 367 apply to the judgments of the trial Court and S. 424 to Judgments of an appellate Court.⁶⁵

‘In every trial’.—Judgments as are referred to in S. 366 relate to judgments in trials.⁶⁶

3. Ss. 366 and 367 do not apply to inquiries under Chapter VIII or XII.—“Now it may be open to doubt whether the provisions of Ss. 367 and 424, which apply to judgments in trials and in appeals, govern orders under S. 123, sub-sec. (3).”⁶⁷ This doubt has now been removed by the insertion of sub-sec. (6) in S. 367 by S. 100 of Act XVIII of 1923.

The provisions of Ss. 360 and 367 are not applicable to proceedings under S. 145.⁶⁸

61. *per* Trevelyan, J., in *Damu v. Sridhar*, 21 C 121 (127).

62. Halsbury, Laws of England, Helsham Ed. Vol. IX, Paragraphs 260 to 264.

63. *Thikka Surya Rao v. Siragu Sethiraju*, A 1948 M 510 : 48 Cr LJ 754 following, *Maheshwar Kandayya*, 31 M 543; *Dr. Harrien Singh*, A 1939 FC 43; *See Kuppaswami Rao*, A 1949 FC 1; *Krishna Mehta v. Sudhakar Das*, A 1953

Or 281.

64. *Surendra Singh v. State of U. P.*, 1954 SCR 330 : A 1954 SC 194.

65. *Nandlal Chunilal*, A 1946 B 276 FB.

66. *In re Nagappa*, (1904) 6 Bom LR 897.

67. *Kalu Mirza*, (1919) 37 C 91 (97); *In the matter of Ramaswamy Chetty*, (1903) 27 M 510.

68. *Thikka Surya Rao v. Siragu Setharaju*, A 1948 M 510 : 48 Cr LJ 754.

In the context of S. 494, the term 'judgment' is applicable to an order of committal which terminates the proceedings so far as the inquiring Court is concerned.⁶⁹

These sections do not apply to proceedings under S. 195.—"We do not think that S. 367 is applicable to an order passed under S. 195, as S. 367 relates to such judgments as are referred to in S. 366, that is to say, judgments in trials."⁷⁰

These sections do not apply to dismissal of complaint or discharge.

(i) *Dismissal under S. 203.*—They are specifically provided for in Ss. 203, 253 and 209 of the Code. An order of dismissal under S. 203 is not a judgment within the meaning of S. 369.⁷¹ A Magistrate who has dismissed a complaint under S. 203 is not precluded from entertaining a fresh complaint upon the same facts.⁷²

(ii) *Order of Discharge.*—Ghose, J., in the dissentient judgment of the Full Court held: "An order under S. 253 would in my opinion be a judgment."⁷³

Ghose, J., also dissenting in the Full Bench decision in *Mir Ahmad Hossein v. Mahomed Askeri*⁷⁴, held that the order of discharge did not amount to a judgment within the meaning of Ss. 367 and 369 where there was no judicial investigation by the Magistrate of the merits of the complaint.⁷⁴ An order of discharge does not constitute a judgment.⁷⁵ Refusal by the High Court while exercising revisional powers under Ss. 435 and 439 to interfere with the order of dismissal of a complaint cannot take away the jurisdiction of the Magistrate to entertain a fresh complaint when there is fresh evidence or when there was manifest error or manifest miscarriage of justice in the previous order.⁷⁶

4. Judgment of Appellate Courts.—S. 424 says that the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply so far as may be applicable to an appellate judgment other than that of a High Court. See commentary on S. 424 *infra*.

5. 'shall be pronounced'.—No expression of opinion by a Judge becomes a judgment until it has been pronounced.⁷⁷

"Sections 366 and 367 read together require that judgment shall be (1) written, (2) signed, (3) dated and (4) pronounced in open Court. The latter three must take place on the same occasion. Till all these formalities have

69. *The State of Bihar v. Ram Naresh Panday*, A 1957 S C 383 (385).

70. *In re Nagappa*, (1904) 6 Bom L R 897 (899).

71. *per* White, C.J., in *In re Chinna Kaliappa Gounden*, (1905) 29 M 126 (FB) at p 131; 15 MLJ 79; 1 MLT 31; 3 Cr L J 274.

72. *Makhatambi v. Hasan Ali*, (1904) 1 NLR 18 following *Dwarka Nath Mandal v. Beni Madhab Banerjee*, (1901) 28 C 652 (FB) and *Mir Ahmad Hossein v. Mahomed Askeri*, (1902) 29 C 726 (FB); 6 CWN 633.

73. *Dwarka Nath Mandal v. Beni Madhab Banerjee*, (1901) 28 C 652 (665) FB; 5 C W N 457; decision against an

order by Presidency Magistrate.

74. 29 C 726 (FB); 6 CWN 633. overruled in *P. N. Talukdar*, A 1962 SC 1198.

75. *per* White J., in *In re Chinna Kaliappa Gounden*, 29 M 126 (FB) (131) following *Dwarka Nath Mandal v. Beni Madhab Banerjee*, (1901) 28 C 652 (660) FB; *per* Pinhey, J., in *Maheswara Kondaya*, (1908) 31 M 543 (545).

76. *S. M. Sarkar v. P. N. Talukdar*, A 1961 C 461 (FB); 1961 (2) Cr LJ 204. Overruled on other points by *P. N. Talukdar v. Saraj Sarkar*, A 1962 SC 1198.

77. *Abdul*, (1892) AWN 157.

been gone through the judgment is not delivered; and there is nothing to prevent the officer who wrote it from tearing it up and writing another.”⁷⁸

Judgment inoperative until pronounced.—The Allahabad High Court held that a judgment, though written and signed, was inoperative until it was pronounced and must be merely taken as an expression of opinion.⁷⁹

Judgment not pronounced—Record lost—Procedure.—Where a judgment has been lost it is open to the Judge to re-write from memory the substance of it. S. 366 only imposes the condition that the judgment should be pronounced in open Court and imposes a few other conditions, but such conditions do not include the condition that the record should not have been lost or that if only a portion of the judgment (that relating to the conviction and sentence alone) is pronounced, the conviction is illegal.⁸⁰

6. Judgment not written when sentence is passed.—A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by S. 367 of the Code of 1882 has been written is illegal.⁸¹ In consequence of these decisions,⁸¹ ⁸² and, ⁸³ S. 366 (4) was inserted in the Code of 1898 which has been preserved intact even by the Amending Act XVIII of 1923. To pass a sentence before recording reasons for the decisions is a procedure neither contemplated nor permitted by Ss. 366 and 367 of the Code.⁸⁴

7. Sub-section (2)—Personal attendance at the hearing of judgment when not necessary or may be dispensed with.—S. 366 (2) contemplates the absence of the accused up to the stage of judgment and even after that stage when the judgment is one of acquittal or one awarding a sentence of fine.⁸⁵

8. Sub-section (3).—This clause lays down that irregularity in delivering judgment by reason of the absence of any party or their pleader or defect in service of notice upon them to hear the judgment does not vitiate the judgment.

Irregularity in following S. 366 (3) does not vitiate a judgment.—It is cured by S. 537.⁸⁶

9. Sub-section (4)—‘Nothing in this section shall be construed to limit in any way the extent of the provisions of S. 537.’—This clause was inserted in the Code of 1898 by reason of the decision in *Hargovind*.⁸⁷ The view in *Abdul*⁸⁸ which held that S. 537 was inapplicable is no longer good law. But what was the necessity of inserting this clause when S. 537 (a) lays down that no finding, sentence or order passed by a Court of competent jurisdiction shall

78. *In re Savarimuthu Pillai*, 40 M 108 (109) : (1916) MWN 372 : 32 MLJ 81 : 17 Cr LJ 166 ; *Ramdhan Rai*, (1913) 11 ALJ 745 : 14 Cr LJ 562 ; *Pattabhiranayya, In re* ; A 1942 M 668 : 44 Cr LJ 5.

79. *Ramdhun Rai*, (1913) 11 ALJ 745 : 14 Cr LJ 562 : 21 IC 162.

80. *Kamakshamma*, (1913) 38 M 498 (499) : 25 M L J 445 : (1913) M W N 862 : 14 CrLJ 595, following *Narsingh Narain Singh v. Harkhu Singh*, 8 CLJ 521 ; *Rajgir Sahay v. Iswardhari Singh*, (1910) 11 CLJ 243 (248) ; 5 IC 660 (Civil case).

81. *Hargovind Singh*, (1892) 14 A 242,

followed in *Bandanu Atchayya*, (1903) 27 M 237.

82. *Abdul*, (1898) AWN 157.

83. *Damu v. Sridhar*, (1893) 21 C 121 ; *Tilak Ch. Sarkar*, (1896) 23 C 502.

84. *Moriokhan Dhangar Khan*, (1911) 5 SLR 131 : 12 Cr LJ 610 : 12 IC 986.

85. *Jamal Khatun*, (1912) 6 SLR 206 : 14 Cr LJ 272 : 19 IC 544.

86. *Sankuralinga Mudaliar*, (1922) 45 M 913 : 43 MLJ 369 : (1922) MWN 579 : 68 IC 615 : AIR (1922) M 502 (FB).

87. (1892) 14 A 242.

88. (1892) AWN 157.

be reversed or altered on appeal or revision on account of any error, omission or irregularity in a judgment? It seems the Legislature was over-cautious. Where the Magistrate who tried the case was not incapacitated from delivering the judgment, but he found it more convenient, as he was going into camp, to ask another Magistrate to deliver it for him, *held* that the mistake was cured by S. 537.⁸⁹ See also Commentary on S. 367 *infra*.

367. Language of judgment. Contents of judgment.—

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

Judgment in alternative.—(3) When the conviction is under the Indian Penal Code, and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) In trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury:

Provided that it shall not be necessary to record such heads of the charge in cases where the charge has been delivered in English and taken down in shorthand.

(6) For the purposes of this section, an order under Section 118 or Section 123, sub-section (3), shall be deemed to be a judgment.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Effect of the 1923 and 1955 Amendments. |
| 2. Legislative Changes.—1923 and 1955. | 4. Language of Judgment. |
| | 5. Every such Judgment. |

89. *Nur Muhammad Khan*, (1923, January), 21 ALJ 137; 24 Cr LJ 173; 71 IC 526:

AIR (1923) A 276.

6. Be written by the presiding officer of the Court or from the dictation of such presiding officer.
7. Contents of Judgment.
 - (i) the points for determination.
 - (ii) the decision thereon and the reasons for the decision.
 - (iii) and shall be dated and signed by the presiding officer in open Court.
 - at the time of pronouncing it.
8. Judgment in particular offences.
9. Appreciation of Evidence.
 - Burden of Proof.
10. Strong suspicion.
11. Benefit of doubt.
12. Partisan or relation witnesses.
13. Chance Witness.
14. Evidence of Identification.
15. Defence Evidence.
16. Plea of alibi.
17. Plea of private defence.
18. Plea of Insanity.
19. Plea of accident.
20. Absconding of Accused.
21. Medical Evidence.
22. Circumstantial Evidence.
23. Investigation—Action of Police Officer—Presumption.
24. Personal knowledge by Judges or Magistrates.
25. Sub-section (2).
26. Sub-section (3).
 - Judgment in the alternative.
27. Sub-section (4).
 - Judgment of acquittal.
28. Sub-section (5).
 - in jury trials heads of charge to be recorded.
29. Judgment should contain a finding against each individual accused when there are several accused.
30. Court has no jurisdiction to alter or review its order after the judgment is pronounced.
31. Judgment of an Appellate Court.
32. Section does not apply to summary dismissal of appeal under S. 421.

1. Corresponding sections in former Codes.—This section corresponds to Ss. 380, 381 of the Code of 1861 and to S. 255, last paragraph, S. 287, paragraph 2 ; Ss. 461, 463 and 464 of the Code of 1872 and the Code of 1898 before it was amended was similiary worded as that of 1882.

2. Legislative Changes.—In sub-section (1) after the words “by the presiding officer of the Court,” the words “*or from the dictation of such presiding officer*” were inserted by S. 100 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923) and by the same Act the words at the end of sub-sec. (1) “*and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him*” were added. Sub-section (6) was added by S. 100 of the same Amending Act.

Legislative Changes (1955).—Sub-section (5) was substituted by the Amending Act 26 of 1955 for the Old sub-sec. (5) which stood as follows :—

“(5). If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed ; Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.”

3. Effect of the 1923 Amendment.—(1) Judgment may now be written from the dictation of the presiding officer of the Court but to ensure it authenticity it has been provided that in such cases every page of such judgment shall be signed by him. (2) Order under S. 118 or S. 123 (3) shall be deemed to be a judgment within the meaning of this section *i. e.* S. 367 applies to orders under S. 118 or S. 123 (3). The insertion of sub-sec. (6) has, it seems, given effect to the following decisions under the old Code⁹⁰ which have held that the judgment or order must show that the Judge has considered the case of each individual prisoner and the case of *Prathipathi* and other cases⁹¹ which held that a final order under S. 118 was bad where

90. *Kalu Mirza*, (1909) 37 C 91 (97) ; *Kassim Biswas*, (1882) 10 CLR 335—decision under S. 491 of the Code (Act X of 1872) ; *Brijnandan Prasad*, (1914) 37 A 33 (36) ; (1905) AWN 41 ; 2 ALJ 174 ; *Ayodhya Prasad Singh*,

(1908) 35 C 929 (930) ; *Bahadur Shah*, (1909) ; 25 PWR 1909 ; 10 Cr LJ 591 ; 4 IC 432.

91. *Prathipati Venkatasami*, (1907) 30 M 330 ; *Ram Chandra Halder*, (1908) 35 C 674 (676) ; *Mulchand*, (1914) AWN 144.

it was passed without taking evidence and the case of *Irapa* and other cases⁹² which held that legal evidence must be recorded.

Effect of the 1955 Amendment.—It is no longer necessary to record reasons in the judgment in cases of conviction of an offence punishable with death for imposing a lesser sentence.

4. Language of Judgment.—Sub-section (1) contemplates that the judgment shall except as expressly provided in the Code be in the language of the Court or in English. It was held further in *Dhanukdhari's* case⁹³ that the irregularity could be cured by S. 537. The language of the judgment must be temperate and sober and not satirical⁹⁴. Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to find a place in a judgment.⁹⁵

Great care should be taken that no disparaging or libellous remarks should be made upon any person who has had no opportunity to defend himself and who has not even appeared at the witness box.⁹⁶

5. 'Every such Judgment'.—"Such judgment has reference to the judgment in every trial in any criminal Court of original jurisdiction as stated in S. 366 as opposed to 'appellate judgment' for which reference should be made to the provisions of S. 424 *infra*. The Code does not define 'judgment' but S. 366 lays down what the language and contents of the judgment are to be. By S. 367, the judgment is to contain the decision and the reasons for the decision."⁹⁷

6. 'Be written by the presiding officer of the Court or from the dictation of such presiding officer'.—The words '*or from the dictation of such presiding officer*' are new and were inserted by S. 100 of the Amending Act (XVIII of 1923). The Code now provides that the judgment may be dictated. The Code of 1898 before amendment contained no such provision and the view, in *Hargovind Singh and other cases*⁹⁸, which held that the judgment must be written by the Court itself and it would be a contravention of the provisions of the section if it was dictated and written by the clerk but signed by the Judge, cannot be treated as good law in view of the change in the section by the addition of the above words in sub-sec. (1). The amendment, in effect supersedes the view in *Manik's* case⁹⁸ and specifically provides for writing of the judgment from the dictation of such presiding officer as an alternative to writing by the Court and provides for safeguard against abuse by insertion of the last clause in sub-sec. (1) '*and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*'

7. Contents of Judgment.—S. 424 read with S. 367 lays down what the contents of a judgment of any appellate Court other than a High Court should be. The judgment of the Court of Appeal should be such that the High Court, as a Court of Revision, might on looking into the judgment be in a position to judge for itself what the case was and how the Court of Appeal had considered the evidence as bearing on the guilt or innocence of the indi-

92. *Irapabin Basapa*, (1871) 8 Bom HCR Cr Ca 162; *Isreepershad Singh*, (1873)

20 WR (Cr) 18; see also *Niranjan Singh*, (1870) 2 NWPHCR 431.

93. *Dhanukdhari Singh v. Harihar Singh*, (1906) 4 CLJ 232 : 4 Cr LJ 162.

94. *Thomas Pellako*, (1911) 5 Bur LT 20 : 13 Cr LJ 259; *Tajmal Naraindas*, A 1933 S. 91; *Kameshwar Dutt Misra*, A 1949 A 586.

95. *Dhuram Dutt Ojha*, (1867) 8 WR (Cr) 13.

96. *Chaudhury M.D.*, A 1943 L 298; *Kartar Chand Sankardas*, A 1938 S. 103.

97. *Chinna Kaliappa Gounden*, (1905) 29 M 126 (FB) 131 : 15 MLJ 79 : 3 Cr LJ 274.

98. *Hargovind Singh*, (1892) 14 A 242 (270); *Manik Lal Mullick v. The Corporation of Calcutta*, (1906) 4 CLJ 411.

vidual accused before the latter affirmed the judgment of the trial Court.⁹⁹ In simple cases, where the facts are clear, no further reason than that "the evidence is accepted" by the Judge may be strictly required. In complicated cases, however specially where there are more than one question, both of law and fact, arising, a mere statement of this kind is not satisfactory, though not illegal within the meaning of S. 367.¹⁰⁰ A judgment should confine itself to a consideration of the issues before the Court together with a fair and legitimate comment on any errors or irregularities that may be disclosed in the course of the trial.¹ It is generally undesirable to make documents prepared by the parties to a case part of the judgment, but where a statement of the prosecution evidence was checked by the trial Court before being embodied in the judgment, the accused was held not to have been prejudiced.² An accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and contain the particulars required by S. 367; otherwise it is no judgment at all.³ Judgments should be written legibly and on one side of the paper only, a margin of one-fourth of each sheet being left blank.⁴

Every judgment must contain : (1) the points for determination ; (2) the decision thereon ; and (3) the reasons for such decision and it should clearly be shown that the entire material which has a bearing on these points has been fully considered.⁵

Judgments ought to set out what the evidence is and not merely the conclusion of the learned Magistrate.⁶

The duty of the Court is to give a summary of the evidence of material witnesses and to appraise the evidence with a view to arrive at the conclusion whether the testimony should be believed.⁷

Rules framed by the Rajasthan High Court provide that judgments of High Courts may be delivered orally in open court and the transcript can be initialled or signed when prepared by the judgment-writer later on.^{7a}

The principles of natural justice require that no court shall give a finding whether on fact or law and particularly on facts without giving an opportunity to all the contesting parties.^{7b}

Every judgment shall contain.—

(i) **'The point or points for determination.'**—"Attention is drawn to S. 367 which lays down that every judgment of a criminal Court must contain, and in particular to the necessity of stating clearly the points for determination in each case"⁸ S. 367 prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon, and the reasons for the decision.⁹ In a case of rioting the judgment of the lower Court must expressly contain all findings necessary to constitute the offence and the

99. *Inatulla Sarkar*, (1923) 39 CLJ 117.

100. *Shanker*, (1925) 24 ALJ 318, following *Pandeh Bhat*, 19 A 506 (FB).

1. *Thomas Pillako*, (1911) 5 Bur LT 20 : 13 Cr LJ 259 : 14 IC 643.

2. *Kasem Ali*, (1919) 47 C 154 : 31 CLJ 192 : 21 Cr LJ 386 : 55 IC 994.

3. *Thakur Singh*, (1919) 20 Cr LJ 444 : 51 IC 268.

4. CO No. 3 of 18th March, 1892.

5. *Vema Reddy v. Gangi Reddy*, A 1958 AP 571 : 1958 Cr LJ 1118 ; *Baldeo v. Deonarain*, A 1954 A 104 ; *Wamanrao Anandrao Patil v. Umrao Tulshiraji Deshmukh*, A 1937 Or 217 ; *Chiramal*

Varisad, A 1953 TC 275 : 1953 Cr LJ 1301.

6. *Panchu Sheikh*, A 1943 C 612.

7. *Aftab*, A 1954 SC 436.

7a. *Dhanna*, A 1963 Raj 104 following *Surendra Singh v. State of U. P.*, 1954 SCR 350 : A 1954 S C 194.

7b. *M. Narayan v. State of Kerala*, A 1963 SC 1115.

8. Bom HC Cr Cir p. 38 ; *Vema Reddy v. Gangi Reddy*, A 1958 A p. 571.

9. *Ramlall Singh v. Haricharan Ahir*, (1909) 37 C 194 : 11 CLJ 410 : 5 IC 999 ; *Shanker*, (1925) 24 ALJ 318.

common object must, therefore be *expressly* found.¹⁰ Where the judgment of a Magistrate makes no attempt to scrutinize the oral evidence of the complainant but summarily accepts these evidence, the judgment cannot be upheld in revision.¹¹

(ii) **'The decision thereon and the reasons for the decision'.—**Where the Magistrate acquitted the accused, on a charge of rioting with the common object of taking possession of the complainant's land and assaulting his durwans, without coming to a finding on the question of possession, *held* that the judgment was unsatisfactory and the order of acquittal was set aside and retrial ordered.¹² The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded.¹³ In a case under S. 145 whether Ss. 366 and 367 are applicable, the final order shall embody a statement of the reasons for his decision sufficient to enable the High Court to determine whether the Magistrate had, or had not complied with sub-sec. (4) of S. 145 and directed his mind to the consideration of the effect of the evidence adduced before him.¹⁴

(iii) **'And shall be dated and signed by the presiding officer in open Court at the time of pronouncing it, and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.'**—S. 367 requires the dating and signing to be in open Court at the time of pronouncement.¹⁵ Directing another Magistrate to pronounce a judgment, though an irregularity is covered by S. 537.¹⁶ This Amending Act XVIII of 1923 having provided for judgments to be written from the dictation of such presiding officer in the first part of this sub-section makes the consequential amendment by providing that every such page shall be signed by the presiding officer. See Commentary to S. 366 *ante* under the heading "shall be pronounced."

'At the time of pronouncing it'.—The maxim "*qui facit per alium, facit per se*" (he who does a thing by the agency of another does it himself), applies where a Magistrate who is himself unable to come to Court, writes and signs his judgment in a criminal case and gets it pronounced by another Magistrate.¹⁷

It is an elementary principle of Criminal jurisprudence that firstly no one can be tried or sentenced in *absentia* except in petty cases and when represented by a pleader, secondly, the judgment must be pronounced in open Court, signed and dated; and thirdly, that if these formalities are not strictly complied with the conviction and sentence cannot be sustained.¹⁸

10. *Dasarathi Mahapatra*, (1908) 36 C 158 (159).

11. *Pirbux v. Mussamat Baji*, (1925) 21 Cr LJ 140 : 45 IC 620 (N) 120; *Onkarmal Agarwala v. Tulsimoni Gogoi*, A 1950 Ass 81 : 51 Cr LJ 782.

12. *Surendra Nath Sinha*, (1925) 53 C 471; see *Rupa Mandal, v. Keshab Mandal*, (1907) 5 CLJ 452 where appellate judgment of acquittal was held defective and rehearing of appeal was ordered.

13. *Hargovind Singh*, (1892) 14 A 242 (273).

14. *Bhuban Chandra Hazra v. Nibaran Chandra Santra*, (1921) 25 CWN

887.

15. *In re Saraimuthu Pillai*, (1916) 40 M 108 : 3 LW 46 : (1916) MWN 372 : 32 MLJ 81 : 17 Cr LJ 166 : 33 IC 646.

16. *Nur Muhammad Khan*, (1923) 21 ALJ 137 : 24 Cr LJ 173.

17. *Nur Mahammed Khan*, (1923) 21 ALJ 137 : 24 Cr LJ 173 : 71 IC 525 : AIR (1923) A 276; see *Ramdhir Rai*, (1913) 11 ALJ 745.

18. *In re Athipalayan*, A 1960 M 567 following *Tilak Ch. Sarkar* 23 C 502; *Surendra Singh v. State of U. P.*, A 1954 SC 194.

8. Judgment in particular offences.—In a case of trespass it is the duty of a criminal Court to determine what was the intention of the alleged offender.¹⁹ In a case of *rioting* the judgments of the lower courts must expressly contain all findings necessary to constitute the offence and the common object must therefore be expressly found.²⁰ In a case of *theft* the judgment should contain as one of the points for determination whether it has been proved that there was an intention to take dishonestly any movable property out of the possession of the person aggrieved without that person's consent.²¹

Cases of murder—see Commentary on sub-sec. (5).

9. Appreciation of Evidence.—The cardinal rule of the administration of criminal justice is that the prosecution must prove the guilt of the accused and that the accused need not prove anything. The Court cannot look to the plea of the accused and his evidence to see whether there are material available to bolster up the case for the prosecution.²²

The point that the Courts have to consider is not whether the defence put forth was proved but whether the prosecution has discharged the burden that initially lay on it.²³ The oft-quoted maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer²⁴ is sometimes misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court.²⁵ In a recent decision the Supreme Court has held that it is a Court's duty to convict a guilty person when the guilt is established beyond reasonable doubt no less than it is his duty to acquit the accused when such guilt is not established.²⁶

Considered as a whole, the prosecution may be true, but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.²⁷

Burden of proof.—The burden of proof is on the prosecution to prove the prisoner's guilt beyond reasonable doubt.²⁸

The same standard of proof cannot be insisted while appreciation of evidence offered in defence.²⁹

The argument is hackneyed one that when one part of a witness's evidence is disbelieved it is unsafe to act on the rest of his testimony.³⁰

19. *Budh Singh*, (1879) 2 A 101 (103).

20. *Dasarathi Mahapatra v. Raghusahu*, (1908) 36 C 156 (159); see *Manaruddi*, (1908) 35 C 718 and *Ramlal Singh v. Haricharan Ahir*, (1909) 37 C 194 (196).

21. *Ramlal Singh v. Hari Charan Ahir*, (1909) 37 C 194. See *Arfan Ali*, 44 C 66 : 20 CWN 1270.

22. *State of M.P. v. Babulal*, A 1958 MP 55 : 1958 Cr LJ 190.

23. *H. P. Durgappa v. State of Mysore*, A 1956 Mys 40-1956 Cr LJ 630.

24. Per Holryod J. in *Sarah Hobon's case* 1 Lewis CC 261; *Tarit Kanti Biswas*, 45 C 169 : 19 Cr LJ 530 (SB).

25. *Parshadi*, A 1955 A 443 (461).

26. *Harbans Singh v. State of Punjab*, A 1962 SC 439 (case under Section 417).

27. *Sarwan Singh Ratan Singh v. State of Punjab*, A 1957 SC 637 : 1957 Cr LJ 899.

28. *In re Doraiswamy*, 1953 MWN 923; *Major Wauchope*, 38 CWN 178; *Lachman Singh*, A 1933 Oudh 281; *Maharaj Bun*, A 1952 A 473 : 1952 Cr LJ 792; *Ramanand*, 55 CWN 572; *Gurumurthy Patro*, A 1946 P. 149; *Ram Kela*, A 1946 A 191; *S. Pichai Pillai*, A 1946 M 289; *Panchu Kurmi*, A 1956 C 268; *Mohurthi Prasad*, A 1952 C 127.

29. *Panchu Kurmi*, A 1956 C 268 : 1956 Cr LJ 743.

30. *Sukha v. State of Rajasthan*, A 1956 SC 513 : 1956 Cr LJ 923; *Bishambhar Rishi*, 48 Cr LJ 778.

In India at least the principle '*Falsus in Uno Falsus in omnibus*' has long been exploded, because the witnesses in law Courts almost always add finishing touches to their evidence.³¹

Where the facts proved beyond doubt, or admitted, indicate that some sort of occurrence must have taken place, there is no rule of law preventing a Judge from arriving at a theory of actual happenings, if this can be fairly done on all the evidence. But this is not permissible when the prosecution story is bound to be false in its fundamental aspects. The above legal principle follows from a number of cases, notably the cases of Worlington (1935) AC 462.³²

10. Strong suspicion.—If the proof adduced tends to strong suspicion but falls short of the requisite standard the Court is entitled to give at least benefit of doubt.³³

Suspicion however strong is not sufficient to warrant a conviction.³⁴ In a criminal case, mere suspicion however strong cannot take the place of proof.³⁵

11. Benefit of doubt.—Is not a formula for shirking the task of Magistrates to grapple with the facts and give definite conclusions of their own. Benefit of reasonable doubt must be given to accused.³⁶ Where it is doubtful whether all of the accused were guilty, every one of them must get the benefit of doubt.³⁷

Where the High Court gave one of the accused benefit of doubt and the positive evidence against the co-accused was not stronger than or different from the evidence against the accused acquitted, the Supreme Court acquitted the co-accused but stated that the observations could not be taken as laying down any rule of universal application.³⁸ The Court can proceed on evidence given on oath and not on the statement made in a letter.³⁹ Even if the eye witnesses try to improve their evidence, discarding the embellishments, the evidence can be relied on.⁴⁰ F. I. R. cannot be treated as substantive evidence. It corroborates and contradicts the informant only.⁴¹

Simply because the first information report contains a brief statement of facts it cannot be said that the evidence of the witness is to be discredited.⁴² The suspicious delays that occur as regards important steps in the course of investigation renders it unsafe to hold that the case of the prosecution has been proved beyond reasonable doubt.⁴³

12. Partisan or relation witnesses.—Though in appreciating evidence Court always considers the evidence of interested witnesses with caution,

31. *Ramlal Singh*, A 1958 MP 380 : 1958 Cr LJ 1402.

32. *Chotan Mahto*, A 1959 P 362 (363)—See cases referred to.

33. *Krishnabiharilal*, A 1956 MB 86 *In re Kuruva Nagamma*, A 1941 M 870 : 43 Cr LJ 596 ; *Jainlal*, A 1943 P. 82 ; *Ramanand*, 55 GWN 572 ; *Surajmal*, A 1953 MB 249 : 1953 Cr LJ 1764.

34. *Arulan Isreal*, A 1955 TC 6 : 1955 Cr LJ 122.

35. *Sarwan Singh v. State of Punjab*, A 1957 SC 637 ; 1957 Cr LJ 1014.

36. *Arunugan Solathirayar v. Ponnalogu Penderar*, A 1958 M 127.

37. *Para Kinkar*, A 1955 Tripura 19 : 1955

Gr LJ 292 ; *Soli Sheikh*, A 1931 C 752 : 33 Cr LJ 85 ; *Binda*, A 1934 Oudh 485.

38. *Mohinder Singh v. State of Punjab*, A 1955 SC 762 : 1955 Cr LJ 1542.

39. *Ramjanam Singh v. State of Bihar*, A 1956 SC 643 : 1956 Cr LJ 1254.

40. *Ula Panam*, A 1955 TC 104 : 1955 Cr LJ 852.

41. *Nisar Ali v. State of U.P.*, A 1957 SC 366 ; *Kartar Singh*, A 1958 A 90 : 1958 Cr LJ 129.

42. *Ram Sakal Koeri*, A 1955 P 288 : 1955 Cr LJ 979.

43. *Santa Singh v. State of Punjab*, A 1956 SC 526 : 1956 Cr LJ 930.

but it would be unreasonable to discard the evidence only on that ground when the probabilities of the case, the subsequent conduct of the villagers, the report made, all indicate that the story deposed to must be substantially true.⁴⁴

In cases of factious fights a high degree of certainty is required.⁴⁵ The Court is justified in discarding the evidence of prosecution witnesses who were not truthful witnesses besides being inimically disposed towards the accused.⁴⁶ The statements of relation witnesses are not to be discarded unless either due to inherent ring of falsehood by them or other considerations which detracted from the value of their statements.⁴⁷ Mere relationship is no ground for rejecting the testimony of a witness.⁴⁸

The proposition that when the eye-witnesses to the occurrence were interested persons there should be corroborations of their evidence by independent witnesses cannot be of universal application.⁴⁹

13. Chance Witness.—A chance witness is a witness who should not normally be where he happens to have been. From this point of view one may be a chance witness even at his own house, if for instance he should have been at one's own office.⁵⁰

14. Evidence of Identification.—Failure to hold an identification parade does not make inadmissible the evidence of identification in Court. The weight to be attached to such identification is a matter for the courts official and it is not for the Supreme Court to reassess the evidence unless exceptional grounds are established necessitating such a course.⁵¹

15. Defence Evidence.—The point that the Courts have to consider is not whether the defence put forth by the accused was proved but whether the prosecution has discharged its initial burden⁵². The Magistrate is not right in insisting on the same standard of proof in judging the evidence offered in defence as it applies to the case for the prosecution.⁵³

When an accused has offered reasonable explanations of his conduct, then even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.⁵⁴

16. Plea of alibi.—Where the plea was not based on the mere oral testimony of witnesses but there are documents to substantiate the fact that the plea was not raised at the early stage will not matter.⁵⁵

17. Plea of Private defence.—The onus is on the accused to establish it.⁵⁶

44. *Kanu Dharna Patil*, A 1955 B 390: 1955 Cr LJ 1333; *Madan Mohan*, A 1956 Or 171: 1956 Cr LJ 1083.

45. *Vengala Reddy*, In re A 1956 A P 26: 1956 Cr LJ 31.

46. *Ramshankar Singh v. State of U. P.*, 1956 S C A 591: A 1956 SC 441: 1956 Cr LJ 822; *Ramratan*, A 1956 Raj 196: 1956 Cr LJ 1432.

47. *Dar Singh Gharia Bhilala*, A 1955 MB 25: 1955 Cr LJ 279; *Bijay Singh Dangal Singh*, A 1956 MB 170.

48. *State of Punjab v. S. S. Singh*, A 1960 SC 493; *Dalip Singh v. The State of Punjab*, A 1955 SC 364 'murder case.'

49. *Mangal Singh v. State of M. B.*, A 1957 SC 199: 1957 Cr LJ 325.

50. *Sunder*, (1958) ALJ 19.

51. *Kampta Prasad v. Delhi Administration*, A 1958 SC 350: 1958 Cr LJ 698.

52. *P. Dasagappa*, A 1956 Mys 40: 1956 Cr LJ 630.

53. *Panchu Kurmi*, A 1956 C 268: 1956 Cr LJ 743: 58 CWN 279. *Woolmington*, 1935 AC 462.

54. *Aher Rajakhima v. State of Saurashtra*, A 1956 SC 217: 1956 Cr LJ 426.

55. *Anna*, A 1956 Hyd 99.

56. A 1960 Mys 294: (1960) ALJ 136.

A failure to take up an express plea of private defence cannot preclude the accused from making out such a defence on the basis of the prosecution evidence itself.⁵⁷

18. Plea of Insanity.—The burden is discharged if the defence establishes facts and circumstances which might lead to a reasonable inference that at the time of commission of the offence the accused was of unsound mind, the unsoundness of mind being of the nature or extent mentioned in S. 84 I. P. C.⁵⁸

19. Plea of accident.—If the accused pleads an exception within the meaning of S. 80, Penal Code there is a presumption against him and the burden to rebut that presumption lies on him.⁵⁹

20. Absconding of Accused.—The fact that the accused was absconding for about four months is a very strong circumstance.⁶⁰

21. Medical Evidence.—In the case of death by drowning, asphyxia is a common cause in a majority of cases. In the instant case upon medical evidence it could not be definitely established that the injuries are *ante mortem*.⁶¹ The Court should call upon the medical witness to explain whether or not the weapon alleged to have been used caused the injury.⁶²

22. Circumstantial Evidence.—Must point inevitably to the conclusion that it was the accused and accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.⁶³ It is well-settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt.⁶⁴ There are two important factors in every criminal trial that weigh heavily in favour of an accused person, one is that the accused is entitled to the benefit of every reasonable doubt and the other, that when an accused offers a reasonable explanation of his conduct, even though he cannot prove his assertions, they should ordinarily be accepted unless the circumstances indicate that they are false.⁶⁵

Incriminating statements made to a police officer are hit by Ss. 25 and 26 of the Evidence Act. The statement that the axe is one with which the murder had been committed is not a statement which leads to any discovery within the meaning of S. 27 of the Evidence Act. It is, therefore, wrong to admit such statement where the chain of circumstantial evidence was incomplete as in the instant case the conviction of the accused for murder of his uncle deserved to be set aside.^{65a}

57. *Ghommdn*, Z 1958 Ker 74 : 1958 Cr LJ 509 ; *Veesana Nandan*, (1912) MWN 404 ; *Upendra Nath Das*, 19 CWN 658 (FB) ; 16 Cr LJ 561 ; *Afizuddi*, 23 CWN 833.

58. A 1961 P 355 ; 1961 (2) Cr LJ 357 ; *R. v. Podri*, (1959) 3 All ER 418 (429).

59. *Sarju Prasad*, A 1959 P 66 ; 1959 Cr LJ 226.

60. *K.M. Nanavati*, (1962) SCA 434.

61. *Adi Bhumiani*, A 1957 Or 216 : 1957 Cr LJ 1152.

62. *Tahsildar Singh*, A 1958 A 255 see *Santa Singh v. State of Punjab*, A 1956 SC 526 : 1956 Cr LJ 930.

63. *Eradu v. State of Hyderabad*, A 1956 SC 316 ; *Deonandan Mishra v. The State of Bihar*, A 1955 SC 801 ; *Mohinder*, A 1955 SC 792 ; *Dabnu*, A 1957 HP 52 ; *Makaray Seethu*, A 1955 Mys 27.

64. *Hnumant v. State of Madhya Pradesh*, A 1952 SC 343 (345-346)—*Bhagat Ram v. State of Punjab*, A 1954 SC 621 : 1954 Cr LJ 1645 ; *Govinda Reddy v. State of Mysore*, A 1960 SC 29 ; 1960 Cr LJ 137 ; *In re Shivana*, A 1955 Mys 17 ; *Jagmohan*, A 1947 A 99 ; 48 Cr LJ 829 ; *Sher Mohd.*, A 1945 L 27, *Hujrumull*, 8 CWN 278 FB, *Hemchandra Halder*, 38 CWN 582 ; *Jahura Bibi*, 35 CWN 169 ; *M. Ata Md. Khan*, A 1950 L 199 (FB) ; *Ratanlal*, A 1949 A 222 ; *Shankar Prasad*, A 1952 A 776.

65. *Aher Raja v. State of Saurashtra*, A 1956 SC 217 ; 1956 Cr LJ 426.

65a. *Prabash v. State of Uttar Pradesh*, A 1963 SC 1113 : 1962 ALJ 1097 following *Kottaya* 74 I A 65 : A 1947 PC 67 and *Deoman Upadhaya*, 1961-1 SCR 14 A 1960 SC 1125.

23. Investigation—Actions of Police Officer—Presumption.—The presumption that a person acts honestly applies as much to a police officer as of other persons and it is not a judicial approach to distrust and suspect him without good grounds therefor.⁶⁵ It would be open to the trial Court to accept the police evidence and convict the accused if it is of a satisfactory character.⁶⁶

A statement of a witness recorded under S. 164 can not be equated with the testimony of witnesses.^{66a}

24. Personal knowledge by Judges or Magistrates.—Should not be allowed to be used in judging the truth of a case. He should proceed on the evidence.⁶⁷

25. Sub-section (2) “It shall specify the offence..... sentenced”.—The judgment should specify the offence and the punishment follows on conviction. A Sessions Judge has no power to alter or set aside a conviction and sentence once made and signed by him,⁶⁸ but the sentence can be altered either on appeal or reference or revision. While awarding sentence the offences which the accused are found guilty of and all the sections of the Penal Code must be recorded,⁶⁹ and in cases of number of accused charged under various sections of the Penal Code, a combined sentence is illegal.⁷⁰ A Magistrate need not use the terms of a section in recording a finding.⁷¹

26. Sub-section (3)—Judgment in the alternative.—An alternative finding under S. 381 of the Code of 1861 (XXV of 1861) should not be resorted to until both the committing Officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the charges, and such a finding cannot be based in a case of giving false evidence upon two statements which are not absolutely contradictory, the one of the other, nor when in one of them the accused gives only hearsay evidence.⁷² When the judgment did not state in express terms that the Court was in doubt as to the question under which of the two sections the offence fell, as required by S. 367, *held* that this was at the most an irregularity and did not vitiate the judgment.⁷³

A Judge should not give in a Criminal case a finding in the alternative.⁷⁴

Provision is made in sub-sec. (3) for judgment in the alternative on account of alternative charges framed under S. 236 or which might have been framed under that section.⁷⁵

See notes to S. 236 *ante*, on the meaning of doubtful offences.

27. Sub-section (4)—Judgment of acquittal—A prisoner is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, and no formal warrant is necessary.⁷⁶ Where the Magistrate acquitted the accused, on a charge of rioting with the common object of taking possession of the complainant's land and assaulting his *durwans*, without coming to a finding on the question of possession,

66. *Kaliganda Malu*, A 1956 Sau 25.

66a. *In re Ratna Reddi*, A 1963 AP 252.

67. *Kunda Sessa Reddy v. Mathyala China Pullaiah*, A 1958 AP 585 : 1958 Cr LJ 1123.

68. *Poran Mal*, (1875) 23 WR (Cr) 49 ; *Kassim Pillai*, A 1952 TC 565 ; 1953 Cr LJ 75.

69. *Subharatnan*, A 1949 M 633.

70. *Brijnandan*, A 1948 A 136 ; 49 Cr LJ 103 ; *P. C. Kashi Ram*, A 1953 A 42 ;

1953 Cr LJ 197.

71. *Teasdale Whigham v. Florence Teasdale*, A 1938 C 623 ; 39 Cr LJ 969.

72. *Bedoo Nashya*, (1869) 12 WR (Cr) 11.

73. 5 PR 1886 ; *Moktarali*, 49 CWN 392 ; A 1945 C 421.

74. *Nilmadhab Patnaik*, A 1955 P 317 ; 1955 Cr LJ 1089.

75. *Moktarali*, 49 CWN 392 ; A 1945 C 421.

76. *Anon*, (1869) 5 MHCR App. ii.

held that the judgment was not a satisfactory one and that the order of acquittal must be set aside and re-trial ordered.⁷⁷

Where a Magistrate by an informal order on the order sheet acquitted the accused without delivering a judgment at all, *held* the procedure was irregular.⁷⁸

28. Sub-section (5).—Has been substituted for the old sub-sec. (5) which required reasons to be stated for imposing the lesser penalty. See notes on commentary under S. 31 *ante*. See *Ananta Kumar's case*.⁷⁹

Murder—Absence of mitigating circumstances, the court has full discretion to award death sentence or lesser sentence.^{79a}

Proviso.—‘in trials by Jury the Judge shall record the heads of the charge to the Jury and need not write a judgment’.—These words were inserted in the Code of 1872.

The words in S. 464 of the Code of 1872 (Act X of 1872) *viz.* that in trials by jury, the “heads” of the Judge’s charge are to be recorded; but these words must be construed reasonably, and must be held to include such a statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the Jury or whether there has been any misdirection in the charge.⁸⁰

“We should observe that as a rule we expect some statement in the record to show that the law has been explained to the jury”.⁸¹ “We are not unmindful of the fact that the law requires only the heads of the charge to be recorded. At the same time, since the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded in an intelligible form and with the sufficient fulness to enable the Appellate Court to satisfy itself that all points of law were clearly explained to the Jury in reference to the facts and the evidence in the case”.⁸² The heads of the charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury.⁸³

Sub-section (6).—Orders under S. 118 or S. 123 (3) must be self-contained and show that evidence against each of the accused has been considered individually.⁸⁴

29. Judgment should contain a finding against each individual accused when there are several accused.—Where several persons are charged with an offence, the judgment of the Court should contain a discussion of the evidence as against each accused.⁸⁵

30. Court has no jurisdiction to alter or review its order after

77. *Surendra Nath Singha v. Janaki Nath Ghose*, (1925) 53 C (471).

78. *Dhonda Kandoo*, A 1933 A 669; 34 Cr LJ 1036.

79. A 1962 C 428—See cases referred to.

79a. *In re Amalla Kuleswara Rao*, A 1963 AP 249.

80. *Kasim Shaikh*, (1875) 23 WR (Cr) 32 followed in *In re Sambhulal* (1908) 10 Bom LR 565 (566); *Abbas Peada*, (1893) 25 C 736 (738); 2 CWN 484 (486) see *Ikramuddin*, (1917) 39 A 348; 15 ALJ 205; 18 Cr LJ 491.

81. *Biru Mandal*, (1897) 25 C 561 (563).

82. *Panchu Das*, (1907) 34 C 698 (703,

704).

83. *Fanindra Nath Banerjee*, (1908) 36 C 281 referring to circular orders of the Calcutta High Court Ch. I ord. 59.

84. *Ghanasam*, A 1937 S 26.

85. *Penumetsa Thirumalavaju*, (1917) 19 Cr LJ 248; 44 IC 40 following *In re Ramaswamy Naidu*, 16 Cr LJ 809; 31 IC 825; *Arindra Rajbanshi*, (1916) 20 CWN 1296; 18 Cr LJ 294; *Jamait Mullick*, (1907) 35 C 138; *Kalu Mirza*, (1909) 37 C 91; *Punjan*, A 1943 P 417; *Inatullah*, A 1924 C 618; *Madho*, 41 Cr LJ 725.

the judgment is signed.—A Magistrate has no power to alter or review the order once passed by him.⁸⁶

See commentary on S. 369.

Judgment cannot be supplemented by explanation except in the case of orders passed by Presidency Magistrates, where they are specially empowered under S. 441 to submit reasons to be considered by the High Court.

It is well established that the judgment cannot be supplemented by explanation.⁸⁷

31. Judgment of an Appellate Court.—See S. 424 *infra* and Commentary on that section.

There are no definite rules as to what the judgment of a High Court acting in its appellate as well as revisional jurisdiction should contain because the judgment is final and does not therefore require the statements of reason especially in a revision application where the parties are not bound to be heard.⁸⁸ It is well-settled that the appellate judgment must be quite independent and stand by itself without being supplementary to the judgment of the trial Court.⁸⁹

32. This section does not apply to a summary dismissal or an appeal under S. 421 *infra*.—An appellate Court in rejecting an appeal under the provisions of S. 421 need not give its reasons for the decision.⁹⁰

A full bench of the Allahabad High Court held:—“We do not say that it is necessary to write a judgment in the form prescribed by S. 367 of the Code of 1882 or anything like. We only say that we think it is advisable for those Courts whose orders may be challenged by application in revision to record something which may be a guide for the Court acting in revision”.⁹¹

The Patna High Court, however, has held that in dismissing an appeal under S. 421 it must record an order giving reasons for the dismissal and showing that the points raised were duly considered by it.⁹²

But it has been held in a case where the Sessions Judge did not dismiss the appeal under S. 421 but recorded the order thus:—“No one appears to argue the appeal. I have read the record myself and think the conviction is right. Appeal dismissed,” that the order did not comply with the provisions of S. 367. If no one appeared to argue the appeal, the Judge should have read the evidence and considered it and disposed of the appeal by writing a judgment in accordance with the provisions of S. 367.⁹³

Expunging Remarks.—The High Court has inherent jurisdiction to expunge passages or remarks made by the Subordinate Court, the test to be adopted is whether they are either irrelevant or inadmissible or not warranted by the evidence.⁹⁴ In the absence of a person before the Court, it is fundamental that any prejudicial remark against him should be scrupulously

86. *Parbati Charan Roy v. Sajjed Ahmed Chowdhury*, (1908) 35 C 350 : 12 CWN 605 : 7 Cr LJ 401 ; *In re Harilal Buch*, (1897) 22 B 949 followed in *T. Narasinga Rao*, (1918) 16 Cr LJ 584 : 30 IC 136.

87. *Jura Khan Singh*, (1907) 7 CLJ 238 : 7 Cr LJ 312 ; *Abhoy Chandra Das v. G. Fuller*, (1898) 2 CWN 289 : 25 C 625.

88. *Mahendra Pal Singh*, A 1959 A 313 ; 1959 Cr LJ 541 ; *J. S. Chopra v. State of Bombay*, A 1955 SC 633 ; 1960 Cr LJ 1333.

89. *Prabha Karan Nair*, ; A 1960 Ker 314 ; *Bhola Nath Mallick*, 7 CWN 30 ; *Jasail*,

35 C 138 ; *Rajani*, 45 CWN 794 ; *Shankar*, A 1926 A 318 ; *Md. Hussain*, A 1945 M 118.

90. *Rash Behari Das v. Balgopal Singh*, (1893) 21 C 92 (96) ; *Kundan*, (1914) 36 A 496, following *Waru Bai*, (1895) 20 B 540.

91. *Nannhu*, (1895) 17 A 241 (FB) at p. (243), *Kundan*, (1914) 36 A 496 : 12 ALJ 850 : 15 Cr LJ 512.

92. *Gobind Behari*, (1920) 2 PLT 10 : 22 Cr LJ 321 : 61 IC 49.

93. *Noni Sheikh*, (1907) 11 CWN cxxxiv.

94. *Rangachari*, 1955 Andh WR 374 ; *Sardar Lal Singh*, A 1959 Punj 211.

avoided, unless the remarks are absolutely justified on the materials placed before the Court.⁹⁵ Wholesale condemnation of leading townsmen and Police based on mere gossip or the Magistrate's own imagination are highly objectionable.⁹⁶ A full bench of the Bombay High Court has held that the High Court has no inherent powers to expunge remarks from a judgment but can only observe that the Magistrate should not have made these observations.⁹⁷

368. Sentence of death.—(1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) *Omitted.*

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
| | 3. Sentenced to death. |

1. Corresponding sections in former Codes.—Sub-section (1) corresponds to Ss. 50, 51 and 53 of the Code of 1861 and S. 321 of the Code of 1872 and sub-sec. (2) to S. 319 of the Code of 1872 and the section is similarly worded as in the Code of 1882.

2. Legislative Changes (1955).—Sub-section (?) which related to place of transportation for life has been omitted by Act 26 of 1955.

3. 'Sentenced to death'.—See Chapter XXVII, Ss. 375-379. See Sch. V. Form No. XXXIV for 'warrant of commitment under sentence of death', and Form No. XXXV, for 'Warrant of Execution on a Sentence of Death.'

369. Court not to alter judgment.—Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court by the Letters Patent or other instrument constituting such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 7. Ss. 369 and 561A. |
| 2. Legislative Changes. | 8. 'Signed its judgment'. |
| 3. Statement of Objects and Reasons. | 9. 'Alter'. |
| 4. Report of the Select Committee. | 10. 'Clerical error.' |
| 5. Scope. | —Procedure if court desires to correct the error. |
| 6. Summary dismissal of revisional application. | 11. Dismissal for default |
| | —right to restore. |

1. Corresponding sections in former Codes.—This section corresponds to S. 464, paragraph 1 of the Code of 1872 and in the Code of 1898 before it was amended the section was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words "save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court" had been substituted by S. 101 of the Amending Act

95. *Ajoy Kumar Mukherjee*, A 1959 Ass 8 ; 1959 Cr LJ 27 ; *Lakshman Rao, In re* ; A 1940 M 134.

96. *Brijlal*, A 1942 L 232 ; 43 Cr LJ

808.

97. *State v. Nilkantha Srind Bhawe*, A 1954 B 65 (FB).

(XVIII of 1923) for the words: "No Court other than a High Court." The words and figures "as provided in Ss. 365 and 484 or" were omitted by S. 101 of the said Amending Act.

3. Statement of Objects and Reasons.—"In view of the cases reported in 7 A 672, 10 B 176 (F B), and 14 Cal 42 (F B) it is proposed to make it clear that S. 369 confers no power on the High Court to alter or review its own judgment after it has been signed."

4. Report of the Select Committee.—"The proposal to repeal the words 'other than a High Court' was intended to remove the possibility of reading S. 369 as if it gave High Courts unlimited powers of altering or reviewing their judgments. But there are cases other than those referred to in Ss. 395 and 484 in which a review of judgment is possible. We would refer to S. 434 and also to cl. 26 of the Letters Patent of the Presidency High Courts. The Indian Legislature has power to amend the Letters Patent in this respect. We have, therefore, re-drafted the amendment so as to provide that no Court shall alter or review its judgment as provided by or under any law for the time being in force, or, in the case of a High Court, in its Letters Patent."

5. Scope.—The finality embodied in S. 369 is only in relation to the Court which pronounces the judgment, for it forbids the Court after it has signed its judgment to alter or review the same, S. 369 being subject to the other provisions of the Code must be read subject to S. 430, the role of finality embodied in S. 369 cannot affect cases provided for in Ch. 32; S. 439 (6) is not therefore controlled by S. 369 on the contrary S. 439 (6) must be read as controlling S. 439.⁹⁸ Judgment within the meaning of S. 369 is final decision of the Court intimated to the parties and the world at large by pronouncement and delivery. An undelivered judgment is not operative and can be changed.⁹⁹

S. 369 does not apply to decisions or orders passed by the High Court in its revisional jurisdiction, S. 430 also does not apply to decisions or orders in revision by the High Court under Ch. 32; the High Court can in appropriation cases restore a Criminal application in revision dismissed for default.¹

Where revision application is dismissed for default of appearance, the High Court can revise its order if necessary to serve ends of justice.^{1a}

6. Summary dismissal of revisional application.—When a petition in revision is dismissed summarily after hearing the Advocate for the petitioner, it is final and not subject to review or alteration by the same High Court.^{1b}

It can not be said that the judgment delivered by the High Court orally in open court can be reviewed although not signed. The inherent powers under S. 561-A do not authorise the court to rehear a case where the appellant or his Counsel are not heard for their own fault.^{1c}

7. Ss. 369 and 561A.—*Whether High Court competent to alter or review criminal judgment passed by itself.*—There is no conflict between Ss. 369 and 561-A. The High Court has no power to alter or review its own judgment

98. *U. J. S. Chopra v. State of Bombay*, (1955) SCJ 603; A 1955 SC 633; 1955 Cr LJ 1410; *Janardhan Reddy v. The State of Hyderabad*, A 1951 SC 217.

99. *Surendra Nath Singh v. State of U. P.*; A 1954 SC 194 followed in *Raghubans Prasad*, A 1961 P 397 (order of discharge is not judgment and can be reviewed); *Dwarka Nath Mondal*, 28 C

652 FB *Mir Ahmed Hussain*, 29 C 726 FB.

1. *Ramanter Thakur*; A 1957 P 33; 1957 Cr LJ 82; *Keshab Lal v. Gaveria*, A 1952 Raj 50; 1952 Cr LJ 593.

1a. *Mallick*, A 1963 Mys 191.

1b. *Nandar Sindhi*, A 1958 Or 20.

1c. *Dhanna*, A 1963 Raj 104.

in a criminal case, once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error.²

8. 'Signed its judgment'.—This rule is inoperative. Stuart, C. J., in *Chattar Sing*³ observed on the impropriety of a judicial officer adding a "note" to his judgment in a criminal case impugning the correctness of the conclusion he had arrived at on the evidence in such case.³

9. 'Alter.'—A Magistrate may order costs to be paid under S. 148 (3) subsequently and such latter order is not an alteration or review of his judgment in the original case within the meaning of S. 369.⁴ It has been held in *Rajjab's* case⁵ that the High Court may review where a case has been disposed of merely for default of appearance.

High Court has no jurisdiction to alter its judgment except to correct a clerical error.⁶ A full bench of the Allahabad High Court has held that the High Court can revise its order for the purpose of preventing abuse of the process of any Court.⁷ Interlocutory order is not affected by S. 369.⁸

10. 'Clerical error.'—*i. e.* mistake in copying the judgment or order.

A clerical error is an error which can be explained only by considering it as a slip or mistake.⁹

It the following cases¹⁰ it was held under the unamended Code that even the High Court had no power to review its own judgment, and it was held in *Poran* and other cases¹¹ that the *Sessions Judge* had no such powers, and in *Poran*¹² that the *District Magistrate* could not review his own judgment.

See however the *Statement of Objects and Reasons* quoted ante.

In *Nand Narain Newar's* case¹³ it was however held that no Court other than a High Court, when it had signed its judgment should alter or review the same except as provided in certain sections or to correct clerical errors.

What is the procedure if the Court desires to correct the error?—It was suggested in *Gobinda Sahai's* case¹⁴ that the petitioner can apply to the Judge who passed the order before the order had been sealed. But where the order is signed and sealed the only way is to submit the proceedings to the High Court.¹⁵ Another view is to move the Local Government by reference under Chapter XXIX of the Code.¹⁶

11. Dismissal for default—Right to restore.—The Madras High Court in *Kunhamdi Haji*¹⁷ held that the Court may rehear a criminal appeal

2. *Raju*, (1928) 10 L 1; *Nachinathu, In re*; A 1958 M 452; 1958 Cr LJ 1197; *Banwari Lal*, 57 A 807; A 1935 A 466; *Dahu Raut*, 61 C 155; 34 Cr LJ 1100; *Ganapat*, A 1931 N 169.

3. 2 A 33.

4. *Nafar Chandra Pal Chowdhury v. Siddhartha Krishna Majumdar*, (1920) 47 C 974.

5. 46 C 60.

6. *Kalipada Jana v. Sarbeshwar Panda*, A 1958 C 568; 1958 Cr LJ 1312.

7. *Raj Narain*, A 1959 A 315 (FB).

8. ILR (1948) IC 407 (410).

9. *Bangara Reddy*, A 1959 AP 95.

10. *Fox*, 10 B 176 (FB); *Gibbons*, 14 C 42

FB; *Durga* 7 A 672; *Gobind Sahai*, 38 A 134; 14 ALJ 61; *Kalu*, 45 A 143; *Rajjab Ali*, 46 C 60; 20 Cr LJ 265; *Nand Kishore Lal*, 20 Cr LJ 447 (P).

11. 23 WR (Cr) 49; *Mari Parsu*, 42 B 202; 20 Bom LR 87; 19 Cr LJ 279; *Ganesh*, 23 B 50.

12. 23 WR (Cr) 49.

13. 21 CWN 344.

14. 38 A 134.

15. *In re Dhondi Nathaji Raut*, 23 Bom LR 346; 22 Cr LJ 608; 62 IC 880; *Hiralal Buch*, 22 B 949 (958); *Poran*, 23 WR (Cr) 49.

16. *Kalu*, 45 A 143.

17. 46 M 382; 24 Cr LJ 439.

or petition dismissed for default as there is no decision on the merits, although in *Kanakasabbai*¹⁸ and *Ranga Row*¹⁹ it held a contrary view.

370. Presidency Magistrate's judgment.—Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars :—

- (a) the serial number of the case ;
- (b) the date of the commission of the offence ;
- (c) the name of the complainant (if any) ;
- (d) the name of the accused person, and his parentage and residence ;
- (e) the offence complained of or proved ;
- (f) the plea of the accused and his examination (if any) ;
- (g) the final order ;
- (h) the date of such order ; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Cl. (f). |
| 2. Particulars in Cls. (a) to (g). | 3. Cl. (i). |
| | 4. Revision. |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 114 and 126 of Act IV of 1877 and is the same as that of the Code of 1882.

See S. 263 for summary trials, S. 362 for Record of Evidence in Presidency Magistrate's Courts, S. 441 which allows a Presidency Magistrate to supplement his judgment by setting forth the grounds of his decision while submitting an explanation to the High Court and S. 537(a) as to irregularities in judgments or orders.

2. Particulars in Cls. (a) to (g).—Where out of the various particulars required to be recorded in the usual way on the printed form provided for the purpose, all the important items of these particulars were recorded, held the omission to record other particulars is an irregularity.²⁰ The duty of the Presidency Magistrate is to keep records properly.²¹

Cl. (f).—There is no rule how the column should be filled. So the entry 'denies' made in that column is sufficient, if at the time the plea was taken, the accused merely denied having committed the offence.²² A mere note 'examined under S. 342' is not a sufficient compliance with the section.²³ The substance of the examination of the accused which is to be recorded under

18. (1915) MWN 786 : 16 Cr LJ 697.

19. 23 MLJ 371 : (1912) MWN 982 : 13 Cr LJ 710.

20. *Bishnupada Deb*, 30 GWN 981 : 27 Cr LJ 1131.

21. *Shamlal*, 36 CWN 852 : 33 Cr LJ 729 ;

Manmohan Panday v. Corporation of Calcutta, 35 CWN 868 ; 33 Cr LJ 264.

22. *Sadagar Chaudhuri*, 56 C 1067 ; 30 Cr LJ 526.

23. *Kanchan*, 48 Cr LJ 790.

S. 342(2) is to be embodied in the judgment and the judgment is to be recorded in the form prescribed under this section.²⁴ Where the trial Magistrate examined the accused under S. 342 but did not record the substance of his examination and plea, the order was set aside.²⁵

3. Cl. (i)—‘A brief statement of the reasons for the conviction’.—The meaning of S. 370, Cl. (i) of Act X of 1882 is that where the offence found is sufficiently grave to involve a fine of Rs. 200/- or imprisonment for the substantive offence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly,²⁶ and although the Magistrate should state the reasons for conviction in such a manner that the High Court on revision may judge whether there were sufficient materials before him to support the conviction, the brevity should not be such as to tend to obscurity.²⁷

In deciding a criminal case, a Presidency Magistrate remarked : “I convict the accused. I believe the evidence of the complainant and the witnesses for the prosecution”. Held that the above judgment did not satisfy the requirements of S. 370 Cl. (i) of the Cr. P. Code, under which there should be a statement of the reasons which induced the Magistrate to believe the evidence for the prosecution.²⁸

Merely recording the evidence and saying that the case is proved, will not constitute compliance with this section.²⁹

Absence of reasons for finding the accused guilty vitiates conviction.³⁰ In an order of acquittal the Magistrate need not give reasons. The mere fact that the statement of reason was extremely brief is not sufficient to justify interference with acquittal. If the Presidency Magistrate writes no judgment at all, where he inflicts a fine of less than Rs. 200/- that would be a good argument, but if he writes a judgment in such a case, he must record proper findings which go to constitute the offence.³¹

4. Revision.—When the High Court in revision has sent for the Records in a case where S. 370(1) has not been complied with, the Magistrate can submit a report under S. 441 and remedy the defect in the Original order by giving brief reasons.³²

371. Copy of judgment, etc., to be given to accused on application.—(1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

24. *Vithal Tulsiram*, A 1956 B 123.

25. *Ismail Sha*, A 1926 C 692 ; 27 Cr LJ 116.

26. *Moturam v. Balaseeram*, (1886) 14 C 174; *Shidganda*, (1893) 18 B 97.

27. *Mukundi Lal*, 21 A 189 : (1899) A WN 34 ; *Emaman*, (1904) 31 C 983 : 8 CWN 839 ; *Yacoob v. Adamson*, (1886) 13 C 272 ; *Panjab Singh*, (1881) 6 C 579 ; *Dervish Hossain*, (1922) 46 M 185 ; *In re Varadavajulu Pillai*, 23 Cr LJ 602 (M).

28. *Shanker Ramdas*, (1915) 17 Bom. LR 890 : 16 Cr LJ 771 : 31 IC 371 ; *Dashinamurthi, In re* : A 1942 M 603 ; 43 Cr LJ 859.

29. *Shamlal*, 36 CWN 852 ; A 1932 C 655.

30. *Commercial Bureau*, A 1948 C I ; 48 Cr LJ 552.

31. *Nishi Kanta Chatterji v. Behari Kahar*, 60 C 636 : 34 Cr LJ 1059.

32. *Dashinamurthi, In re* ; A 1942 M 603 : 43 Cr LJ 859.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury or, where a transcript of the charge forms part of the record under Section 297, a copy of such transcript shall, on the application of the accused, be given to him without delay and free of cost.

Case of person sentenced to death.—(3) When the accused is sentenced to death by any Court and an appeal lies from such judgment as of right, the Court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

(4) When the accused is sentenced to imprisonment, then, without prejudice to the provisions of sub-section (1) or sub-section (2), a copy of the finding and sentence shall, as soon as may be after the delivery of the judgment, be given to the accused free of cost.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 5. Who are entitled to copies of judgment. |
| 2. Legislative Changes. | 6. No Court-fee to be paid on application for copies of judgment. |
| 3. Effect of Amendment. | 7. Sub-section (3). |
| 4. Scope.
—Copy of judgment to be given to accused on application. | —Limitation for appeal against death sentence. |

1. Corresponding sections in former Codes.—This section corresponds to S. 22 and paragraph 1 of S. 41 of Act XI of 1874 and is the same as in the Code of 1882.

2. Legislative Changes (1955).—Sub-section (4) was added by Act 26 of 1955. The words in sub-sec. (2) 'or where a transcript of the charge forms part of the record under S. 297, a copy of such transcript' were also added by Act 26 of 1955.

3. Effect of Amendment.—Under the old sub-sec. (2) a copy of the charge to the jury was given to the accused on his application free of cost. As there was delay in the Judge signing the written charge after it was prepared and typed, now a copy of the transcript taken in shorthand when it forms part of the Record will be granted to the accused. When the accused is sentenced to imprisonment a copy will be given to the accused free of cost though not applied for, to facilitate the filing of appeal and to ask for bail pending the filing of the appeal.

4. Scope.—Copy of judgment etc. to be given to accused on application.—This section provides that an accused person is entitled to obtain a copy of the judgment and except in summons-cases the copy shall be given to him free of cost upon application. Sub-section (2) provides for granting of copy of heads of charge to the jury in trials by jury free of cost to the accused. Sub-section (3) provides that the Judge shall inform the accused in cases of capital sentence of the period of limitation within which appeals should be filed.

5. Who are entitled to obtain copies of judgments.—Application is necessary. See S. 548 *infra*.

All prosecutors whose charges are dismissed by the Presidency Magistrate are affected by the order of discharge, and are, therefore, entitled under S. 170 of the Presidency Magistrate's Act to obtain copies of the order made by, and of the depositions taken before, the Magistrate.³³

An Advocate against whom remarks have been made by a Court imputing to him misconduct should be furnished with a copy of the written judgment containing those remarks, in order that he may place his own conduct before the particular Court in the light most favourable to himself and with such explanations as he may be able to afford and as may perhaps induce the Court to alter, modify or perhaps even withdraw the opinion expressed adversely to the Advocate's conduct in the particular case.³⁴

S. 371 can only refer to a copy of the judgment of the original Court. Therefore a party aggrieved by the judgment of a High Court in its appellate or revisional jurisdiction is not entitled to a free copy. He is entitled to a copy of such a judgment on payment but S. 548 gives the court enough discretion to grant a copy. Thus a free copy can be granted on the ground of the applicant's poverty.³⁵

6. No Court-fees to be paid on application for copy of judgment.—“In the exercise of the powers conferred by S. 35 of the Court Fees Act (No. VII of 1870), the Governor General in Council is pleased to remit the Court fee on a copy or translation of judgment in a case other than a summons case, and a copy of the heads of the Judge's charge to the Jury when the copy of the translation is given under this section; also on a copy of translation of a judgment in a summons-case when the accused is in jail”—Notification, Government of India, No. 4650 dated 10th September, 1889 (G. I. 1889), Part I, p. 506.

7. Sub-section (3)—Period of limitation for preferring appeal against the order of sentence of death.—Under Art. 150, Sch. II of the Limitation Act (IX of 1908), an appeal against a sentence of death must be filed within 7 days from the date of sentence. In computing the period of limitation for appeals, time spent in obtaining copies must be excluded, *vide* S. 12 of the Limitation Act of 1908.

In all cases in which a person is sentenced to death, the Sessions Judge must explain to the convict that he must file his appeal in the Sessions Court within seven days and the Judge must record whether the convict desires to appeal and that the convict was informed that his appeal must be made within 7 days—N.W.P. Gazette, 1873 p. 101.

The Calcutta High Court by a Circular of 1919 has provided for an accused charged under S. 302 I. P. C. to be defended at the Sessions Court as also before the High Court at the cost of the crown when he is unable to defend himself. The duty of the District Magistrate is to telegraph to Government Pleader if prisoner retains Counsel.³⁶

372. Judgment when to be translated.—The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that

33. *Bank of Bengal v. Dinonath Roy*, (1881) 8 C 166 : 10 CLR 190.

34. *In re Phillip Godinho*, (1904) 6 Bom LR 54.

35. *Anil Kumar Biswas*, A 1954 C 29 : 1953 Cr LJ 1883.

36. Madras Notification, 9th July 1874, p 73.

of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

1. Corresponding sections in former Codes.—This section corresponds to paragraph 3 of S. 464 of the Code of 1872 and is the same as that of the Code of 1882.

373. Court of Session to send copy of finding and sentence to District Magistrate.—In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Madras. |
| 2. State Amendments. | —West Bengal. |
| —Bombay. | 3. Rules and orders. |

1. Corresponding sections in former Codes.—This section corresponds to S. 384 of the Code of 1861 and paragraph 1 of S. 302 of the Code of 1872 and is similarly worded as in the Code of 1882.

2. State Amendments—Bombay.—In the marginal note, the marginal note ‘Copy of finding and sentence to be sent to the District Magistrate or Commissioner of Police’ was substituted and the following proviso was added, namely: ‘Provided that the Court of Session for Greater Bombay shall send such copy to the Commissioner of Police for greater Bombay’ by Bombay Act 32 of 1948.

Madras.—Marginal note substituted as in Bombay Amendment and the following proviso has been added:—

“Provided that the Court of Session for the Presidency-Town of Madras shall send such copy to the Commissioner of Police, *vide* Madras Act 34 of 1955.

West Bengal.—After the words ‘District Magistrate’ the words and commas, ‘or the Chief Presidency Magistrate, as the case may be’ have been inserted by the City Sessions Court Act 1933, *vide* West Bengal Act 20 of 1953.

3. Rules and orders.—In *Bengal*, Sessions Judges are directed to give every facility to Magistrates, and District Superintendents of Police for inspecting the records of cases in their Courts for the preparations of copies by clerks sent by the District Magistrate, care being taken that the records are not removed from the Judge’s office.³⁷ In *Madras* the Magistrate should communicate the finding and sentence to the Superintendent of Police.³⁸ In *Bombay*, the Court of Sessions should at the conclusion of every trial of prisoners committed thereto, communicate the result thereof to the committing authority for his information.³⁹

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374. Sentence of death to be submitted by Court of Session.—When the Court of Session passes sentence of death,

37. Cal. HC Cir. No. 5, Sept. 21, 1880.

38. MHC Proceedings 19th June, 1886.

39. Bombay Gazette, 1879, pp. 471, 475.

the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Trial by Jury—Misdirection. |
| 2. Scope. | 5. Rules and orders. |
| 3. Distinction between Ss. 374 and 375. | 6. Practice. |

1. Corresponding sections in former Codes.—This section corresponds to S. 380 of the Code of 1861 and paragraph 1 of S. 287 of the Code of 1872 and is similarly worded as in the Code of 1882.

For Form of warrant of commitment under sentence of Death—*See* Sch. V. Form No. XXXIV, *see* also S. 31 (2).

2. Scope.—The provisions contained in Chapter XXVII appear to be quite exhaustive ; they constitute a complete Code.⁴⁰

3. Distinction between Ss. 374 and 375.—Where there is a reference to the High Court under S. 374, the entire case is before the High Court and in fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence under S. 375 if it so desires. There is a difference when a reference is made under S. 374 and when disposing of an appeal under S. 423 and that is, the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the material about the guilt or innocence of the accused. It is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials apart from the view expressed by the Sessions Judge.⁴¹

4. Trial by Jury—Misdirection.—In case of a reference under S. 374 it is the duty of the Court to take the entire evidence into account. What has got to be done in cases where inadmissible evidence has been admitted and has been incorporated in the summing up is to exclude the inadmissible evidence and consider whether the balance of evidence remaining thereafter is sufficient to maintain the verdict. In performing its duty under S. 374 the High Court is bound to consider the merits of the case for itself.⁴² The questions of misdirection are of less importance in a case of reference under S. 374, because on a reference the High Court is bound to come to its own conclusion as to the fact or innocence of the accused.⁴³ Where there is an appeal by a convict, the submission under S. 374 becomes unnecessary in the sense that it is decided automatically, but where an appeal has not been filed the convict gets the same advantage that he could have had if he had in fact preferred an appeal.⁴⁴ If it is brought to the notice of the High Court that the Sessions Judge had omitted to send the death reference for confirmation the High Court can deal with it in exercise of its revisional powers.⁴⁵

40. *Chhotka*, A 1958 C 482 : 1958 Cr LJ 1170.

41. *Jumman v. State of Punjab*, A 1957 SC 469 : 1957 Cr LJ 586.

42. *Chhotka*, A 1958 C 482 : 1958 Cr LJ 1170 ; *Panchu Sheikh*, 34 CWN 1154 ; A-1931 C 178 ; *Hazrat Gul Khan*, 32

CWN 345 : A 1928 A 430.

43. *Durgacharan Singh*, 41 CWN 1312 ; 39 Cr LJ 308.

44. *Bashir Ahmed*, A 1951 EP 57 ; 52 Cr LJ 1041 (FB).

45. *Pacho Kewalram*, A 1944 S 83 : 45 Cr LJ 1041 (FB).

5. Rules and orders.—The Sessions Judge should give immediate intimation to the Superintendent of the Jail in which the condemned prisoner is confined, in order that proper precautions may be taken for his safe custody.⁴⁶

The Madras High Court has ordered that, in referring a case to the High Court for confirmation of the sentence of death, the particulars of the evidence together with the Judge's remarks should be embodied in a letter to the Registrar, and that an English translation of the whole of the evidence given at the trial should be submitted.⁴⁷

Sessions Judges should be careful to note in their letter of reference whether the prisoner has signified his intention to appeal.⁴⁸

6. Practice.—It appears to be the practice of the Bombay High Court that where a prisoner has been sentenced to death, even though the conviction was had on the unanimous verdict of a jury, the whole case is reopened before the High Court both on matters of fact as well as on matters of law.⁴⁹ No doubt in a reference under S. 374 the entire case is open to the High Court, but that assumes that whatever has happened before the case comes to the High Court has been done in strict accordance with the provisions of the law, and where the High Court is unable to say that there has been a proper trial before a Judge and a jury, then the only course open is to set aside the conviction and sentence and direct a retrial.⁵⁰ On such reference the High Court must be satisfied that the finding of fact arrived at by the jury is justified by the evidence on the record.⁵¹ Where a case is referred to the High Court under S. 287 of Act X of 1872, the Court is bound, under S. 288 of the same Act, to go into the facts of the case, although the conviction was by the verdict of a jury.⁵²

375. Power to direct further inquiry to be made or additional evidence to be taken.—(1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Power to direct further inquiry to be made or additional evidence to be taken. |
| 2. Legislative Changes (1955). | |
| 3. Scope. | |

46. All. H. Ct. Cir. 3, April 22, 1873.
 47. Pro. Aug. 6, 1864 ; Pro. Aug. 12, 1862.
 48. *Anon*, 7 MHC App. xxi.
 49. *Dajivesara*, (1915) 17 Bom LR 1072 : 16 Cr LJ 818 : 31 IC 994.

50. *Rajab Ali Fakir*, (1927) 31 CWN 881.
 51. *Arshed Ali*, (1924) 30 CWN 166.
 52. *Jaffar Ali*, (1873) 19 WR (Cr) 57 ; *Chatradhari Goala*, (1897) 2 CWN 49.

1. Corresponding sections in former Codes.—This section corresponds to S. 400 of the Code of 1861 and S. 289 of the Code of 1872 and is similarly worded as in the Code of 1882.

2. Legislative Changes (1955).—The words “or assessors” after the words “in the presence of jurors” in sub-sec. (2) have been omitted by Act 26 of 1955.

3. Scope.—This section is an exception to S. 353 which requires evidence to be taken in the presence of accused.

This section is not intended to apply to a case in which there has been an illegality or an error which has occasioned a failure of justice.⁵³

4. Power to direct further inquiry to be made or additional evidence to be taken.—The High Court has power under S. 297 of the Code of 1872, not only to order the accused to be tried, but also, to be committed for trial, if it appears to the High Court that the accused was improperly discharged.⁵⁴

High Court's powers to take additional evidence.—When the accused applies to call for further evidence and his application is refused by the lower Court, but is renewed in the Appellate Court, the accused should be permitted under S. 375 to produce the further evidence.⁵⁵ Negligence on the part of the prosecution can never be a ground for taking additional evidence against accused,⁵⁶ but it can be taken when due to the ineptitude of the lawyers for the accused or lack of vigilance on the part of the Judge.⁵⁷

376. Power of High Court to confirm sentence or annul conviction.—In any case submitted under Section 374, the High Court—

- (a) may confirm the sentence, or pass any other sentence warranted by law, or
- (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or
- (c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

SYNOPSIS

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|---|----------------|
| 1. Corresponding sections in former Codes. | 4. Clause (a). |
| 2. Legislative Changes (1955). | 5. Clause (b). |
| 3. Scope—Power of High Court to confirm sentence or annul conviction. | 6. Clause (c). |
| | 7. Proviso. |

1. Corresponding sections in former Codes.—This section corresponds to S. 399 of the Code of 1861 and S. 288 of the Code of 1872 and is similarly worded as in the Code of 1882.

53. *Hari*, A 1935 S 145 : 36 Cr LJ 1161.

54. *Prosunno Coomar Ghose*, (1873) 19 WR (Cr) 57.

55. *Bhagwan Kuar*, (1911) 16 PWR 1911

(Cr) : 12 Cr LJ 412 : 11 IC 596.

56. *Abdul Muhim Khan*, A 1953 Hyd 145 ; 1953 Cr LJ 785.

57. *Lal Mia*, 47 CWN 336 : 45 Cr LJ 99.

2. Legislative Changes (1955).—The words ‘whether tried with the aid of assessors or by jury’ which occurred after S. 374 have been omitted by Act 26 of 1955.

3. Scope—Power of High Court to confirm sentence or annul conviction.—Although the trial of an accused is by a jury, Ss. 375 and 376, Cr. P. C., show that in a case submitted for confirmation of sentence of death under S. 374, the High Court must deal with the case upon the facts, as well as with reference to any questions of law arising in it, and that its powers are not limited in the way they are in an appeal from a conviction in a trial by jury.⁵⁸ Ss. 376 must be read as conferring upon the High Court the power mentioned in Cls. (a), (b) and (c) of the said section unaffected by the provisions of Ss. 418 and 423 (2); It would therefore make no difference even if the appeal preferred by the accused is technically heard before final orders are passed in the confirmation case.⁵⁹ In a case under S. 374, the questions of misdirection are of less importance but though the High Court is not bound by the verdict of the jury, they will attach greatest possible weight to the verdict of the jury if it answers a reasonable test.⁶⁰ In dealing with confirmation cases the High Court should consider the evidence carefully and record its conclusions clearly after dealing with all the points argued before it by the Counsel for the defence.^{60a} The word ‘any case’ means the whole case and where the accused has been convicted by the jury at the same trial both under Ss. 302 and 404 I. P. C. the ‘whole case’ would mean not merely that part of the case which relates to the sentence under S. 302 but the entire incident.⁶¹

4. Clause—(a) ‘May confirm sentence or pass any other sentence warranted by law’.—In determining whether such sentence should be confirmed, the full court was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction.⁶²

Where the condition of the convict rendered it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one of transportation for life.⁶³ In *Benoyendra Pande’s Case*,⁶⁰ the High Court commuted the death sentence where due to the delay in preparation of paper-book and the intervention of long vacation the accused remained under the sentence for ten months. The Supreme Court in *Bisoo Mahgoo*⁶⁴ advised the High Courts to deal with confirmation cases promptly but held that delay is no ground for commuting the death sentence. It has been held in *Lachman Kewalram’s case*⁶⁵ that in a proper case an inordinate delay should be considered a good ground for commutation but that is a consideration which should be left to the executive. If there is no sufficient evidence to warrant a conviction and there is no chance of further evidence coming to light the High Court will acquit the accused.⁶⁶ The High Court set aside the verdict

58. *Chatradhari Goala*, (1897) 2 CWN 49; *Abdul Razak*, (1894) Rat 710; *Jaffar Ali*, (1873) 19 WR (Cr) 57; *Loung*, (1921) 15 SLR 103; 23 Cr LJ 33 (FB); *Jumman v. State of Punjab*, A 1957 SC 469; *Ram Krishna Mithulal v. State of Bombay*, A 1955 SC 104; *Chotka*, A 1958 C 489; 1958 Cr LJ 1170.

59. *Narayan Ramchandra Jarag*, A 1948 B 244; 49 Cr LJ 348; *Narahari Ganapati Barkar*, A 1946 B 452.

60. *Benoyendra Chandra Pandey*, 40 CWN

432; A 1936 C 73; *Kamaresh Chandra Karmakar*, A 1938 C 220; 39 Cr LJ 541 (2).

60a. *Gurucharan Singh*, A 1963 S C 348.

61. *Kaikhushru Khushetji*, A 1953 A 166; 1953 Cr LJ 660.

62. *Sarmukh Singh* (1879) 2 A 218 (FB).

63. *Boodhoo Jolaha*, (1878) 2 CLR 215.

64. A 1954 SC 714.

65. A 1955 B 373; 1955 Cr LJ 1324.

66. *Ashraf Ali*, 37 CWN 595; 34 Cr LJ 533 (2). (SB).

and acquitted the accused.⁶⁷ The High Court may convict the accused of a minor offence.⁶⁸ The High Court convicted the accused under S. 411 I. P. C. by altering it from one under S. 404 in a case where under S. 302 I. P. C. death sentence was passed.⁶⁹

5. Clause (b)—‘May annul conviction and convict the accused of minor charge’.—

‘Or order a new trial’.—In a case in which the lower Court passed the sentence of death on the accused, the High Court of Calcutta, on reference, ordered a new trial, on the ground that the evidence was incomplete and it was necessary to take further evidence before judgment could be properly pronounced against the accused.^{69a} Under S. 376 (b) Cr. P. Code, the High Court has jurisdiction to order a new trial on the same or an amended charge.⁷⁰ In an appeal, where the High Court is not bound to order a retrial where inadmissible evidence has been admitted in a trial with the aid of a jury or where there are misdirections. The power of the High Court to dispose of the case (by acquitting or convicting the accused) itself without ordering a retrial is not confined to murder-references and appeals.⁷¹

6. Clause (c)—‘May acquit accused’.—The Calcutta High Court on a reference for confirmation of death sentence, refused to convict the accused on the uncorroborated testimony of an accomplice who had previously been convicted of the same offence on her own confession.⁷²

7. Proviso.—Where while dealing with a reference under S. 374 the High Court finds that there is such an error in the charge as would entitle the High Court to reverse the verdict of the jury under S. 423 (2) it is not open to the High Court to look into the evidence in order to confirm the conviction on its own view of the facts.⁷³

377. Confirmation of new sentence to be signed by two Judges.—In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. When such Court consists of two or more Judges. |
| 2. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 401 of the Code of 1861, S. 290 of the Code of 1872 and is similarly worded as in the Code of 1882.

2. Scope.—When in the case of a death sentence, the order of confirmation is only made, passed and signed by one of the two Judges, the peremptory provisions of S. 377 are not complied with.⁷⁴

67. *Arshad*, 30 CWN 166; *Pachu Mondal*, 32 CWN 702.

68. *Hazrat Gul Khan*, 32 CWN 345; A 1928 C 430.

69. *Kaikhushru Khrushetji*, A 1953 B 166; 1953 Cr LJ 660.

69a. *Doulat Kunjra*, (1902) 6 CWN 921.

70. *Mohar Ali Sheikh*, (1915) 19 CWN 556; 21 CLJ 495; 16 Cr LJ 481; 29 IC 321.

71. *Abdul Rahim*, 73 IA 77; A 1946 PC 82; 47 Cr LJ 616. See also *Ram Krishan Mithanlal*, A 1955 SC 104; *Chotka*, A 1958 C 482; 1958 Cr LJ 1170.

72. *Ramsodoy Chuckerbutty*, (1873) 20 WR (Cr) 19.

73. *Naibulla*, 46 CWN 108; A 1942 C 524.

74. *Fakira*, 64 IA 148; A 1937 PC 119; 38 Cr LJ 498.

3. “**When such Court consists of two or more Judges.**”—If in any particular State there is only one Judicial Commissioner as the ultimate appellate authority, and if the confirmation of sentence of death has to be made by him, the procedure laid down must be followed. The fact that there is not a Bench of two Judges as in the High Courts to deal with death sentences is no ground for converting the Supreme Court into an ordinary Court of appeal and confirmation in such matters.⁷⁵ The question was left undecided in.⁷⁶

378. Procedure in case of difference of opinion.—When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Reference to a third Judge. |
| 2. Scope. | 4. Duty of the third Judge. |

1. Corresponding sections in former Codes.—This section corresponds to S. 271-B of the Code of 1872 and is similarly worded as in the Code of 1882.

2. Scope.—This section prescribes the procedure in case of difference of opinion between two Judges of the High Court dealing with a case of capital sentence referred under this chapter (S. 374) and states that the case should be laid before a third Judge to be selected by the Chief Justice and the opinion or decision of the said third Judge shall be final.

3. Reference to a third Judge.—Where the two Judges or the Division Bench differed the whole case was disposed of by a third Judge, who commuted the sentence of death to one of transportation for life on the ground that the capital sentences suspended over the heads of the accused for nearly six months.⁷⁷

4. Duty of the Third Judge.—It is the duty of the third Judge to examine the whole evidence himself and come to a final judgment after giving due consideration and weight to the reasons given by the two judges. Neither S. 378 nor S. 429 contemplates the dice being loaded heavily in favour of either view.⁷⁸ The Supreme Court has held that the sentence should be reduced to transportation when there is difference of opinion in the High Court not only on the question of guilt, but also on the question of sentence, although they did not fetter the discretion of the third Judge in the matter of sentence.⁷⁹

379. Procedure in cases submitted to High Court for confirmation.—In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the

75. *Kalwanti v. State of H. P.*, (1953) SCR 546; A 1953 SC 13.

76. *Pandurang v. State*, A 1955 SC 216.

77. *Autar Singh*, (1913) 17 CWN 1213 : 14 Cr LJ 642. *Dukari*, 33 CWN 1226.

78. *In re : Ravipati Sitaramayya*, A 1953 M 61 : 1953 Cr LJ 245; *In re : Narsiah*, A 1959 AP 313.

79. *Pandurang v. The State of Hyderabad*, A 1955 SC 216.

order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

1. Corresponding sections in former Codes.—This section corresponds to S. 383 of the Code of 1861, S. 301, paragraph 1, of the Code of 1872 and is similarly worded as in the Code of 1882.

380. Procedure in cases submitted by Magistrate not empowered to act under Section 562.—Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by Section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

SYNOPSIS

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| 1. Legislative Changes. | 4. Scope—Procedure in cases submitted |
| 2. State Amendment. | by Magistrate not empowered to act |
| —Bombay. | under S. 562. |
| 3. Report of Select Committee (1898). | |

1. Legislative Changes.—This section was inserted for the first time in the Code of 1898.

2. State Amendment.

Bombay.—The words ‘Sub-Divisional Magistrate’ were deleted by Bombay Act 23 of 1951.

3. Report of Select Committee (1898).—The *Select Committee* on the Code of 1898 observed with reference to this section :—

“We have omitted this clause in the Bill as introduced for reasons already given under S. 31 *ante*. We have substituted a clause providing the procedure to be followed when a Magistrate not empowered under Cl. 562 is of opinion that a first offender should be dealt with under that section.

4. Scope—Procedure in cases submitted by Magistrate not empowered to act under S. 562.—Logically this section should not have been inserted and placed under this chapter which with the exception of this section deals with submission by the Sessions Judge for confirmation of death sentence by the High Court and the decision thereupon and subsequent procedure. The procedure laid down in this section could have very well formed a part of S. 562 or should have been placed immediately after S. 562. Perhaps the Legislature inserted this section under chapter XXVII as the heading of the chapter not being restricted to “confirmation of death sentence” permitted of the insertion of this section as coming under the heading.

A Magistrate to whom proceedings are submitted as provided by S. 562 may pass such sentence or make such order as he might have passed or made if the case had been originally heard by him. He is not prevented from acquitting the accused, if on a perusal of the evidence he comes to the

conclusion that conviction should not have taken place.⁸⁰ Section 349 of the Code of Cr. Procedure does not authorise a bench of Magistrates to refer a case for higher punishment to a District Magistrate or Sub-divisional Magistrate.⁸¹

When an accused person comes before a Magistrate under S. 380, he can be treated only as a convicted person and the Magistrate is not empowered to set aside the conviction already passed.⁸² There is a fundamental difference between the position of the accused persons under S. 562. Under S. 380 the accused persons come before the Superior Magistrate as convicted persons and he has no other option but to proceed under S. 380 and pass sentences upon them.⁸³

It is open to the Sub-Magistrate to sentence some of the accused to imprisonment and refer the remainder for the application of S. 562.⁸⁴ Section 380 empowers the Magistrate to make further enquiries so that he may decide whether or not it is a fit case for passing an order under S. 562 or he ought to impose some substantial sentence under the I. P. C.⁸⁵

A second class Magistrate found the accused guilty of an offence under S. 325 I. P. C., and submitted the proceedings to the District Magistrate under the proviso to S. 562 Cr. Pr. Code. The District Magistrate returned the case to the second class Magistrate, pointing out that S. 562 could not be applied. *Held* that the District Magistrate's action was illegal, in view of the terms of S. 380.⁸⁶

Where proceedings are submitted to a First Class Magistrate under S. 562 and he passes sentence in the case under S. 380, the conviction must, for the purposes of appeal, be considered to be within the meaning of S. 408 of the Code and the order is appealable to the Sessions Court.⁸⁷

CHAPTER XXVIII

OF EXECUTION

A sentence of imprisonment cannot be suspended to take effect at a future period, but must commence from the time that the sentence is passed. Where a Deputy Magistrate postponed the execution of a sentence of imprisonment for a stated period, at the request of the accused, to allow the accused time for preferring appeal, it was held that the sentence was bad in law, and could not be carried into execution.⁸⁸

381. Execution of order passed under Section 376.— When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

80. *Mi Thi Hla v. Mi Kin*, UBR (1915) Ist Qr. 55 : 16 Cr LJ 535 : 29 IC 663.

81. *Jalal Khan*, (1908) 4 LBR 277 : 8 Cr LJ 475.

82. *P. C. Doraiswamy Naidu*, A 1945 M 302 ; 47 Cr LJ 178 ; *Public Prosecutor v. Garappa Naidu*, A 1933 M 728.

83. *Piramanayaga Panduram*, A 1942 M 390 ; 41 Cr LJ 568 ; *Venkataswami Naiakem*, A 1942 M 657 (1) : 44 Cr LJ 91.

84. *Piramanayaga Pandaram*, A 1942 M 390.

85. *Venkataswami Naiakam*, A 1942 M 657 (1).

86. *Abdul Lal Shein*, (1907) 4 LBR 150 : 7 Cr LJ 449.

87. *Bhimappa Ulvappa*, (1915) 17 Bom LR 895 : 16 Cr LJ 738.

88. *Kishen*, (1869) 12 WR (Cr) 47 : 3 BLR App (Cr) 50.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Warrant to be addressed—whom. |
| 2. Forms of Warrant. | 4. Rules and orders. |

1. Corresponding sections in former Codes.—This section corresponds to S. 301, paragraph 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. Forms of Warrant.—For Form of warrant of execution on a sentence of Death, *see* Form No. XXXV' and Form No. XXXVI for warrant after a commutation of sentence.

3. Warrant to be addressed—whom?—The warrant should be addressed to the officer-in-charge of the jail.^{88a}

4. Rules and orders.—"Sessions Judges directed to make arrangements for communicating every order of confirmation, reversal or commutation of sentence of death to the Superintendent of jail wherein the prisoner is confined, within 24 hours of receipt of the order in the Sessions Court.⁸⁹

"The date named by the Sessions Court, in its warrant for the execution of a sentence of death, shall not be less than fourteen, nor more than twenty-one, days from the date of the issue of such warrant."—C. O. No. 2 of 5th May, 1876, Calcutta High Court.

382. Postponement of capital sentence on pregnant woman.—If a woman sentenced to death is found to be pregnant the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | pregnant woman.
—Pregnancy is to be certified. |
| 2. Postponement of capital sentence on | 3. English Practice. |

1. Corresponding sections in former Codes.—This section corresponds to S. 306 of the Code of 1872, S. 114 of Act X of 1875 and is similarly worded as in the Code of 1882.

2. Postponement of capital sentence on pregnant woman.—For Form of warrant after a commutation of sentence *see* Form No. XXXVI, Sch. V.

Pregnancy is to be certified.—The pregnancy of the prisoner is to be certified by a Civil Surgeon.⁹⁰

3. English Practice.—"If the defendant is a female and she has been found guilty of a capital charge, she may allege that she is quick with child, and thereupon a jury of twelve matrons must be empanelled and sworn to try whether or not this is the case. This they do by inspection of the defendant, but it is usual to give them the assistance of a surgeon in this examination. If the jury of matrons finds that she is quick with child, the Court

88a. M. H. C. Proceedings, 13th March, 1868.

89. Madras Rules of Practice, S. 249.
90. Bom. Gazette 1879 p. 471.

respites the offender until she is delivered of a child, or until the expiration of the ordinary period of gestation.⁹¹

383. Execution of sentences of imprisonment for life or imprisonment in other cases.—Where the accused is sentenced to imprisonment for life or imprisonment in cases other than those provided for by Section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Rules and orders. |
| 2. Legislative Changes (1955). | 4. Warrant of imprisonment. |
| 3. Execution of sentence of imprisonment for life or imprisonment in other cases. | 5. Commencement of date of imprisonment. |
| | 6. Sentence of imprisonment in police lock-up. |

1. Corresponding sections in former Codes.—This section corresponds to cl. (1) of S. 302-A of the Code of 1872, S. 183 of Act IV of 1877 and is the same as that of 1882.

2. Legislative Changes (1955).—The words ‘imprisonment for life’ have been substituted for ‘Transportation’ by Act 26 of 1955.

3. Execution of sentence of imprisonment for life or imprisonment in cases other than those provided in S. 381.

Rules and orders.—Every criminal Court, when it passes a sentence of imprisonment for life or imprisonment, shall endorse on the back of the warrant, with which under S. 383 it forwards the convict to jail the following particulars :—(a) Age of the convict ; (b) caste of the convict ; (c) place of residence of the convict ; (d) plea of the convict ; and (e) opinion of the assessor (where the trial is conducted with the aid of assessors).

If at the trial any previous conviction has been established, the following particulars shall also be given :—(a) name of the offence of which the convict was previously convicted ; (b) sentence passed upon him ; (c) date of such sentence ; (d) name, designation of the trying authority.

The above particulars shall be written in the same language in which the warrant itself is written.⁹²

Period of imprisonment how to be calculated.—In calculating sentences of imprisonment, the day upon which the sentence is passed and the day of release ought both to be included and considered as days of imprisonment, for example, a man sentenced on the 1st January to one month’s imprisonment should be released on the 31st January, not on the 1st February.⁹³

Sentence of imprisonment for life on woman.—Under the orders of Government, the Chief Court has directed that in every case in which a sentence of imprisonment for life is passed on a woman for the murder of her

91. Halsbury Vol. IX p. 375 ; Archbold, 27th ed. p. 242 ; see *R. v. Hunt*, 2 Cox 261.

92. Bom. H C Cr Circ, p. 38.

93. Madras, G. O. No. 2411, dated 22nd November, 1881.

infant child, and the sentence is not appealed against, the file of the case, shall after the expiration of the period allowed for appeal, be forwarded to the Chief Court for submission to Government with a view to the consideration of the question whether any commutation or reduction of the sentence should be allowed.⁹⁴

4. Warrant of imprisonment.—See Sch. V, Form No. XXIX on warrant of commitment on a sentence of imprisonment or fine. “The warrant to be sent to the jail under S. 383 shall set out in full the sentence passed. So far as the sentence is for imprisonment, the Jailor shall give effect to it according to the terms of the warrant”.⁹⁵ The signature of a Magistrate to a warrant of commitment under S. 303 of the Code of Criminal Procedure, 1872, should not be affixed by a stamp.⁹⁶

5. Commencement of the date of imprisonment.—A sentence of imprisonment must commence from the time that the sentence is passed; it can be suspended to take effect at a future period.⁹⁷ Where a Magistrate, after sentencing two prisoners to separate terms of imprisonment, admitted them to bail, in order that they might have the means of appealing, *held* that such admission to bail did not make the previous sentence commence at a future time, and consequently illegal.⁹⁸ A sentence of imprisonment for the period passed in lock-up is illegal, but a sentence of imprisonment until the rising of the Court is good and fulfills the requirement of the law.⁹⁹

An accused person was convicted after having been in custody for a week, and was sentenced “to undergo the imprisonment he had already suffered”, *held* that the sentence was illegal.¹ An order directing an accused “to be imprisoned until he gives security” is bad, a definite period for such imprisonment, not exceeding one year, should be stated in the order.^{1a} Rigorous imprisonment for one day and detention till the rising of the Court are not different kinds of punishments. In the former case accused cannot be sent to jail.²

6. Sentence of imprisonment in Police custody—illegality.—It is illegal to sentence an accused person to suffer imprisonment in a Police lock-up. The terms “prison” and “jail” do not include any place for the confinement of prisoners who are exclusively in the custody of the Police.³

384. Direction of warrant for execution.—Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Particulars necessary in the case of Military Prisoners. |
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1. Corresponding sections in former Codes.—This section corresponds to S. 222 of the Code of 1861, S. 303 of the Code of 1872 and is similarly worded as that of the Code of 1882.

94. Punj Gir Chapter XIV, p. 240.
 95. C. O. No. 1 of 9th February 1880.
 96. *Subramanya Ayyar*, (1883) 6 M 396 : 2 Weir 328.
 97. *Kishen Soondar*, (1869) 3 BLR App Cr 50 : 12 WR (Cr) 47.
 98. *Okhoy Kumar*, (1880) 7 CLR 393 (398).
 99. *Baghel Singh*, (1906) PWR 1907 (Cr) : 5 Cr LJ 217.

1. *Tha Hmun*, (1907) 4 LBR 152 : 7 Cr LJ 453.
 1a. *Mailamdi Fakir v. Taripulla Pramanik*, (1882) 8 C 644 (645).
 2. *Mulluckchand Sheikh*, 53 CWN 106 : 50 Cr LJ 135.
 3. *Po Thin*, (1913) 7 LBR 62 : 15 Cr LJ 10 : 22 IC 154.

2. Particulars necessary to be stated in the warrant in the case of Military prisoners.—When a soldier is committed to jail, his Military rank should always be noted in the warrant of commitment.⁴ There must be a separate warrant for each prisoner and a definite period of imprisonment should be stated.⁵

385. Warrant with whom to be lodged.—When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

1. Corresponding sections in former Codes.—This section corresponds to S. 223 of the Code of 1861, S. 304 of the Code of 1872 and S. 104 of Act X of 1875 and is the same as that of 1882.

386. Warrant for levy of fine.—(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender ;

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter :

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The State Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

4. Punj Cir Vol. II, p. 244.

5. *In re Horace Lyall*, 29 C 286 (FB).

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. "Has been sentenced to a fine". |
| 2. Legislative Changes. | 7. Sub-section (1).
—'May take action'. |
| 3. Statement of objects and reasons. | 8. 'Any movable property.' |
| 3a. Report of the Select Committee (1916) and (1923). | 9. 'Belonging to the offender.' |
| 4. Effect of Amendment. | 10. Sub-section (2). |
| 5. Applicability of the section.
—Does it apply to realisation of costs under S. 148. | 11. Sub-section (3). |
| | 12. Sub-section (1) (b) and sub-sec. (3). |
| | 13. Sentence of fine must be specific. |
| | 14. Proviso. |

1. Corresponding sections in former Codes.—This section corresponds to S. 61 of the Code of 1861, S. 307, paragraph 1 of the Code of 1872, S. 105 of Act X of 1875, and S. 185 of Act IV of 1877 and the Code of 1882 was similarly worded as that of the Code of 1898 before amendment.

2. Legislative Changes.—This section has been substituted by S. 102 of the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923) for old S. 386 of the Code of 1898 which ran as follows :—

"Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the fine by distress and sale of any movable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned."

3. Statement of objects and reasons.—"Clauses 87 and 88 make immovable property as well as movable property liable to sale, as it is not thought reasonable that immovable property should be allowed to escape ; and at the same time power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims."

"The proviso to sub-sec. (1) lays down that if the offender has undergone the whole term of the imprisonment awarded in default of fine, the Court shall not issue a warrant for the levy of fine."

"Under this proviso after the imprisonment awarded in default of payment of fine has been served, no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary. The infliction of a double punishment is ordinarily uncalled for and by the issue of warrants for the recovery of fines when there is no real reason why they should be recovered, the time of the police is frequently wasted. Convicted persons also are thus harassed for long periods after they have expiated their offences by undergoing imprisonment.—Statement of Objects and Reasons (1921)".

"Under sub-sec. (2) power is given to the Local Government to make rules regarding the execution of warrants and the determination of claim."—*Ibid.*

3-a. Regarding sub-sec. (3) the Select Committee observed :

"We would add a clause after sub-sec. (2) to enable a fine to be realised through the Collector as if the order was a decree of a Civil Court. We can see no reason why a property owner who may be able to conceal his movables should not be forced to pay a fine which has been inflicted upon him by a Criminal Court, just as much, and by the same process, as a civil debt. It

seems to be recognised that the liability is so enforceable by S. 70, Penal Code, *vide* the decision in 20 Cal 478, and we think that this should be made clear by the section under consideration. The proper person to effect such realisation is, we think, the Collector of the District, who will be treated as the decree holder"—Report of the Select Committee of 1916.

See Legislative Assembly Debates, 7th and 8th February 1923 as to the reason for the change. Referring to the section as substituted for S. 386 of the Code of 1898 the *Select Committee* in 1923 observed as follows :

"We approve generally of the principle embodied in this clause in that it enables a fine to be recovered by procedure against immovable property through the agency of the Civil Court, but we do not think that the matter can suitably be dealt with as a proviso to a rule making power dealing with warrants of attachment against immovable property. We have therefore, redrafted a great deal of this clause, introducing execution through the Civil Court as a substantive provision. We think it should be made clear that the civil court should not arrest or detain an offender who has already been sentenced to imprisonment in default of the fine.

"We recognise that the procedure prescribed may in some cases involve considerable delay and we attempted to find some more summary method of proceedings against immovable property on the lines of those laws which enable moneys due to the Crown to be recovered as arrears of land revenue. We have, however found ourselves unable to devise any procedure which will not be open to most of the objections put forward against the present clause."

4. Effect of the Amendment.—(1) Under the old Code fine could be realised by 'distress and sale' of movable property only ; under the amendment it can be recovered both by sale of movable as also immovable property and the Collector of the District is authorised to realise the amount by execution according to Civil process. (2) Under the old Code even if the accused had undergone the period of imprisonment, fine could be realised as under proviso to sub-sec. (1) cl. (b). Ordinarily in such cases fine will not be realised "unless for special reasons to be recorded in writing the Collector thinks it necessary". (3) Clause (2), empowers the State Government to frame rules regulating the execution of such warrants and the summary determination of claims. (4) Clause (3) states that such warrants shall have the force of a decree and the Collector of the District will be deemed to be the decree holder and for the purposes of the Code the nearest Civil Court shall execute the decree in the manner prescribed in the Civil Procedure Code. (5) The proviso to cl. (3) makes it clear that no such warrant shall be executed by the arrest or detention in prison of the defaulter. The amendment has in effect superseded the view in *Madari* and other cases⁶ which held that a sale of immovable property for realising a fine is illegal and passes no title to the purchaser. The word "attachment" having been substituted for the words "by distress and sale" the decision in *Sengammal*,⁷ which held the word "distress" ordinarily refers to tangible movable property which does not include mere debts or "choses in action," though it may include bonds or title deeds cannot be regarded as good law, and *Pichu Vachiar v. Secretary of State*,⁸ which held that a warrant for distress is preferable to a Civil Court is modified. The amendment however does not affect that decision on the point that surplus proceeds with the mortgagee for payment to the mortgagor

6. *Madari v. Meher Din*, 22 Cr LJ 369 (L) : 61 IC 527 ; *Sitanath Mitra*, 20 C 478, *Lallu Karwar*, 5 Bom HC Cr Ca 63 (64).

7. *Secretary of State v. Sengammal*, (1917) MWN 105 : 18 Cr LJ 1 : 36 IC 833.
8. 40 M 767 : (1917) MWN 20 : 21 MLT 71 : 38 IC 986.

after appropriation are movable property within the meaning of S. 386. The words in cl. (2) that the State Government may make rules "for the summary determination of any claims, etc." have in effect superseded *Hiralal's* case⁹ which held that the Code did not contain any provisions for the trial of claims which might be preferred to property distrained under S. 386.

The amendment by prescribing the mode of recovering fine has modified the view in *Ramjeevan Kurmi v. Durga Charan Sadhukhan*,¹⁰ which held that the section is silent in respect of any other mode of recovering fine than by distress and sale of movable property. The amendment by the insertion of *proviso* to sub-sec. (1) (b) practically gives effect to the decision in *Jungbee*¹¹ which held that the section was not applicable to fines and forfeitures so as to allow of imprisonment and distress going on simultaneously. The section having been re-cast and substituted for the old S. 386 of the Code of 1898 *Rules and Orders* prevailing under the old Code need not be considered.

5. Applicability of the section.—The provisions of Ss. 386 to 389 have been declared to apply to fines imposed (1) under the Andaman and Nicobar Islands Regulation, 1876 (III of 1876) ; see S. 35 as amended by the Andaman and Nicobar Islands Regulation, 1884 (I of 1884), S. 7 ; and (2) under Police Act, 1861 (V of 1861), S. 37, General Acts, Vol. I. The provisions of S. 387 have been extended under S. 1 (2) to the Commissioner of Police, Calcutta, see Ben R & O.

Do the provisions of S. 386 apply to realisation of costs under S. 148 ?—The words "may in his discretion" in S. 386 cannot be used for the purpose of interpreting the words "may be recovered" in S. 148.¹² As "costs" and "fine" are not the same thing *proviso* to S. 386 cannot apply to realisation of costs as provided in S. 148 *ante*.

6. 'Has been sentenced to a fine'.—Section 386 applies to a case where sentence is not only fine but also imprisonment in default.¹³

7. Sub-section (1) (a)—'May take action'.—Section 386 casts a duty on the State to recover a fine imposed on an offender by a Court of law. It is the primary duty of the Court sentencing an offender to fine to make attempts to recover the fine in the first instance and make the offender to undergo imprisonment only in the event of his failure to pay the same.¹⁴

8. 'Any movable property'.—It has been observed *supra* that *Sengammal's* case¹⁵ is no longer good law. Movable property is not now restricted to "tangible or corporeal movable property." The word "attachment" which qualifies it makes it wider.

Surplus sale proceeds with the Mortgagee for payment of the mortgage or after appropriation and payment under S. 69 of the Transfer of Property Act are 'movable property' under S. 386 and are liable for distraint.¹⁶ This decision¹⁶ has been modified by the amendment which substitutes 'attachment' for 'distress'.

Where a Magistrate had directed that the amount of maintenance ordered to be paid under S. 488 of the Cr. Pr. Code should be a charge

9. *Hiralal*, 28 PLR 1915 : 16 Cr LJ 166 : 27 IC 550. See cases referred to.
10. 21 C 979 (985).
11. (1872) 17 WR (Cr) 7 : 8 BLR App 49.
12. *Harmon Krishna Baghi*, (1922) 3 PLT 762 : 24 Cr LJ 126 : 71 IC 254 : AIR (1923) p. 57.
13. *Ram Dayal Tewari v. Corporation of Calcutta*, 56 CWN 339 : 1953 Cr LJ

207.
14. *Siddappa*, A 1957 Mys 52 : 1957 Cr LJ 523.
15. *Secretary of State v. Sengammal*, (1917) MWN 105 : 18 Cr LJ 1 : 36 IC 833.
16. *Pichu Vachiar v. Secretary of State*, 40 M 767 : (1917) MWN 20 : 21 MLT 71 : 5 LW 664 : 18 Cr LJ 426 : 38 IC 986.

on the joint estate of the person ordered to pay it and his brothers, and the order was not disturbed in appeal or revision, *held* that the levy of arrears due by attachment and sale of such joint estate should not be interfered with on a subsequent application for revision.¹⁷

As the undivided share of a member of a joint family to specific movable property is not capable of being seized and delivered to the purchaser such a case cannot be dealt with under S. 386 (1) (a),¹⁸ or cannot be attached and sold; the amendment of 1923 has not made any difference in this respect.¹⁹ The attachment of the share of a delinquent in a joint movable property cannot be effected by seizure, but it should be proceeded against as laid down in Or. 21, R. 47 Civil Procedure Code. If necessary a Receiver may be appointed for the delinquent's share.²⁰ The proper procedure for attachment of a share movable property of a joint family of the delinquent is not under S. 386 (1) (a) but under (b).²¹ In Calcutta, it has been held that the inquiry should be under Government Rules.²² In Uttar Pradesh, paragraph 819 of the Manual of the Government Orders provides that the inquiry shall be conducted as under Or. XXI Rr. 58 to 61, C. P. C. Whether the claim is preferred to attached property there should be a proper enquiry as laid down in Or. 21 R. 58, C. P. C.²³

9. 'Belonging to the offender'.—Section 386 (1) (a) does not authorise the attachment of any property other than the movable property of the offender.²⁴

10. Sub-section (2).—Enacts that the State Government may make rules regulating the manner in which warrants under sub-sec. (1) (b) are to be executed. In the absence of rules the Magistrate should follow the procedure prescribed in S. 88 and determine the claim under S. 386 (2).²⁵

Levy—The word "levy" means to enforce execution and not to realise.^{25a}

11. Sub-section (3).—Section 386 merely provides a means for execution of a warrant of fine through a Civil Court. It remains as a warrant of a criminal Court and does not become a decree of the Civil Court. The immovable property of an agriculturist can be attached and sold in execution of an order passed under S. 386 of the Code as amended in 1923. Section 22 of the Dekkan Agriculturist's Relief Act, 1879, is no bar to such attachment and sale, the mere fact that the warrant is executable as if it were a decree not sufficing to make the provision of that section applicable.²⁶

12. Section 386 (1) (b) and (3).—The warrant issued under S. 386 (1) (b) is to be deemed to be a decree for certain purpose only and not for all purposes. The only effect of S. 386 (3) is that the warrant which is to be deemed to be a decree is to be executed according to the mode laid down in the Civil Procedure Code.²⁷

17. *Shivalingappa Nijappa Tubachi v. Gurlingawa*, (1925) 49 B 906.—See reference to old cases.

18. *Shrawan*, A 1933 N 348; 34 Cr LJ 1263.

19. *Manmothanath*, 60 C 851; 34 Cr LJ 579; *Pramatha Bhusan*, 37 CWN 567; A 1933 C 402; *Bansraj Das*, A 1939 A 378; *Rajendra Prasad Mistri*, 12 P 29: 33 Cr LJ 872 (SB); see *Contra*, *Shidilingappa v. Gurlingara*, 49 B 906: 27 Cr LJ 652.

20. *Narasanna*, 55 M 1041: 33 Cr LJ 642.

21. *Pritandas*, A 1933 S 43: 34 Cr LJ 354; *Sahadev Singh v. Ram Kishan Singh*, A 1932 P 212.

22. *Sarojini De Chaudhury*, 43 CWN 443; A 1939 C 337.

23. *Harimal*, A 1933 A 135 (1); 34 Cr LJ 847.

24. *Rajendra Prasad Mistri*, 12 P 29: 33 Cr LJ 872 (F B).

25. *Chhanganlal Madhavji v. Mimunabi Amadmiya*, A 1955 Sau 86: 1955 Cr LJ 1402.

25a. *Gapalan*, A 1963 Bom 21.

26. *Collector and District Magistrate, Salara v. Mahedu Raghu*, (1926) 50 B 846.

27. *Collector of Broach and Panch Mohala v. Occhawal Bhikalal*, A 1941 B 158: 42 Cr LJ 534.

13. Sentence of fine must be specific.—See *Amritalal Bose's case*,^{27a} where the full bench decided that the sentence of fine cannot be distributed amongst the accused persons if there are more than one accused. A sentence must impose a specific fine on each prisoner.²⁸

When payment of a fine or fee is ordered to be made jointly by several persons convicted together, it may be recovered from all or any one of them, and, if payment made by one is nullified by the reversal of the order as to him, the liability of all and each of the others revives, as what was done subject to appeal was but provisional or subject to a condition subsequent.²⁹ See S. 388 *infra* for suspension of execution of sentence of imprisonment in default of payment of fine.

14. Proviso.—The proviso to S. 386 seems to contemplate cases in which for sufficient reasons the authorities have not been able to realise the fine before the default sentence is served and this proviso has to be availed of by them when for no default or negligence of their own, they are unable to recover the fine. The special reasons referred to in the proviso must necessarily relate to reasons accounting for the fact of the non-recovery of the fine before the default sentence has been served or any other reason in that behalf.³⁰

“Special reasons”.—The special reasons are those which have some relation to the failure on the part of the State to recover fine before the offender finished his term of imprisonment in default of fine. The reasons which turn on the gravity of an offence can not be characterised as special reasons envisaged by the proviso to S. 388 (1).^{30a} Where the accused surrendered himself stating that he was unable to pay the fine and was sent to jail, it is open to the Court to direct that fine may be realised according to Civil process.³¹

387. Effect of such warrant.—A warrant issued under Section 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative Changes.

1. Corresponding sections in former Codes.—This section corresponds to S. 307, paragraph 2, of the Code of 1872 and the Code of 1898 before it was amended read similarly as that of 1882.

2. Legislative Changes.—The words “A warrant issued under S. 386 sub-sec. (1), Cl. (a) by any Court” were substituted for the words “such warrant” by S. 103 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923), and by the said Act, the word ‘attached’ was substituted for the word “distress.”

387A. Warrant for levy of fine issued by a Court in Jammu and Kashmir.—Notwithstanding anything contained

27a. *Amritalal Bose*, (Star Theatre case) 44 C 1025 : 21 CWN 1016.

28. *Anon.*, (1869) 5 MHCR App. v.

29. Rat 90.

30. *Siddappa*, A 1957 Mys 52 ; 1957 Cr LJ

523.

30a. *Hari Singh*, A 1963 Raj 80.

31. *Nilkantha Pal v. Bishaka Pal*, A 1935 C 546 ; *Sarojini De Choudhury*, 43 CWN 443 : A 1939 C 337.

in this Code or in any other law for the time being in force, when an offender has been sentenced to pay a fine by a Criminal Court in the State of Jammu and Kashmir and the Court passing the sentence issues a warrant to the Collector of a District in the territories to which this Code extends authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter, such warrant shall be deemed to be a warrant issued under clause (b) of sub-section (1) of Section 386 by a Court in the territories to which this Code extends and the provisions of sub-section (3) of the said section as to the execution of such warrant shall apply accordingly.

SYNOPSIS

1. Legislative Changes (1955).

2. Effect of Amendment.

1. Legislative Changes (1955).—This section was inserted by Act 26 of 1955.

2. Effect of Amendment.—This section enables execution of warrant for levy of fine issued by a Court in Jammu and Kashmir.

388. Suspension of execution of sentence of imprisonment.—(1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

- (a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and
- (b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money

has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith ; and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that subsection, fails to do so, the Court may at once pass sentence of imprisonment.

SYNOPSIS

1. Legislative Changes.
2. Statements of Objects and Reasons.
3. Scope.

1. Legislative Changes.—This section was substituted by S. 3 of the Code of Criminal Procedure (Second Amendment) Act, 1923 (XXXVII of 1923).

2. Statements of Objects and Reasons.—“The amendment allows time to be given for the payment of the fine without the issue of a warrant”, *vide* Bill No. III of 1914.

The section has been amended in order to give effect to the recommendations of the Joint Committee.

Since this section was substituted for the old section and there is a considerable change in the language it is not necessary to discuss the rulings under the old Code.

For Forms of a bond mentioned in Cl. (b).—See Sch. V. Form XXXVIIA *infra*.

3. Scope.—Section 388 (1) applies to cases where an offender is sentenced to fine only. Hence the Court is not bound to release the accused after the expiry of the substantive sentence of imprisonment so that he might make arrangements to pay up the fine.³² S. 388 does not apply to a case where the sentence is one of fine only and there is no provision except S. 388 by which a fine can be ordered to be realised by instalments.³³ Where a sentence of imprisonment is passed in addition to a sentence of fine even if the sentence of imprisonment is a nominal sentence only S. 388 has no application.³⁴

389. Who may issue warrant.—Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

“Judge”—includes successor-in-office.—The successor-in-office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the Court which levies the fine must be the same as the Court which imposed it.^{34a}

390—395.—*Rep. by the Abolition of Whipping Act 1955 (44 of 1955), S. 3.*

396. Execution of sentences on escaped convicts.—
(1) When sentence is passed under this Code on an escaped

32. *Siddappa*, A 1957 Mys 521; 1957 Cr LJ 523.

33. *Ali Husain*, A 1933 C 308 ; 34 Cr LJ 530.

34. *Mohammad*, A 1934 R 11 ; 35 Cr LJ 608.

34-a. *Chunder Coomar Mitter v. Madoosoodhun Dey*, (1868) 9 WR (Cr) 50.

convict, such sentence, if of death, imprisonment for life, or fine, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, shall take effect according to the following rules, that is to say:—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes (1955). |
| | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 47 of the Code of 1861, S. 316 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The words ‘or Transportation’ have been omitted by S. 75 of Act 26 of 1955. The other changes in the section are consequential. In Explanation (a) to sub-s. (3) the old Code contained the words ‘Transportation or penal servitude.’

3. Scope.—The punishment awardable under S. 224 I. P. C. being in addition to the original sentence, the Courts when passing sentence must comply with the directions of S. 396 (Cls. 2 and 3) of the Code.^{34b}

397. Sentence on offender already sentenced for another offence.—(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :

Provided that where a person who has been sentenced to imprisonment by an order under Section 123 in default of

^{34b}. (1882) Weir 1, 203.

furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

SYNOPSIS

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|---|--|
| 1. Corresponding sections in former Codes. | 6. Court. |
| 2. Legislative Changes—1923 and 1955. | 7. Commencement of sentence. |
| 3. Application of section to a youthful offender. | 8. Imprisonment in default of fine if can be concurrent. |
| 4. Effect of the 1923 Amendment. | 9. 'Shall run concurrently with such previous sentence.' |
| 5. 'When a person already undergoing sentence of imprisonment.' | 10. Proviso. |

1. Corresponding sections in former Codes.—This section corresponds to S. 48 of the Code of 1861, S. 317 of the Code of 1872 and the Code before the amendment of 1923 was similarly worded as that of the Code of 1882.

2. Legislative Changes (1923).—The words "unless the court directs that the subsequent sentence shall run concurrently with such previous sentence" and the proviso were inserted by S. 106 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

Legislative Changes (1955).—This section has been substituted for the old section by S. 76 of Act 26 of 1955. Sub-sec. (2) is practically a proviso to sub-sec. (1) with consequential modifications because transportation has been abolished.

3. Application of the section to a youthful offender.—In the case of a youthful offender, however, such sentences run concurrently. See S. 32 of the Reformatory Schools Act, 1897 (VIII of 1897), General Acts, Vol. IV.

4. Effect of the 1923 Amendment.—(1) The Court may now direct that the subsequent sentence shall run concurrently with the previous sentence.

The insertion of the words '*unless the Court directs that the subsequent sentence shall run concurrently with the previous sentence*' has in effect superseded the following decisions³⁵ which held that a Court had no power to direct that the subsequent sentence should run concurrently with a sentence passed at a previous trial and seems to have modified the following decisions³⁶ which held that an order that sentences of imprisonment passed upon an accused in *two trials held on the same day* should run concurrently is not illegal for until an accused has actually passed into the jail it cannot be said that he is undergoing a sentence of imprisonment.

35. 2 Weir 453; *San E.*, (1907) 4 LBR 147; 7 Cr LJ 445; *Advocate General v. Gouridaswami alias Krishnaswamy*, (1912) MWN 396; 13 Cr LJ 466; 15 IC 306; *Makbul Hussain*, (1913) 11 ALJ 263; 14 Cr LJ 240; *Kamal Mandal* (1916) 24 CLJ 54; *Bhagwandas Baldas*, (1906) 2 Bom LR 111;

Tukaram Sedashiva, (1902) 4 Bom LR 876; *Sander Singh*, (1911) 20 PLR 1912; 13 PWR (1912) (Cr); 13 Cr LJ 3; 13 IC 109.
36. *Mahan*, (1917) 19 Cr LJ 207 (A); 43 IC 623; *Harak Narain*, (1921) 19 ALJ 310; *Mahamed Isaf Habib*, (1911) 13 Bom LR 200.

(2) The *proviso* added to the first clause is an exception to the general rule enunciated in Cl. (1) of the section and states that imprisonment for an offence committed prior to the passing of the order under S. 123 will not be concurrent with detention under S. 123. The Amendment Act (XVIII of 1923) by the insertion of this *proviso* has provided that ordinarily the sentence in such cases should be concurrent where the offence has been committed prior to the order of detention under S. 123 but when the offence is committed after the order under S. 123 has been passed, the sentence will not be concurrent. This *proviso* has in effect adopted the view enunciated in the following decision,³⁷ and has in effect superseded the following decisions³⁸ which held that imprisonment in default of furnishing security under S. 123 was not a sentence of imprisonment under S. 397.

5. **‘When a person already undergoing sentence of imprisonment.’**—It is not competent to a Court to give a direction that several punishments passed on an accused for two or more distinct offences do run concurrently when the sentences have been passed at different trials.³⁹

A person detained in the Civil prison is not undergoing a sentence of imprisonment.⁴⁰

6. **‘Court.’**—The word ‘Court’ used in S. 397 (1) includes the High Court exercising appellate or revisional jurisdiction.⁴¹

7. **Commencement of sentence.**—In a case of several offences under one section of the Penal Code, the proper way is to try the accused (under separate charge) for each of the several distinct offences under the section, which have been clearly proved against him. On conviction of each of these separate charges a separate sentence on each conviction should be passed, with a direction (under p. 317 of the Code of Criminal Procedure) that each should take effect on the expiry of the next prior sentence.⁴²

8. **Imprisonment in default of fine if can be concurrent.**—There is no provision of law enabling a Court to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial, or at different trials.⁴³ The word ‘imprisonment’ as used in this section includes imprisonment in default of payment of fine which by virtue of S. 64 I. P. C., is a sentence, and, therefore any subsequent sentence of imprisonment will not begin until the expiry of the sentence of imprisonment in default.⁴⁴

9. **‘Shall run concurrently with such previous sentence.’**—Where no order is passed by the Sessions Judge that the sentence would run concurrently with the previous sentence, the High Court on an appeal from second conviction can direct under S. 561-A the sentence to run concurrently.⁴⁵ The concluding words of sub-sec. (1) indicate that the Magistrate is competent to make the subsequent sentence run concurrently with the previous sentence though passed in a separate trial.⁴⁶

37. *Tula*, 30 A 334 (FB) : 5 ALJ 318 : (1908) AWN 133 : 7 Cr LJ 427.

38. *Markander Genda*, (1916) 1 PLJ 212 : 2 PLW 369 : (1917) Pat Supp CWN 32 : 17 Cr LJ 528 : 36 IC 496 ; *Muthukanaran*, 27 M 525 : 1 Cr LJ 1090 ; *Joghi Kannigan*, 31 M 515 ; *Venkataram Jetli*, 20 M 444 ; *Durga Bhairab*, 6 Bom LR 1098 : 1 Cr LJ 1114 ; *Diwan Chand*, 14 PR 1895 Cr ; *Kanji Joysingh*, 5 Bom LR 26.

39. *Kamal Mandal*, (1916) 24 CLJ 54 ; *Diwan*, 14 PR (Cr) 1895.

40. *Shin Taung*, (1916) 10 Bur LT 266 (LB) : 17 Cr LJ 480 : 36 IC 160.

41. *Sharat Chandra*, A 1957 MP 294.

42. *Sobrai Gowalla*, (1873) 3 Beng LR (Cr) 50 : 20 WR (Cr) 70.

43. *Haji*, A 1941 L 200 : 42 Cr LJ 642.

44. *Punjaji Lalaji*, A 1939 B 174 : 40 Cr LJ 602.

45. *Bajjnath Kurmi*, A 1961 P 138 ; *Reoti*, A 1933 A 411 ; *Nagappa*, A 1931 B 529 following *Sis Ram*, A 1929 A 585.

46. *Suira*, A 1951 Raj 68.

10. Proviso.—Reading Ss. 120 and 123 together it appears that the proviso applies only if the accused at the same time was undergoing a substantive sentence of imprisonment for another offence.⁴⁷ Where a person who was ordered to undergo rigorous imprisonment in default of furnishing security under S. 123 was subsequently convicted for an offence under S. 176 I. P. C., his sentence cannot be made to commence after the expiry of the previous sentence but should commence immediately.⁴⁸

398. Saving as to Sections 396 and 397.—(1) Nothing in Section 396 or Section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes (1955). |
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1. Corresponding sections in former Codes.—This section corresponds to proviso of S. 317 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—The words 'or to a sentence of transportation' which occurred in sub-sec. (2) after the words 'substantive sentence of imprisonment' were omitted by S. 77 of the Act 26 of 1955 and the words 'or penal servitude for an offence punishable with imprisonment' were omitted by Act 17 of 1949.

399. Confinement of youthful offenders in reformatories.—(1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the State Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the State Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

47. *Fazul Khush Muhammad*, A 1941 S 190 : 43 Cr LJ 105.

48. *Palaniappa Goundan*, 1937 MWN 95.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 4. Exact period should be mentioned. |
| 2. State Amendments.
—Bombay.
—Uttar Pradesh. | 5. 'Such rules as the State Government prescribes.' |
| 3. 'The Court may direct.' | 6. Appeal. |
| | 7. Revision. |

1. Corresponding sections in former Codes.—This section corresponds to S. 433 of the Code of 1861, S. 318 of the Code of 1872 and excepting sub-sec. (3) which was inserted for the first time in the Code of 1898 it is the same as that of the Code of 1882.

It may be pointed out that sub-sec. (3) follows the view in *Deputy Legal Remembrancer v. Ahmed Ali*.⁴⁹

2. State Amendments.

Bombay.—The provisions of S. 399 should cease to apply to any area in which Parts II to XI of the Bombay Children Act have been brought into operation, *vide* S. 6 of the Bombay Children Act, 61 of 1948.

Uttar Pradesh.—The provisions of S. 399 shall cease to apply to any area where Chapters I and III to VIII of the U. P. Children Act I of 1952 are brought into force.

3. 'The Court may direct.'—Only first class Magistrates can pass an order under this section.⁵⁰

In estimating the sentence proper to be passed on a juvenile offender, a Court is not at liberty to advert to the circumstance that no reformatory has been established by the Local Government. The Court is bound to pass such a sentence as appears to the Court in the exercise of its discretion to be adequate to the offence.⁵¹

4. Exact period should be mentioned.—A District Magistrate before whom the case of a youthful offender came, under the provisions of S. 9 of the Reformatory Schools Act, 1897, found the accused to be thirteen years of age, sentenced him to six months' rigorous imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a Reformatory School for a period of five years unless he should attain the age of eighteen years at an earlier date; *held*, that the order was wrong, inasmuch as it failed to fix the exact period of detention.⁵²

An order of detention passed by a District Magistrate under S. 10 of the Reformatory Schools Act (Act VIII of 1897) is not a "sentence" within the meaning of S. 426 of the Code of Criminal Procedure, nor is it a punishment as enumerated in S. 53 of the Indian Penal Code. A Sessions Judge, therefore, has no power to suspend its operation under S. 426 of the Code of Criminal Procedure.⁵³

5. 'Such rules as the State Government prescribes.'—For rules regarding the discipline and training of persons confined in Reformatories, in: (1) *Bengal*, see *Calcutta Gazette*, 1899, Pt. I, P. 226; (2) *Madras*, see *Madras List of Local Rules and Orders*, 1903, Vol. I, P. 147; (3) *Bombay*, see *Bombay Local Rules and Orders*, 1896, Vol. I, P. 160; *Burma* see *Burma Gazette*,

49. (1897) 25 C 333 (335).

50. *Kaidya Hussein*, 1 Bom LR 162; *Baktwar*, 34 PR 1910; *Madasami*, 12 M 94 FB.

51. 2 Weir 453.

52. *Rama*, (1900) 24 M 13:1 Weir 882; *Rama Sudama Mahar*, (1912) 15 Bom LR 306:19 IC 512.

53. *Kishna Pandaram*, (1915) 16 Cr LJ 134 (M):27 IC 198.

1897. This section has no application in the *Punjab* where the Reformatory Schools Act of 1897 is in force.⁵⁴

6. Appeal.—There is nothing in the Reformatory Schools Act which deprives the accused of the right of appeal. S. 16 does not relieve an Appellate Court of the duty of seeing whether a conviction and sentence are maintainable.⁵⁵

7. Revision.—*See* S. 439 *infra*.

Section 16 of the Reformatory Schools Act does not in any way take away the jurisdiction of the High Court to alter or set aside the sentence, in substitution for which an order for detention is made. The power of the High Court remains intact to consider the propriety or legality of any sentence passed upon a youthful offender,⁵⁶ *e.g.* when such order is made without jurisdiction and is not an order warranted by Act No. VIII of 1897.⁵⁷

400. Return of warrant on execution of sentence.—When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. 'Fully executed.' |
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1. Corresponding sections in former Codes.—This section corresponds to S. 385 of the Code of 1861, S. 305 of the Code of 1872 and is the same as that of the Code of 1882.

2. 'Fully executed'.—*See* S. 426 *infra*.

CHAPTER XXIX

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

401. Power to suspend or remit sentences.—(1) When any person has been sentenced to punishment for an offence, the appropriate Government may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certi-

54. *Nur Mahomed*, 17 PR (Cr) 1919 : 91
PLR 1918 : 19 Cr LJ 917.

55. *Ram Singh*, 18 PR 1907.

56. *Reasul v. Courtney*, (1900) 28 C 423 : 5

CWN 211.

57. *Hori*, 21 A 391 (FB) : (1899) Awn 138.

fied copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted, is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted, may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(6) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with :

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail ; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 8. Imprisonment in default of fine. |
| 2. Legislative Changes—1923, 1950 and 1955. | 9. Court if of opinion that the State Government should remit the sentence. |
| 3. State Amendments.
—(1) East Punjab.
—(2) Uttar Pradesh. | 10. Sub-section (2)—‘Appropriate Government’. |
| 4. Effect of the 1923 Amendment.
—Effect of 1955 Amendment. | 11. Calling for the opinion of the presiding Judge. |
| 5. Analogous Provisions. | 12. “Together with his reasons for such opinion.” |
| 6. English Law. | 13. Sub-section (6).
—‘Special Order.’ |
| 7. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 54 of the Code of 1861, paragraphs 1 and 2 of S. 322 of the Code of 1872 and excepting sub-sec. (6) which was inserted in the Code of 1898 the Code before it was amended in 1923 was similarly worded as that of the Code of 1882.

2. Legislative Changes (1923).—Sub-section (6) was inserted for the first time in the Code of 1898. The words “and also to forward with..... as exists” in sub-sec. (2), and sub-sec. (4-A) were inserted by S. 107 of Act XVIII of 1923.

(1950).—Sub-sections (4-A) and (5-A) were omitted by Adaptation of Laws Order, 1950.

(1955).—The proviso to sub-sec. (6) has been added by Act 26 of 1955. Sub-secs. (5 and 5-A) have been omitted by Adaptation of Laws Order, 1950.

3. State Amendments.

(1) East Punjab.—In sub-sec. (4-A) of S. 401, between the words ‘Criminal Courts’ and ‘under’ the words ‘or other authority’ were inserted by S. 3 of East Punjab Act, 49 of 1949.

(2) Uttar Pradesh.—Same as in East Punjab Amendment *vide* S. 9 of the Uttar Pradesh Act 46 of 1948.

4. Effect of the 1923 Amendment.—(1) In recommending for suspension or remission of sentence the presiding Judge in addition to the reasons for such opinion is under the amendment required to forward with the statement of such opinion the certified copy of the record of the trial or of such record thereof as exists.

(2) The Amending Act (XVIII of 1923) by enacting sub-sec. (4-A) makes the application of the section wider so as to include any order passed under any section of this Code or under any Regulation or Ordinance which restricts the liberty or imposes any liability upon the accused or his property.

Effect of 1955 Amendment.—The proviso to sub-sec. (6) provides that the petition for suspension or remission of the sentence if filed by the convict will not be entertained unless he surrendered in jail or is already in jail. When the petition is made by any other person it must contain a declaration that the convicted person is in jail.

5. Analogous provisions.—See Art. 161 of the Constitution which reads as follows :—

“The Governor of a State shall have the power to grant pardons, reprieves, respite or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.”

6. English Law.—See Halsbury, Laws of England, 3rd ed. Vol. 10, para 1003, P. 546. The Law of pardon and the history of the genesis and development of the Royal Prerogative of Mercy has been discussed in *K. M. Nanavati v. State of Bombay*.^{57a}

7. Scope.—An order of remission under S. 401 does not in any way interfere with the order of the Court, it affects only the execution of the

^{57a}. *Nanavati v. State of Bombay*, (1961) 1 SCR 54 : A 1961 SC 112 : (1961) Cr LJ 173.

sentence passed by the Court and frees the convicted person from the liability to serve full term of imprisonment, though the order of conviction and sentence passed by the Court stands.^{57b}

To carry it into effect the provisions of S. 401, the sentence is the function of the executive Government. It is up to them to decide whether they should invoke the powers of granting permission in a particular case.^{57c} A remission of sentence does not mean acquittal and an aggrieved party has every right to vindicate himself or herself.^{57d}

The effect of an act of remission is not to obliterate the offence altogether,^{57e} but to wipe out the unremitted portion of the sentence altogether and not merely to suspend its operation.^{57f}

'Suspension' clearly means that the sentence has not been remitted and it is only in abeyance.^{57g}

It was held by the Supreme Court while construing Art. 161 of the Constitution which contains similar powers that it is open to the Governor to grant a full pardon at any time during the pendency of the case in the Supreme Court in exercise of what is called 'mercy jurisdiction'. That power is essentially vested in the head of the Executive, because the judiciary has no such mercy jurisdiction. But the Governor can not exercise his power of the suspension of the sentence for the period when the Supreme Court is in seisin of the case. It would be for the Supreme Court to pass such orders as it thinks fit, whether the petitioner should be granted bail or should surrender to his sentence.^{57h}

8. Imprisonment in default of payment of fine—Section is not applicable.—There is no scope under S. 401 for merely remitting a sentence in default of payment of fine.⁵⁷ⁱ

9. Court if of opinion that the State Government should remit the sentence.—Where there is no defect in the charge to the Jury, the High Court in appeal cannot interfere but may recommend the case as one fit for exercise of the Provincial Government's powers under S. 401.⁵⁸

10. Sub-section (2)—'Appropriate Government'—See S. 402.

11. "Calling for the opinion of the presiding Judge".—The appropriate Government may require the presiding Judge of the Court to state his opinion as to whether application should be granted or refused. But it is not obligatory on the appropriate Government to so consult the presiding Judge.⁵⁹

12. 'Together with his reasons for such opinion.'—Section 380 of the Code of Cr. Procedure does not authorise a Sessions Judge to sentence a

57b. *Sarat Chandra v. Khagendra Nath*, A 1961 SC 334 ; *M. Homi*, A 1953 P 302 : 1953 Cr LJ 1053.

57c. *Mathammal Saraswati*, A 1957 Ker 102 : 1957 Cr LJ 852.

57d. *Puttaiwa, In re*, A 1959 Mys 116 : 1959 Cr LJ 617.

57e. *Manapragada Ramchandra Rao*, 1956 An WR 1071.

57f. *Venkatesh Yeswant*, A 1938 N 513 : 40 Cr LJ 397 (FB).

57g. *Jagdish Prasad*, A 1949 A 626 : 50 Cr LJ 999.

57h. *K. M. Nanavati v. State of Bombay*, (1961) 1 SCR 54 : A 1961 SC 112 : 1961 Cr LJ 1053 overruling *K. M. Nanavati*, A 1960 B 502 (FB).

57i. *Abdul Gani*, A 1951 Or 342.

58. *In re Pariaswami Nadar*, A 1949 M 375 : 50 Cr LJ 523 ; *Kader Nayar Shah*, 23 C 604 ; *Baggu*, A 1931 L 276 ; *Sardaran Mst.*, A 1933 L 718 : 34 Cr LJ 1251 ; *Dhulan*, A 1934 L 31 : 35 Cr LJ 652 ; *Rauhit*, A 1934 A 770 : 35 Cr LJ 919.

59. *Md. Sarwar*, 52 Cr LJ 357.

prisoner convicted of murder to anything less than transportation for life but only requires the Judge, if he sentences such prisoner to transportation for life instead of awarding capital sentence to assign his reasons for so doing. If there are circumstances which render expedient or advisable a mitigation of the sentence required by the law to be passed in such cases, the Judge may record those circumstances, and submit them for the consideration of the Government, and the Government may, under S. 54 I. P. C. act as it deems proper.⁶⁰

13. Sub-section (6)—‘Special Order’.—Provides that the appropriate Government may make rules or by special order give directions as to suspension of sentences. The Central Government has framed rules.⁶¹

For order by the Government of Bombay as to suspension of sentences under the Bombay Prevention of Gambling Act, 1887, Bom. Code, in respect of anything done under a license granted under the Bombay Race-courses Licensing Act, 1912, Bom. Code, see Bombay Government Gazette, 1912 Pt. I, p. 1193.

402. Power to commute punishment.—(1) The appropriate Government may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

Death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of Section 54 or Section 55 of the Indian Penal Code.

(3) In this section and in Section 401, the expression “appropriate Government” shall mean—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of Section 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government ; and

(b) in other cases, the State Government.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Statement of Objects and Reasons (1923). |
| 2. Legislative Changes—1923 and 1955. | 4. Death Sentence—Inordinate delay in execution. |

1. Corresponding sections in former Codes.—This section corresponds to paragraph 3 of S. 322 of the Code of 1872 and excepting sub-sec. (2) introduced by S. 108 of Act XVIII of 1923 it is the same as that of the Code of 1882.

2. Legislative Changes (1923).—Sub-sec. (2) was added by Act 18 of 1923.

60. *Dabee*, (1864) WR (Cr) 27 ; *Kader Naser Shah*, (1896) 23 C 604.

61. G.I. 19th Nov. 1955, Part II, S. 3 P. 2250.

Legislative Changes (1955).—The words ‘imprisonment for life’ have been substituted for ‘Transportation’.

3. Statement of Objects and Reasons (1923).—“Doubts have been expressed as to the consistency of the S. 402 with S. 55 of the Indian Penal Code and these have now been removed.”

4. Death Sentence—Inordinate delay in execution.—It is true that in proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it. But this is not a rule of law and is a matter primarily for consideration of the Local Government. If the Court has to exercise a discretion in such matter, the other facts of each case will have to be taken into consideration.⁶² See notes on S. 31.

402A. Sentences of death.—The powers conferred by Sections 401 and 402 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government.

Legislative Changes.—This section was added by the Adaptation Order, 1937; was amended by Adaptation Order, 1947 which omitted the words ‘in his discretion’ occurring at the end of the section. A. O. 1950 substituted the word ‘State’ for ‘Provincial’ before the word ‘Government’.

CHAPTER XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

403. Person once convicted or acquitted not to be tried for same offence.—(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have com-

62. *Nawab Singh v. State of U. P.*, A 1954 SC 278 followed in *Vassu Pillai*, A

1957 Ker 34 : 1957 Cr LJ 634 ; *Mahabir Singh*, A 1946 C 36 : 47 Cr LJ 446.

mitted if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897, or of Section 188 of this Code.

Explanation.—The dismissal of a complaint, the stopping of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section.

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 12. Burden of proof. |
| 2. Legislative Changes. | 13. Sub-section (1)—‘has been once tried’. |
| 3. English Law. | 14. By a Court of competent jurisdiction. |
| 4. Article 20 (2) of the Constitution and S. 403. | 15. Must have been convicted or acquitted of such offence. |
| 5. Sections 282 and 235, Companies Act.—Section 403 does not apply. | 16. ‘While such conviction or acquittal remains in force.’ |
| 6. Scope. | 17. Fresh trial barred if the previous trial was for the same offence. |
| 7. Section bars second trial—no judgment can be passed in respect of second complaint. | 18. Cross-cases of rioting. |
| 8. Application of the section. | 19. Fresh trial on same facts is barred. |
| —Security proceedings under Ch. VIII. | 20. Where on same facts a charge might have been framed under S. 236 or for which he might have been convicted under S. 237. |
| —Section does not apply to dismissal of complaint under S. 203. | 21. Sub-section (2). |
| —Or to discharge of an accused. | —Fresh trial on same facts not barred. |
| —Applies to acquittals under Ss. 247, 345 and 494. | 22. ‘Distinct offence’. |
| —Section applies to a second trial and not to powers of a Court of appeal. | 23. Sub-section (3). |
| 9. Sections 403 and 494. | 24. Sub-section (4). |
| 10. Acquittal on a date not fixed for hearing—Effect of. | 25. Sub-section (5). |
| 11. ‘Autrefois Acquit’ must be based on an investigation of facts. | 26. Explanation. |
| | 27. Stopping of proceedings under S. 249.—Withdrawal of complaints under Ss. 247 and 248. |

1. Corresponding sections in former Codes.—This section corresponds to S. 55 of the Code of 1861, Ss. 460, 147 (paragraph 2), S. 195 (explanation), S. 215 (explanation 2), and excepting sub-sec. (5) it is the same as that of the Code of 1882.

2. Legislative Changes.—Sub-section (5) was new in the Code of 1898 and this section has not been further amended.

3. English Law.—“The principle on which the right to plead *autrefois acquit* or *autrefois convict* depends, is that a man should not be put twice in jeopardy for the same matter, and it does not rest on any doctrine of estoppel. But it seems always to have been held that a previous acquittal can only be pleaded in bar to a subsequent indictment (1) where the acquittal is for the exact offence charged in the subsequent indictment; or (2) where the subsequent indictment is based on the same acts and omissions in respect of which the previous acquittal was made and some statute directs that the defendant shall not be tried or punished twice in respect of the same acts or omissions.....”⁶³

It was pointed out in *Dudekula Lal Sahib*,⁶⁴ by Abdur Rahim, J., that the provisions of English law relating to ‘*autrefois acquit*’, being altogether different from the system of Criminal Procedure in this country the discussion of the English law would be misleading. On a difference of opinion between Abdur Rahim, J., and Napier, J., the matter was referred to Wallis, C.J., who held:—“The history of the legislation shows, to my mind, a distinction between what I may call the law as to the common law plea of *autrefois acquit* reproduced in S. 403 of the Code, and the statutory acquittals which have been introduced in Ss. 494, 247 and 345”.⁶⁴

A defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences can not be afterwards convicted upon a further indictment charging him with larceny of the same goods.⁶⁵

“Though a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates”.⁶⁶

4. Article 20 (2) of the Constitution and S. 403.—Article 20 (2) of the Constitution, it is to be noted, does not contain the principle of *autrefois acquit* at all. S. 403 (1) has no application to the case where there was only one trial for several offences, of some of which the accused person was acquitted while being convicted of one. Thus where the accused was tried under S. 5 (2), Prevention of Corruption Act and S. 409, Penal Code but was acquitted of the offence under Prevention of Corruption Act there is no bar to his conviction under S. 409, Penal Code. Article 20 cannot apply because the accused was not prosecuted after he had already been tried and acquitted for the same offence in an earlier trial.⁶⁷ The whole basis of S. 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and record a verdict of conviction or acquittal; if the Court was not competent as for example where the required sanction for the prosecution was not obtained the whole trial is null and void, such a trial does not bar a subsequent trial of the accused after obtaining the proper

63. Archbold, 27 Edition, P 157; Halsbury Laws of England, 3rd edition. paragraphs 736-739.

64. *In re, Dude Kula Lal Saheb*, (1917) 40 M 976 : 33 MLJ 121 : 6 LW 175 : 22 MLJ 69 : 19 Cr LJ 501 : 45 IC 261,

see also 23 Cr LJ 305 : 66 IC 657.

65. *R. v. King*, (1897) 1 QB 214.

66. *Plummer*, (1902) 2 KB 339.

67. *S. A. Venkatraman v. Union of India*, A 1954 SC 375 ; 1954 Cr LJ 892.

sanction. The earlier prosecution being null and void, Art. 20 (2) of the Constitution has no application.⁶⁸

If the offences were distinct there is no question of the rule of double jeopardy as embodied in Art. 20 (2) of the Constitution being applicable. Though S. 26 of the General Clauses Act, in its opening words refers to "the act of omission constituting an offence under two or more enactments" the emphasis is not on facts alleged in the two complaints but rather on the ingredients which constitute two offences with which a person is charged. If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked. The above construction of Art. 20 (2) of the Constitution and S. 26 of the General Clauses Act is precisely in line with the terms of S. 403 (2). Where the accused are sought to be punished for the offence under S. 105, Insurance Act after their trial and conviction for the offence under S. 409, Penal Code, the bar of Art. 20 (2) of the Constitution or S. 26 of the General Clauses Act is not applicable.⁶⁹

5. Sections 282 and 235, Companies Act.

Section 282—Companies Act.—Cannot be construed as providing for a double punishment. It is only an alternative punishment when default is committed. Section 282-A does not offend Art. 20 of the Constitution.⁷⁰

Section 235—Companies Act.—Proceedings contemplated by S. 235 of the Companies Act 1913 are not punitive. They do not bar the prosecution of directions for Criminal prosecution.⁷¹

6. Scope.—"The learned Counsel for the petitioner relied upon the maxim adopted in English Courts that no one ought to be tried twice upon the same facts. We accept that maxim without any hesitation, but we apprehend that the maxim means that a person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged",^{71a} but where the prosecution of the accused for an offence under S. 21 of the Bengal Food Adulteration Act having fallen through for want of a valid sanction and the accused acquitted under S. 245 Cr. P. C., the Municipal Commissioners later at a Meeting passed a resolution sanctioning the prosecution of the accused under the said Act, and he was again prosecuted and tried for the same offence; *held* that the previous acquittal of the accused did not operate as a bar to his subsequent trial.^{71b} Where however the petitioner had previously been tried under S. 193 I. P. C., and, upon a careful and exhaustive consideration of the whole evidence acquitted, but he was again put on his trial under Ss. 465, 471 and 120-B; *held*, that inasmuch as the facts on which the complaint founded the present case were inseparable from those upon which the previous case was proceeded with, the proceedings should be quashed.⁷²

Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part; *held*, that an acquittal is conclusive, and it would be a very

68. *Bajinath Prasad v. State of Bhopal*, A 1957 SC 494. 1957 Cr LJ 597; *Yusofali*, 53 CWN 850; A 1949 PC 261; *Subramania Achari In re*, A 1955 M 129; 1955 Cr LJ 514.

69. *State of Bombay v. S. L. Apte*, 1961 (1) Cr LJ 725; A 1961 SC 578 following *Om Prakash Gupte v. State of U. P.*, A 1957 SG 458 and *State of M. P. v.*

Veereshwar Rao, A 1957 SC 598.

70. *Loomchand v. Official Liquidators*, A 1953 M 595; 1953 Cr LJ 1142.

71. *Dr. Sailendra Nath Sinha*, A 1955 C 29.

71a. *Croji* (1896) 23 C 174.

71b. *P. Banerjee v. Bepin Behary Ghose*, (1923) 30 CWN 382.

72. *Cheragali Bepari v. Satish Chandra Ghose*, (1924) 30 CWN 384.

dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates.⁷³

Where an accused person is charged with and tried for various offences arising out of a single act, or series of acts, it being doubtful which of those offences the act or acts constitute, and where he has been acquitted by the verdict of a jury of some of such offences and convicted of others and appeals against such conviction, and where the Appellate Court reverses the verdict of the jury, and orders a retrial without any express limitation as to the charges upon which such retrial is to be held, such retrial must be taken to be upon all the charges as originally framed, and the acquittal by the jury on the previous trial upon some of such charges is no bar to the accused being tried on them again, as, having regard to the provisions of S. 423 of the Code of Criminal Procedure, the provisions of S. 403 in that respect cannot apply to such cases.⁷⁴

The principle of *autrefois acquit* can have no application where an accused is discharged under S. 253, as there can be no trial when the accused is discharged. An order of discharge is not a "judgment." A "judgment" is an order in a trial terminating in either the conviction or acquittal of the accused.⁷⁵

The fundamental rule, which is guaranteed in Art. 20 (2) of the Constitution enunciates the principle of '*Autrefois convict*' or double jeopardy. The roots of that principle are to be found in the well-established rule of the Common law of England "That where a person has been convicted of an offence by a Court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence"—per Charles J., in *Reg. v. Miller*, (1890) 24 RBD 423. To the same effect is the ancient maxim "*Nemo Bis Debet Puniri Pro Uno Delicto*", that is to say, that no one ought to be twice punished for one offence or as it is sometimes written "*Pro Eadem Causa*", that is for the same cause. Article 20 (2) incorporated within its scope the plea of '*Autrefois Convict*' as known to the British Jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution for the same offence.⁷⁶

The scope of S. 403 is restricted to Criminal Proceedings.⁷⁷ The idea underlying the principle is that a person can be prosecuted only once in respect of a particular offence and when that prosecution ends in the acquittal of an accused person, it must receive a finality as all proceedings must.⁷⁸ Where the accused was charged with respect to two transactions which under S. 234 could not be tried at one trial and the case was therefore split up into two trials in one of which the case of forgery was considered only with respect to one document, the trial with respect to the other document which formed the subject-matter of the charge in the other case would not be barred under S. 403.⁷⁹ See also the decision of the Supreme Court in *State of Bombay v. Umar Shao*.⁸⁰

73. *Lalitmohan Chakrabutty*, (1911) 38 C 559.

74. *Krishnadhan Mandal*, (1894) 22 C 377 ; *Nazimuddin*, (1912) 40 C 163.

75. *Moheswara Kondaya*, (1908) 31 M 543.

76. *Maqbul Hussain v. The State of Bombay*, (1955) SCR 730 : A 1953 SC 325 ; *Venkatarama v. Union of India*, A 1954

SC 375.

77. *Mansingh Rao*, A 1958 MP 413.

78. *Janantray Manilal Akhaney*, A 1955 B 259.

79. *Srinivasulu v. P. V. Subhanma*, A 1959 AP 517 : 1959 Cr LJ 1137.

80. A 1962 SC 1158 (case under S. 235).

The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. The verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*resjudicata pro veritata Occipitur*' is no less applicable to Criminal than to Civil Proceedings.⁸¹

Even though the provisions of S. 403 may not strictly apply to the facts of a particular case the wider principle of '*autrefois convict*' underlying the section can be invoked in favour of the accused in the interest of justice and he may not be tried again for the same offence.⁸²

7. Section bars second trial and no judgment can be passed in respect of second complaint.—When a prosecution is barred on account of a previous trial, S. 403 Cr. P. Code directs that the accused shall not be tried. An order of acquittal, therefore, is improper, as no such order can be passed without a trial⁸³ but S. 403 (1) does not bar a fresh trial on the same facts when the conviction and sentence are set aside on the ground that the trial Court had no jurisdiction to try the offence as, for example, where the trial Court has tried an offence without a complaint having been made under S. 195 in a case where such a complaint is required by law.⁸⁴ A conviction of theft under S. 379 of the Indian Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under S. 9 of the Indian Opium Act, 1878.⁸⁵

8. Application of the section.—Section 403 of the Cr. P. Code protects an accused against a subsequent trial for the same offence, and on the same facts, for any other offence for which a different charge from the one made against him "might have been made," but was not made, and not when such different charge was made at the previous trial and the Jury disagreed as to it.⁸⁶

—To Security Proceedings Under Ch. VIII.—A preliminary charge sheet under S. 107 Cr. P. Code was withdrawn by the Police before the parties mentioned therein were ordered to appear. The Magistrate endorsed the charge sheet to the effect that the accused were acquitted. A fresh charge under the same section was subsequently brought by the Police against certain of the same persons who had been previously charge-sheeted; *held* that the withdrawal of the first charge-sheet was no bar to proceeding under the second; *held* further that neither an order of discharge nor of acquittal could properly be made in a case where the accused had not been directed to appear at all.⁸⁷

The power conferred by S. 437 of the Code to order further inquiry cannot be exercised in the case of an order of discharge under S. 119 of the Code, where the Magistrate before making the order of discharge, has

81. *Pritam Singh v. State of Punjab*, A 1956 SC 415 : 1956 Cr LJ 305 ; *Sambasivam v. Public Prosecutor*, 54 CWN 695 PC ; *Sundarlal Bhagaji*, A 1954 MB 129 (134).

82. *Ramchandra Chetty*, 1955 Andh WR 773 ; *Ramkrishna*, A 1956 MB 194 : 1956 Cr LJ 1073.

83. *Oborno Charan Chowdry*, (1908) 5 LBR

12 : 9 Cr LJ 578.

84. *Sheikh Mohammad Yasin*, (1940) 5 P 452 ; *Jiwan*, (1914) 37 A 107 : 13 ALJ 4.

85. *Deoki Koeri*, (1926) 48 A 496.

86. *Nirmal Kanta Roy*, (1914) 41 C 1072.

87. *Marutha Moopan v. Ratnasami Moopan*, (1911) 36 M 315 : 14 Cr LJ 559 : 21 IC 159.

called upon the person, into whose conduct the inquiry is made, to establish his defence.⁸⁸

An order under S. 110 of the Cr. P. Code against the accused, and detention in jail for failure to furnish security thereunder, do not bar their subsequent trial and conviction under S. 403 of the Penal Code.⁸⁹ Several provisions of the Criminal Procedure Code are inapplicable to a person proceeded against under S. 107.⁹⁰ It is competent to the Court hearing an appeal in a case under S. 107 to direct that the case before it be retried.⁹¹

Section does not apply to dismissal of a complaint under S. 203.—A Presidency Magistrate is competent to rehear a warrant-case triable under Chapter XXI of the Code, in which he has discharged the accused person.⁹² See *Mir Ahmed Hossein v. Mahomed Askari*⁹³ in a case from mofussil.

The dismissal of a complaint under S. 203 of the Cr. P. Code does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority.⁹⁴

Where one set of accused persons is acquitted and another complaint in respect of the same occurrence is filed against other persons mentioned in the complaint but not tried at the previous trial, *held*, S. 403 would not be a bar but the result of the previous case may be taken into consideration to determine whether process should be issued.⁹⁵

Section does not apply to discharge of accused.—An order of discharge does not operate as a bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a Police report, or under S. 190 (c) of the Cr. P. Code.⁹⁶ This section applies to cases of acquittal or conviction and not to cases of discharge.⁹⁷ There is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged inasmuch as a discharge is not equivalent to an acquittal.⁹⁸ Where an accused has already been discharged under S. 259 of the Cr. P. Code, a Magistrate has jurisdiction to entertain a second complaint against him based on the same facts⁹⁹. Once an accused person has been discharged the remedy of the complainant is to go up in revision against the order of discharge.^{99a}

Section applies to acquittals under Ss. 247, 345 and 494.—The provision contained in S. 403 of the Cr. P. Code is *imperative*, and bars

88. *Velu Tayi Ammal v. Chidambara Velu Pillai*, (1909) 33 M 85.

89. *Kasem Ali*, (1919) 47 C 154 : 31 CLJ 386 : 65 IC 994 ; *Mt. Harbai v. Raya Premji*, A 1939 S 193 : 40 Cr LJ 745 (FB) ; *Phomsia*, A 1935 A 50 : 36 Cr LJ 128 ; *Subeg*, A 1942 L 84 ; *Bhagwat*, 48 A 501.

90. *Kartik Chandra v. Panna Lal*, A 1958 C 140.

91. *Ram Sarup*, 1956 A LJ 649 ; 1957 Cr LJ 269.

92. *Dwarakanath Mondal v. Benimadhab Bannerji*, (1900) 28 C 652 (FB).

93. 29 C 726 FB.

94. *Chinna Kaliappa Gounden*, (1905) 29

Mad 126 (FB).

95. *Subal*, 30 CWN 546.

96. *Sheikh Idoo*, (1912) 40 C 71 : 16 CWN 983 : 13 Cr LJ 488 : 15 IC 488 ; *Dasarath Singh*, A 1956 C 260 : 1956 Cr LJ 736 ; *Birendra Kumar v. Ashutosh*, A 1957 Tripura 47.

97. *Parmeshwari Das v. Jagannath*, (1919) 17 ALJ 867 : 20 Cr LJ 403 : 51 IC 163.

98. *In re Malaijil Kottayal Koyarsan Kutty*, (1916) 18 Cr LJ 329 : 38 IC 441 (M).

99. *Bijoo Singh*, (1916) 2 PLJ 34 ; 28 Cr LJ 296 : 38 IC 328.

99a. *Gur Charan*, A 1957 A 557 ; 1957 Cr LJ 918.

a second trial of the person who has once been acquitted on the same charge. The section does not make any distinction between acquittals *after* trial and acquittals under Ss. 247, 345 and 494 of the Code. So long as an order of acquittal under S. 247 stands, S. 403 bars a second trial on the same charge, no matter whether the order of acquittal is good or bad, legal or illegal.¹

Section applies to a second trial and not to powers of a Court of appeal—An appeal is not a second trial, but a continuation of the trial in the lower Court and S. 403 has therefore no application.^{1a} A Sessions Judge, ordering a retrial of a case in which the accused had been acquitted of the charge under S. 304 I. P. C. but convicted under S. 326 can not order a retrial on charge of which the accused has been acquitted.² It was held in² that the following decisions³ were not correctly decided. An appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution.⁴

9. Sections 403 and 494—If the Magistrate had no jurisdiction to try the case and therefore acquitted the accused under S. 494 a subsequent trial of the accused for the same offence by a Magistrate having jurisdiction is not barred under S. 403.⁵ The words ‘one or more of the offences for which he is tried’ in S. 494 are general in character and they may be distinct offences of the same kind or offences arising out of the same transaction. Those words in the earlier part of the section cannot be construed differently in judging the effect of the withdrawal under Cls. (a) and (b).⁶ The trial in a summons case commences when the Magistrate takes cognizance under S. 190, certainly from the moment he appears in Court and when the Magistrate decides to acquit the accused under S. 247 on the non-appearance of the complainant, then he must be deemed to have been tried under S. 403.⁷

10. Acquittal on a date not fixed for hearing—Effect of.—An order of acquittal, under S. 247 of the Cr. P. Code passed by mistake on a date not fixed for the hearing of the case, for the absence of the complainant, is a mere nullity and does not debar the Magistrate from proceeding with the trial on the discovery of the error.⁸

11. ‘Autrefois Acquit’ must be based on an investigation of facts.—A decision that a prosecution is barred under the provisions of S. 403 of the Cr. P. Code ought not to be arrived at without an investigation of the facts put forward on behalf of the complainant,⁹ and without

1. *Ram Mahto*, (1921) 2 PLT 170 : 22 Cr LJ 331 : 61 IC 59 ; *Fazar Pramanik*, (1922) 37 CLJ 253 ; *Dudekula Lal Sahib*, (1917) 33 MLJ 121 ; *Mahadeo Gir*, 9 NLR 26 ; *Kiran Sarkar*, (1923) 5 PLT 15 : 24 Cr LJ 815 ; *Kanai Hizra v. Golap Hizra*, A 1953 C 197.

1a. *Pramatha Nath Talukder v. Saroj K. Sarkar*, A 1962 SC 866 overruling, *Saroj Sarkar v. Pramatha Talukdar*, A 1961 C 461 (FB) ; *Dwarka Nath Mondal v. Beni Madhab*, 28 C 652 FB, *Mir Ahmed Hussain*, 29 C 726 FB.

2. *Indra Kumar Nath*, 58 CWN 374.

3. *Krishnadhan Mondal*, 22 C 377 ; *Jabanulla*, 23 C 975 ; *Nazimuddin*, 40 C 163 ; *Kamalakanta Roy Chowdhury*, 41 CWN 1112.

4. *Kalwant v. State of H. P.*, (1955) SCR 546 ; A 1953 SC 131.

5. *Bhuban Mohan Bose*, A 1958 C 202 ; 1958 Cr LJ 502.

6. *In re Billa Mastan*, A 1955 AP 33 ; 1955 Cr LJ 339.

7. *Bhupati Bhusan Mukherji v. Amiya Bhusan Mukherji*, A 1935 C 491 ; *Yashoda v. Mt. Banubai*, A 1927 N 388 : 29 Cr LJ 183 ; *Sukku Ram v. Krishna Deb*, 33 GWN 260 ; *Fula Bewa v. Bonamali Das*, A 1953 Or 257 ; *Sankar Dattaraya v. Dattaraya Sadasiva*, A 1929 B 408.

8. *Achambit Mandal*, (1914) 42 C 365 : 18 CWN 1180 : 16 Cr LJ 148 : 27 IC 212.

9. *Radha Kissen Goanka v. Fateh Chand Borat*, (1918) 23 CWN 543 : 22 Cr LJ 67 : 59 IC 323.

hearing the evidence and ascertaining what the facts are in the case which is being tried and what were the facts found in the previous case.¹⁰

12. Burden of proof.—The burden of establishing the existence of facts necessary for the application of the doctrine of '*autrefois acquit*' lies upon the accused.¹¹

13. Sub-section (1)—'has been once tried.'—A person who has been acquitted under S. 247 Cr. P. Code for default of appearance on the part of a complainant is a person tried by a Court within the meaning and for the purposes of S. 403 Cr. P. C.¹²

The accused was tried for the offence of abetment of theft and acquitted. The trial Judge found that he was guilty of receiving stolen property, but refrained from convicting him of the offence in the absence of a specific charge. He was thereafter prosecuted for the offence of receiving stolen property; *held* that, under S. 403 (1) of the Cr. P. Code, it was not competent to the accused to be put up again on a charge of receiving stolen property, since he could have been charged with the offence at the first trial under S. 236 *ill. (a)* of the Code.¹³

14. 'By a Court of competent jurisdiction'.—See also Commentary under sub-sec. (4) of this section. In *Krishna Ayyar*,¹⁴ the learned Judge pointed out that illustrations (f) and (g) show that the words 'was not competent to try' mean 'had not jurisdiction to try.' A Magistrate cannot acquit a prisoner whom he has no jurisdiction to try.¹⁵

The phrase "has once been tried by a Court of competent jurisdiction" in S. 403, sub-sec. (1) of the Cr. P. Code, is not one which limits the application of the provision to reasons affecting the nature or ordinary powers of the tribunal. It is wide enough to cover a case where the first trial was *abinitio* void owing to the absence of a complaint. In such a case therefore S. 403 (1) is no bar to a fresh trial of the accused.¹⁶ Section 403 expressly deals with an order of acquittal or conviction passed by a Court of competent jurisdiction.¹⁷ Where an offence is tried by a Court without jurisdiction, the proceedings are simply void under S. 530 and there is nothing to prevent a trial by a competent Court under S. 403.¹⁸ The whole basis of S. 403 (1) is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal; if the Court was not competent as for example when the required sanction for the prosecution was not obtained, the whole trial is null and void and it cannot be said that there was any conviction or acquittal in force within the meaning of S. 403 (1); such a trial does not bar a subsequent trial of the accused after obtaining the proper sanction. Article 20 (2) of the Constitution has no application.¹⁹ The words 'Court of competent jurisdiction' mean a court

10. *M. N. Mukherji v. Matangi Charan Palit* (1918) 23 CWN 599.

11. *Imandy Appalaswami*, (1914) 1 LW 847; 15 Cr LJ 672 (M); 25 IC 1000.

12. *Suraiya Sastri v. Venkata Rao*, (1885) Weir II, 457; *In the matter of Guggilapu Paddaya*, (1910) 34 M 253; 12 Cr LJ 41; 9 IC 253, following *Panchu Singh v. Umor Mahomed Sheik*, (1899) 4 CWN 340; *Kiran Sarkar*, 5 PLT 15; *Kanai Hizra v. Golap Hizra*, A 1953 C 197.

13. *In re Pandul*, (1924) 26 Bom LR 440.

14. (1901) 24 M 641, followed in *Ganapathi Bhattar*, 36 M 308; 24 MLJ 463; 13 MLJ 360; 14 Cr LJ 214; 19 IC

310.

15. *Robert Sherijj*, (1866) 6 WR (Cr) 13.

16. *Nanakram*, (1918) 19 Cr LJ 796; 46 IC 716 (N).

17. *Abdul Ghani*, (1902) 29 C 412 (414); *Mohan Lal*, (1921) 19 ALJ 803.

18. *Huslin Gaibu*, (1884) 8 B 307; *Rami Reddi*, (1881) 3 M 48.

19. *Baijnath Prasad v. State of Bhopal*, A 1957 SC 494; 1957 Cr LJ 597; *Yusofali*, 53 CWN 850 (PC); *Girraj Kishore*, A 1957 A 129; 1957 Cr LJ 332; *Basdeo*, A 1945 F C 16; 46 Cr LJ 510; *Gokulchand Diwaraka Das*, 52 CWN.

competent to hear and determine the case and to record a verdict of conviction or acquittal.²⁰ An order of acquittal passed by a special Judge is an order made by a Court of competent jurisdiction functioning under the provisions of the Special Courts Act which is declared valid by the Supreme Court (*Kedarnath Bajaria v. State of West Bengal*, A 1953 S C 404). The accused is entitled to raise the plea of bar under S. 403, if in the meanwhile a fresh prosecution is launched.²¹

For further commentary *see* notes under sub-sec. (4).

Where a prisoner is released by the Court of Session, on the ground that the proceedings had in his case were illegal and irregular, there is no bar under S. 55 of the Code of 1861 to his being subsequently tried and convicted on the same offence.²²

15. Must have been convicted or acquitted of such offence.—The words in the section being “convicted or acquitted of such offence” S. 403 does not apply to a case in which the accused has been discharged²³ nor does it apply to the case of a dismissal of complaint under S. 203.²⁴ The State has a right to hold a departmental enquiry into the conduct of a Public Servant, the withdrawal of the prosecution at an earlier stage did not amount to an acquittal.²⁵

16. ‘While such conviction or acquittal remains in force’.—The person acquitted is to plead previous acquittal by a competent Court under S. 403 in connection with any further proceeding that may be taken against him.²⁶

17. Fresh trial barred if the previous trial was for the same offence.—It follows from sub-sec. (2) that there is no bar to trial for distinct offences. *See* commentary under sub-sec. (2). To render a former acquittal or conviction a defence on a second trial, the offence must, according to S. 55 of the Code of 1861, be the same offence.²⁷ *See* also the view of Peacock, C. J., in *Dwaraka’s* case at 7 W R at p. 19.

Where the petitioners were tried on charges of kidnapping a minor girl and rioting with the common object of kidnapping the girl and the trying Magistrate acquitted them of the said charges but convicted them of being members of an unlawful assembly with the common object of causing assault and wrongful restraint, and on appeal the Sessions Judge set aside the conviction and ordered a retrial on charges of abducting the girl in order to confine her secretly and of rioting with that common object, *held* that retrial on the charges mentioned was barred under S. 403.²⁸

20. *Yusofali Mulla*, 53 CWN 850 ; A 1949 PC 264 ; *Abdul Gani*, 29 C 41 ; *Shankar*, 53 B 69.

21. *N. R. Ghose v. State of West Bengal*, (1960) 2 SCR 58 : A 1960 SC 239 : 1960 Cr LJ 289.

22. *Wahed Ali*, (1870) 13 WR (Cr) 42.

23. *Parmeshwari Das v. Jagannath*, (1919) 17 ALJ 867 ; 20 Cr LJ 403 ; 51 IC 163 ; *Sheikh Idoo*, (1912) 40 C 71 (73) : 16 CWN 983 : 13 Cr LJ 488 : 15 IC 488 ; *Sailani*, (1913) 36 A 4.

24. *Sheo Gobind Singh*, (1920) 1 PLT 293 : 21 Cr LJ 660 : 57 IC 820, following *Dwaraka Nath Mandal v. Beni Madhab*

Banerji, 28 C 652 (FB) : 5 CWN 457 ; *Mir Ahwad Hossain v. Mohammad Askari*, (1902) 29 C 726 (FB) ; *Chinna Kaliappa*, 29 M 126 (FB) : 16 MLJ 79 : 1 MLT 31 : 3 Cr LJ 274 ; *Bisoo Singh*, (1916) 2 PLJ 34 : 3 PLW 432 : 18 Cr LJ 296 : 38 IC 328.

25. *V. D. Jhingan*, A 1955 A 531 ; 1955 Cr LJ 1310.

26. *Darbari Mal*, (1911) 8 ALJ 1129 : 12 Cr LJ 575 : 12 IC 839.

27. *Dwarkanath Dutt*, (1867) 7 WR (Cr) 15.

28. *Kalinath Barwan*, (1920) 24 CWN 856 : 21 Cr LJ 689 : 57 IC 929.

All offences against the Akbari law (Bombay Act V of 1878) being cognizable by a Magistrate of the second class, a person tried for any such offence by any such Magistrate and acquitted, is not liable to be tried again for the same offence under S. 403, unless the acquittal has been set aside by the High Court on appeal by the Government.²⁹ Where a person was found in possession of several articles of stolen property and in respect of some of them he was prosecuted and convicted under S. 411, I. P. C., but he was acquitted on appeal and subsequently he was again tried and convicted in respect of other properties found in his possession on the same date, *held*, that the second trial was illegal under the provisions of this section.³⁰

Where several police constables were convicted of rioting and two of them were previously tried and acquitted on a charge of wrongful confinement for having taken into custody some persons in course of such rioting, *held* that the second trial was not vitiated by contravention of the rule embodied in S. 403 (1) of the Code.³¹

The Sea Customs Authority are not a judicial Tribunal. The appellant could not be said by reason of the proceedings before the Sea Customs Authorities to have been prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate Bombay under S. 23 of the Foreign Exchange Act, Art. 20 (2) of the Constitution will not therefore apply in the case.³² Where A was prosecuted for not submitting certain return on a certain date was found not guilty and was acquitted. He was also prosecuted for attempting to bribe an official of the department concerned to accept the return after the due date and to ante date, *held* that the evidence of acquittal had to be accepted.³³

No person shall be prosecuted and punished for the same offence more than once. *See* notes, *ante* under the caption "Art. 20 (2) and S. 403", S. 403 (1) has no application to the case where there was only one trial for several offences, of some of which the accused person was acquitted while being convicted of one.³⁴ To retain any stolen property is a continuing offence; where accused was previously acquitted of offence of retaining articles of stolen property, subsequent prosecution under S. 412 in respect of greater number of articles is not barred.³⁵

18. Cross-cases of rioting.—The fact that there has been a conviction in one of rioting case, on a plea of guilty, is no bar to a conviction in a cross-case of rioting in connection with the same occurrence which arose out of a dispute regarding the exclusive possession of a piece of land.³⁶

Where in a trial for an offence under S. 471 I. P. C. it appeared that the accused had previously been tried for abetting the forgery of the same document under Ss. 467 and 109 I. P. C., but had been convicted, *held* that the case was not governed by sub-sec. (1) of S. 403 and the plea was also bad as it fell under S. 403 (4) of the Code.³⁷ Where the petition of complaint

29. *Gustadji Barjorji*, (1885) 10 B 181.

30. *Ganesh Sahu*, (1923) 37 CLJ 326.

31. *Ramsahay Ram*, (1920) 48 C 78 : 24 CWN 763 : 31 CLJ 476 : 21 Cr LJ 614 where *R. V. Barron*, (1914) 2 KB 570, was followed and *Suresh Chandra v. Banku*, (1905) 2 CLJ 622 was distinguished.

32. *Maqbool Hussain*, 1953 SCR 730 : A 1953 SC 325.

33. *Manick Chand Agarwalla*, 56 CWN 884 : A 1952 C 730.

34. *State of M. P. v. Veereshwar Rao*, A 1957 SC 592 ; 1957 Cr LJ 892 (case under S. 409 I. P. C. and S. 5 (2) Prevention of Corruption Act).

35. *Yamanappa*, A 1947 B 467 ; 48 Cr LJ 873.

36. *Hafizuddin Khan v. Mahammad Elim*, (1918) 19 Cr LJ 766 : 46 IC 606 (C).

37. *Jivram Dankarji*, (1915) 40 B 97 : 17 Bom LR 881 : 16 Cr LJ 761 : 31 IC 361.

alleged offences under Ss. 352 and 504 I. P. C. and the accused was tried under S. 352 I. P. C. only and acquitted in former trial, *held* that S. 403 (2) was applicable to the case and the accused could be legally tried again for the offence punishable under S. 504 I. P. C.³⁸

The acquittal of an accused person in a case under S. 147 I. P. C. is no bar to his trial for an offence under S. 186 I. P. C.³⁹ An acquittal on a charge of abduction under S. 498 of the Penal Code is no bar to the trial of a charge of detention.⁴⁰ In order to apply S. 403 (1) of the Code it is necessary to see whether under S. 236 of the Code any charge in the previous trial could have been framed for the offences for which the accused is sought to be tried at the second trial.⁴¹

19. Fresh trial on same facts is barred.—See *Alfred Laird's case*.⁴² A person tried and acquitted on a charge of using criminal force under S. 352 (which includes the offence of *battery*), cannot be tried, in respect of the same criminal matter, on a charge of hurt.⁴³ Under S. 403 (1) of the Code an acquittal of offences under Ss. 380 and 411 I. P. C. charged in the alternative, bars subsequent trial for an offence under S. 54A of the Calcutta Police Act (Beng. Act IV of 1866) in respect of the same act, or series of acts which formed the subject of the previous trial.⁴⁴

Where in appeal the Sessions Judge sets aside the conviction for the offences under Ss. 147 and 148 I. P. C. he has no jurisdiction to remand the case for fresh disposal for offences under Ss. 323 and 324 on the same facts as the facts which formed the subject-matter of the charge under Ss. 147 and 148 I. P. C.⁴⁵ Whether having been prosecuted once on a certain set of facts, a man can be prosecuted again depends entirely on whether at the earlier trial, he was in jeopardy of being convicted of the offence for which he is tried or sought to be tried.⁴⁶

20. "Where on same facts a charge might have been framed under Section 236, or for which he might have been convicted under Section 237."—Where in the previous trial though charge under S. 419 I. P. C. was not framed, the petitioner could on the basis of S. 237, have been convicted under S. 419/109 I. P. C. *held* that the subsequent trial was barred under this section and the proceedings were quashed.⁴⁷ A failure to take advantage of the provisions of S. 236 or 237 in all cases of doubtful offences committed in a single act or series of acts either on the part of the Court or the prosecution must bar a subsequent trial under S. 403 (1). Having regard to the provisions of S. 403 (2) where the allegations in the complaint relate to offences under Ss. 323, 147 and 448 I. P. C. the acquittal of the accused under S. 323 will not bar their subsequent trial for the remaining offences.⁴⁸ An acquittal under S. 30 (2) of the Police Act for taking out procession without licence and the subsequent trial for offences under

38. *Bejoy Krishna Pal v. Balai Chand Bhandhari*, (1918) 20 Cr LJ 43 : 48 IC 683 (C).

39. *Tanuk Lal Mander*, (1920) 1 PLT 654 : (1920) Pat Supp CWN 285 : 22 Cr LJ 222.

40. *Mahbub Ali Khan*, (1919) 4 LLJ 488 : 24 Cr LJ 780 : 74 IC 444 : AIR (1924) L 330.

41. *Hayat Khan*, (1917) 4 PLW 211 : 19 Cr LJ 121 : 43 IC 409 ; *Subedar*, (1899) 1 UBR 15.

42. (1926) 31 CWN 195 : 99 IC 1033 : AIR (1927) C 229.

43. *Kaptan v. G. M. Smith*, (1871) 16 WR (Cr) 3 : 7 BLR App 25.

44. *Manhari Chowdhurani*, (1917) 45 C 727 : 27 CLJ 434 : 22 CWN 199 : 19 Cr LJ 198.

45. *Ranga Boyan*, A 1945 M 472.

46. *Ali Reza*, A 1944 P 247.

47. *Sheoshankar Prasad*, A 1960 P 552 ; 1960 Cr LJ 1649 following *Maksudan Mistry*, A 1921 P 22 and distinguishing *M. N. Mukherjee v. Matangi Charan Palit*, A 1919 C 57.

48. *Suraj Narain v. Nirpat Singh*, A 1961 P 406 : 1961 (2) Cr LJ 537.

Ss. 147, 332, 34 and 149 I. P. C. committed in course of the same transaction is not barred under S. 403 nor under the principle analogous to S. 403 as they were not the same offences nor did the case fall under Ss. 236 and 237.⁴⁹

21. Sub-section (2)—Fresh Trial on same facts held to be not barred.—An acquittal on a charge, under S. 409 of the Penal Code, of criminal breach of trust of a certain sum of money committed between two specified dates does not bar, a subsequent trial for criminal breach of trust, committed on an intermediate date, of a separate sum which was not included in the amount of the subject of the first trial.⁵⁰

Sub-section (2).—Is an *exception* to the general rule contained in subsec. (1).

22. 'Distinct offence'.—Under the second part of S. 403 the fact of the accused having been charged at the first trial with one offence only does not prevent the institution of a separate proceeding in respect of some other offence which was disclosed during the course of the first trial.⁵¹ The expression 'distinct offences' occurred in S. 35 *ante* which had been deleted by Act XVIII of 1923. See commentary on that section. Where a person, who was tried and acquitted by a Sessions Judge for offences under Ss. 201, 202 I. P. C. was tried again on the same facts by an inferior Court under S. 176 I. P. C. held that the retrial was barred by S. 403 (2) of the Code.⁵² A conviction of theft under S. 379 of the Indian Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the accused under S. 9 of the Indian Opium Act, 1878.⁵³ An acquittal under S. 182 of the Indian Penal Code in respect of a false information contained in a petition to the Manager of an estate is no bar to a subsequent prosecution for a defamation under S. 500 of the Penal Code, on the same statements⁵⁴ of the same accused for an offence under S. 211.⁵⁵ The fact that a person has been tried for and acquitted of offences under the Indian Penal Code in respect of certain transactions in connexion with the registration of a document is no bar to his trial for an offence under S. 82 of the Registration Act arising out of the same transactions.⁵⁶

Section 403 (2).—Trial of an offence under S. 105 of the Insurance Act after the trial and conviction for the offence under S. 409 I. P. C. is not barred under Art. 20 (2) of the Constitution or under S. 26 of the General Clauses Act.⁵⁷ The Trial in respect of a gross sum embezzled between two specified dates does not bar a second trial in respect of another sum embezzled on intermediate days but it will not be conducive to justice, rather it would be vexatious to have a piecemeal trial.⁵⁸ See the recent decision of the Supreme Court in the case of *State of Bombay v. Umarshee*⁵⁹ where S. 222

49. *Tulsidas*, A 1961 B 133 : 1961 (1) Cr LJ 633 Where *Pritam Singh*, A 1956 SC 415 was distinguished; *Sundarlal Bhagaji*, A 1954 MB 129 not followed and *Gourishankar Rao*, A 1947 P 290 dissented from.

50. *Nagendra Nath Bose*, 50 C 632 : 27 GWN 578 : 25 Cr LJ 156.

51. *Croft*, (1895) 23 C 174; *Jivaram Dankarji* (1915) 40 B 97 : 17 Bom LR 881. See *Prasanna Kumar Das*, (1904) 31 C 1007 : 8 CWN 717; *Ramsahay*, 48 C 78; *Kalicharan*, 42 CWN 1232; *Ibrahim Iboo*, A 1948 B 65; *Hiralal*, A 1934 C 240; 35 Cr LJ 1270.

52. *Sharbekham Gohain*, (1905) 10 CWN 518 : 3 Cr LJ 388.

53. *Deoki Koeri*, (1926) 48 A 496.

54. *Ramsebak Lal v. Muneswar Singh*, (1910) 37 C 604.

55. *Thakur Singh v. Chattar Pal*, (1910) 20 PR 1910 (Cr) : 6 IC 944.

56. *Jiwan*, (1914) 37 A 107.

57. *State of Bombay v. S. L. Apte*, 1961 (1) Cr LJ 725; A 1961 SC 578.

58. *Chittaranjan Saha*, A 1960 P 168 : 1960 Cr LJ 503; *Rameswar Mahapatra*, A 1958 Or 141 : 1958 Cr LJ 794.

59. A 1962 SC 1158.

(2) and S. 235 have been construed. The offence of failure to pay an instalment in a case of conviction under U. P. Excise Act IV of 1910 is complete the moment the accused fails to pay the instalment on the due date. He cannot be punished again and again because he fails to pay a particular instalment in successive months.⁶⁰ In S. 403 (2) the words 'distinct offences' are specifically used. If several offences are committed in the course of the same transaction, a person may be tried for all such offences when the offence of assault could not have been committed if the accused had not trespassed, S. 403 (2) can have no application.⁶¹

The illustrations appended to Ss. 235 and 236 make the position of the applicability of S. 403 as a bar clear. It can be easily answered with reference to whether the offence which has once been the subject-matter of trial rests on facts which are covered by S. 236 or the offence in respect of which a second trial is sought to be launched rests on the principle of S. 235 (1).⁶² There can be no objection to a trial and conviction under S. 409 I. P. C. even if the accused has been acquitted of an offence under S. 5 (2) of the Prevention of Corruption Act.⁶³ Whether a second trial lies would depend on the question whether the offence is distinct or not. The true test of deciding whether a subsequent trial comes under Part 2 of S. 403 is to see whether the acquittal or conviction for the first charge necessarily involves an acquittal or conviction on the second charge.⁶⁴ S. 403 (2) limits or rather explains the common law rule meaning that the acquittal or conviction for the offence constituted by acts A. B. and C. will not bar a subsequent trial in respect of the offence constituted by B the acts B. C. and D.⁶⁵ Where the accused is alleged to have committed distinct and different offences of Criminal misappropriation in respect of different individuals and in relation to different sums of money committed at different places and times, S. 403 is not a bar in the way of prosecution in respect of the subsequent charges simply because the earlier charges ended in an acquittal.⁶⁶ Where the accused persons were tried under Ss. 468, 471, 419, 420, 415 and 191 read with Ss. 120B and 511 I. P. C. and acquitted, their subsequent trial under S. 467 I. P. C. is not barred.⁶⁷ Where the previous trial was under S. 7, Essential Supplies (Temporary Powers) Act and the accused were tried subsequently for offences under Ss. 322 and 392, Penal Code, held S. 403 (2) applies and not S. 403 (1).⁶⁸ Where a person is prosecuted under S. 56 Mysore Police Act and is acquitted, his subsequent prosecution under S. 355 Penal Code is not barred.⁶⁹ Not only act of prime failure is an offence under S. 488 (2) of the Calcutta Municipal Act but its continuance is another offence.⁷⁰ Possession of a revolver without a licence is a distinct offence under the Arms Act. It has nothing to do with the attempt to commit suicide which is an offence under S. 309 I. P. C.⁷¹

23. Sub-section (3).—Accused tried and acquitted under S. 323 I. P. C. cannot be ordered to be retried under S. 324 I. P. C. as that charge

60. *Ramnarain*, A 1956 A 141 ; 1956 Cr LJ 189 see *Contra Karsandas Govindji*, A 1942 B 326 ; 44 Cr LJ 120.

61. *Bejoy Dutta*, A 1951 C 452 : 52 Cr LJ 16 (2).

62. *Jashodanand Biswas*, A 1955 P 356 : 1955 Cr LJ 1277.

63. *State of M. P. v. Veerashwar Rao*, 1957 SCJ 519 ; A 1957 SC 592 ; 1957 Cr LJ 892.

64. *Purnandu Das Gupta*, A 1939 C 65 ; 40 Cr LJ 199 (S B).

65. *Babulal Mohton v. Ram Saran Singh*, A 1930 P 20 : 30 Cr LJ 806.

66. *Osman Ali, In re* ; A 1959 A P 520 : 1959 Cr LJ 1138.

67. *Harol Narmada Prasad*, A 1956 VP 30 ; 1956 Cr LJ 1246.

68. *Kunjilal v. State of M. P.*, A 1955 SC 280 ; 1955 Cr LJ 730.

69. *T. Bangarappa v. Ranganatha Rao*, A 1953 Mys 64 ; 1953 Cr LJ 1055.

70. A 1953 C 357 ; 1953 Cr LJ 775.

71. *Afak Haider*, A 1951 Hyd 168.

could have been framed at the first Trial. The case is covered by illustration (c).⁷² Sub-sec. (3) could only be invoked when the consequences had not happened, or were not known to the Court to have happened at the time the accused was convicted.⁷³

Exception II.—sub-sec. (3).—See illustrations (c) and (e) to the section.

Exception III.—sub-sec. (4).—The second part of sub-sec. (1) says that previous trial is a bar to a subsequent trial on the same facts for any other offence for which a different charge might have been made under S. 236 or for which the accused might have been convicted under S. 237. This exception accepts that principle with this modification that the subsequent trial will not be barred if the previous trial was by a Court not competent to try the same. S. 403 (4) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under S. 195 Cr. Pr. Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings.^{73a}

24. Sub-section (4).—For acquittal for want of sanction or absence of complaint in a summons-case under S. 247 which come under this clause, see commentary on sub-sec. (1) *ante*. Where a Magistrate with first class powers was conducting a trial, the accused beat another person with a shoe and thereby committed an offence under S. 228 I. P. C. besides the offence under S. 355 I. P. C. *held* that the Magistrate had not taken cognizance of the offence under S. 355 I. P. C. hence the subsequent trial was not barred.⁷⁴ A person tried and acquitted on the charge under S. 465 I. P. C. may on the same facts be committed to the Court of Session for trial for an offence under S. 467 I. P. C. on the allegation that the forged document is a valuable security.⁷⁵ The words 'competent to try' in S. 403 refer to the character and status of the Court which decided the case.⁷⁶ The word 'Court' in this section excluded the jury. Hence an acquittal by the Court of Session of an accused would bar his subsequent trial even though the jury consisted of members in excess of the legal number.⁷⁷ On a complaint under Ss. 409 and 477 I. P. C. a Second Class Magistrate acquitted the accused. The complainant filed a second complaint before the District Magistrate, who having regard to S. 530 (k) took cognizance and continued the trial, *held*, the trial was not barred.^{77a}

See illustrations (f) and (g) and see also *Krishna Ayyar*⁷⁸ and *Venkatarama Joshi*⁷⁹ and *Panna*⁸⁰ where it was held that the pleas of 'autrefois convict' and 'autrefois acquit' could not be urged by the accused when the offence was one which the Magistrate was not competent to try.

Absence of complaint under S. 199.—The accused was tried under Ss. 366, 368, 376 I. P. C. and was acquitted. On complaint of the husband of the woman the accused was retried and convicted on the same facts under S. 498 I. P. C. *Held*, that as the earlier Court was incompetent to try the

72. *Bhog Singh*, A 1938 L 614 ; 39 Cr LJ 870.

73. *Sunderlal Bhagaji*, A 1954 MB 129.

73a. *K. Ganapathi Bhatta*, (1911) 36 M 308 ; 24 MLJ 463 ; *Menghraj Devidas*, (1909) 23 Cr LJ 305 (S).

74. *Babulal Mahton v. Ram Saran Singh*, A 1930 P 26 ; 36 Cr LJ 806 ; See *Palani Goundan*, A 1925 M 711 ; *Gobind Swain*, A 1923 P 228 ; *Satrughna Behara*, A 1944 P 328.

75. *Abdul Hakim Khan*, A 1919 C 464.

76. *Meghraj Devi Das*, A 1921 S 137 ; 23 Cr LJ 315.

77. *Vithal Tuka Ram*, A 1945 P 183 ; 46 Cr LJ 520 ; *Nawabali*, 46 GWN 1027.

77a. *Krishnadhan Ghose v. Mahendra Nath Dutt*, 23 GWN 518 ; 20 Cr LJ 112.

78. 24 M 641.

79. 18 Cr LJ 643 ; 40 IC 291 (M).

80. 7 NWPFC 371.

accused under S. 498 in the absence of a complaint by the husband, the latter trial of him under that section upon such complaint did not violate the provisions of S. 403 Cr. P. Code.⁸¹

25. Sub-section (5).—See S. 26 of the General Clauses Act No. X of 1897.

26. Explanation.—“Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused unless its application is precluded by the provisions of the Code. ‘Acquittal’ in Common Law means an acquittal after verdict or sentence. The Legislature having by Ss. 333, 494 and 248 of the Code of Cr. Procedure given the term a wider significance, the Explanation to S. 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit* was not technically applicable and not to bar the application of the aforesaid analogous principle where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused, must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force”.⁸² The Privy Council has held that if the Court acquits an accused for want of sanction instead of discharging the accused, the order is without jurisdiction and operates as a discharge.⁸³ Fresh trial after obtaining sanction is not barred.⁸⁴

See Commentary *ante* under the heading ‘Applicability of the section.’

27. The stopping of proceedings under S. 249.—Where a Magistrate released an accused person without drawing up a formal charge against him, or requiring him to plead or to make any defence to the charge under S. 251 of the Code of 1861, there was no trial before the Magistrate or acquittal under S. 255 but simply a discharge under S. 250, *held* the Sessions Judge was competent in such a case, under S. 435 of Act VIII of 1869 to direct the committal of the accused.⁸⁵ The Forest Department challaned a case of an offence punishable under S. 32 of the Forest Act. Acting under S. 249 Cr. P. Code, the trying Magistrate stopped the proceedings. *Held*, that the order under S. 249 would not bar further proceedings in accordance with law.⁸⁶ Under S. 242 the Trial of a Summons-case begins when the accused appears or is brought before a Magistrate. Withdrawal of complaint under S. 248 before the accused is questioned under S. 242 would amount to a trial and acquittal under S. 403.⁸⁷ An acquittal under S. 247 is a bar under S. 403.⁸⁸

81. *Tikaram Sakharan Kasar*, (1915) 17 Bom LR 678 : 16 Cr LJ 657 : 30 IC 641 ; *Umaruddin*, (1909) 31 A 317.

82. *Per Subramaniya Aiyer, J.*, in dissentient judgment in *Chinna Kaliappa Gounden*, (1905) 29 M 12 (FB).

83. *Yusoofali Mulla*, 53 CWN 850 : A 1949 PC 264 ; 50 Cr LJ 889 ; *Radhabhai*, A 1956 B 439 ; 1955 Cr LJ 1564 ; *C. Devanugraham* ; A 1952 M 725 ; MG *Gopal Krishna Naidu*, A 1952 N 170 ; 1952 Cr LJ 845 ; *Ashaul Huq*, A 1949 N 327.

84. *Yusoofali Mulla*, 53 CWN 850 : A 1949

PC 264.

85. *Goburdhan Bera*, (1869) 4 BLRA (Cr) 1 : 12 WR (Cr) 55.

86. *Achhra*, (1912) 9 PR 1913 : 8 PWR 1913 : 13 Cr LJ 860.

87. *M. Kandasami Pillai*, A 1947 M 306 (1).

88. *Kanai Misra v. Gopal Misra*, A 1953 C 197 : *Dulla*, 45 A 58 ; *In re Simun Goundon*, 38 M 1028 ; *Ram Mahto* ; A 1921 P 311 ; *Abdul Aziz v. Noor Elahi*, A 1934 W 211 (2) : 36 Cr LJ 29 ; *Kum-unbayya v. Lakshmi Narayan Singh Rao*, A 1943 M 6 ; *Sukhram*, 33 CWN 846.

PART VII

OF APPEAL, REFERENCE AND REVISION

CHAPTER XXXI

OF APPEALS

Part VII of the Criminal Procedure is sub-divided into two parts,—(1) Chapter XXXI dealing with Appeals and (2) Chapter XXXII dealing with Reference and Revision.

Chapter XXXI contains Ss. 404-431 whereas Chapter XXXII contains Ss. 432-442.

Mukerji, J., observed with regard to the amended Chapter XXXI as follows :—“In the first place the general tendency of the Amending Acts of 1923 has been to enlarge rather than to curtail the right of appeal in favour of accused persons. By that Act several orders which were not formerly appealable have been made so ; right to appeal to a higher Court has been conferred by S. 406 ; an order refusing to accept or rejecting a surety has been made appealable by S. 406-A, the immunities enjoyed by certain sentences under Ss. 413 and 414 have now been taken away ; special right of appeal has been created in certain cases under Ss. 415-A and 418 (2) ; and it is also interesting to note that in the matter of refusal to accept or of rejecting sureties offered in compliance with an order under S. 562 (1), the provisions as to right of appeal have been made applicable by sub-sec. (4) of S. 562”.⁸⁹

This chapter is not exhaustive.

See Ss. 250 (3), 476-B, 486, 515, 524.

Limitation for presentation of appeal.—*Appeal from a sentence of Death*, by a Sessions Judge,—seven days, Sch. II, Art. 150, Limitation Act XV of 1877 as amended in 1908.

Appeal from an order of acquittal, by the Local Government within six months.—Sch. II, Art. 157. For motions against acquittal by a private person under S. 439 of the Code there is no limitation provided in the Limitation Act, but the practice of the Calcutta High Court is to move the Legal Remembrancer with a view to prefer an appeal by the Local Government and if that application is rejected, to move the High Court within 60 days of the order.

Appeal to the High Court except in the two cases provided for by Art. 150 and Art. 157 above, sixty days, Sch. II, Art. 155.

Appeal to any Court other than a High Court, sixty days, Sch. II, Art. 154.

Appeal to Supreme Court.—Apart from appeal by special leave under Art. 136, appeal will be under Art. 134 to the Supreme Court and under Art. 134 (1) (c) the petitioner has to move the High Court for a certificate about fitness of the appeal. If the High Court rejects the application the petitioner will have to move the Supreme Court for special leave under Art. 136.

89. *Bahadur Molla*, (1924) 52 C 463 (468, 469) : 29 CWN 151.

Computation of the period of limitation.—See S. 12 of the Limitation Act.

Extension of the period.—See S. 5 of the Limitation Act.

404. Unless otherwise provided, no appeal to lie.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Appeal on behalf of State Government—S. 417—private complainants S. 417 (5). |
| 2. Forum of Appeal depends on sentence. | 7. Appeal from order requiring security for keeping peace or for good behaviour. |
| 3. 'Except as provided for by this Code in force'. | 8. Appeal from order refusing to accept or rejecting a surety. |
| 4. Special limitation for appeal. | 9. Appeals under other Acts. |
| 5. Special right of appeal in certain cases. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 414 of the Code of 1861 and S. 286 of the Code of 1872 and is the same as that of the Code of 1882.

2. Forum of appeal depends upon sentence.—Where different sentences are passed on different accused, each accused must be deemed to have been convicted in a separate case of his own ; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence and not on the extent of the sentences of the other accused.⁹⁰ This view however has been modified by the insertion of S. 415A.

3. 'Except as provided for by this Code or by any other law for the time being in force'.—Under the Letters Patent (Calcutta, Madras, Bombay) the High Court exercises appellate jurisdiction in such cases as are subject to appeal by virtue of any law in force.

4. Special limitation for appeal.—See Ss. 411, 412, 413, 414 and 415.

5. Special right of appeal in certain cases.—See S. 415-A, S. 418(2).

6. Appeal on behalf of State Government and private complainant against orders of acquittal.—See S. 417.

7. Appeal from order requiring security for keeping peace or for good behaviour.—See S. 406.

8. Appeal from order refusing to accept or rejecting a surety.—See S. 406-A.

9. Appeals under other Acts.—(1) *Cattle Trespass Act*.—By S. 4 (o) of the Code of Cr. Procedure, the word "offence" includes an act in respect of which a complaint may be made under S. 20 of the Cattle Trespass Act ; and a person against whom an order under S. 22 of the Cattle Trespass Act is made is a 'person convicted on a trial' and is entitled to appeal under S. 407 of the Cr. P. Code.⁹¹ This decision is now good law and the following rulings⁹² have been superseded.

90. *In re Nitoor Moideen Hajee*, (1922) 43 MLJ 561 ; 24 Cr LJ 89 ; 71 IC 217 ; AIR (1923) M 95.

91. *In the matter of Ponnusami*, (1901) 29 M 517.

92. *Raya Lakhma*, (1885) 10 B 230 ; *in re Khadar Khan*, (1887) 11 M 359 ; *Lakshmi Nayakan*, (1896) 19 M 238 ; *Dhiku v. Denonath*, (1888) 15 C 712 overruled.

(2) *Bengal Excise Act*.—Sections 75 and 85 of the Bengal Excise Act apply to proceedings before a Collector and S. 84 shows that the Criminal Procedure Code is applicable to trials before a Magistrate under the Act subject to specified restrictions. An appeal, therefore, lies under S. 410 of the Code, from a conviction and sentence by a Presidency Magistrate, passed under the Act.⁹³

405. Appeal from order rejecting application for restoration of attached property.—Any person whose application under Section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court, may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Corresponding sections in former Codes.—This section corresponds to S. 180 of Act IV of 1877 and is the same as that of the Code of 1882.

406. Appeal from order requiring security for keeping the peace or for good behaviour.—Any person who has been ordered under Section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(a) if made by a Presidency Magistrate, to the High Court ;

(b) if made by any other Magistrate, to the Court of Session :

Provided that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of Section 123.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —1923 and 1955. |
| 2. Legislative Changes. | 3. Effect of 1923 Amendment. |
| | 4. Effect of 1955 Amendment. |

1. Corresponding sections in former Codes.—This section corresponds to S. 409 of the Code of 1861 and S. 287 of the Code of 1872 and the Code before the amendment of 1923 was similarly worded as that of 1882.

2. Legislative Changes (1923).—This section was substituted by S. 109 of the Criminal Procedure Amendment Act (Act XVIII of 1923) for the old section printed in the left hand column.

Legislative Changes (1955).—The first proviso to old S. 406 which enabled the State Government by a notification in the Official Gazette directed the District Magistrate to hear appeals from orders by other Magistrates against an order under S. 118 to give security for keeping the peace or for good behaviour have been omitted by Act 26 of 1955.

3. Effect of 1923 Amendment.—(1) The insertion of the words “for keeping the peace” has provided an appeal against an order directing security

93. *Upendra Nath Biswas*, (1913) 41 C 694.

to keep the peace and has the effect of superseding the following rulings⁹⁴ under the old Code which held that there was no appeal in such cases.

(2) The old Code did not provide for an appeal in cases under S. 107 or Ss. 108, 109, 110 when the order was passed by a Presidency Magistrate or a District Magistrate. Sub-section (a) provides for an appeal to the High Court against orders passed by a Presidency Magistrate as there is no Sessions Judge in the Presidency Towns and sub-sec. (b) provides for appeals to the Sessions Judge against orders passed by any other Magistrate.

(3) The last proviso added to the section excepts proceedings laid before the Judge under S. 123(2) or (3-A) from the purview of this section.

4. Effect of 1955 Amendment.—All appeals against the order under S. 118 shall lie to the Sessions Judge.

It is competent to a Court hearing an appeal in a case under S. 107 of the Cr. P. Code to direct that the case before him be retried.⁹⁵

406-A. Appeal from order refusing to accept or rejecting a security.—Any person aggrieved by an order refusing to accept or rejecting a surety under Section 122 may appeal against such order—

(a) if made by a Presidency Magistrate, to the High Court ;

(b) if made by the District Magistrate, to the Court of Session ; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

SYNOPSIS

1. Legislative changes.

2. State Amendments.
—Bombay.

—Uttar Pradesh.

3. Report of the Select Committee (1923).

1. Legislative Changes.—This section is new and was inserted by S. 110 of the Criminal Procedure Amendment Act (Act XVIII of 1923).

2. State Amendments.—

Bombay.—In sub-sec. (i) (a) the word 'sub-divisional' shall be deleted, for the words 'District Magistrate', 'the Court of Session' shall be substituted (ii) in sub-sec. (2), (a) for the words 'District Magistrate' wherever they occur, the words 'Sessions Judge' shall be substituted, (b) after the words 'State Government', the words 'in consultation with the High Court' shall be inserted, *vide* Bombay Act 23 of 1951. The following section has been inserted by Bombay Act 39 of 1955 :—

"406-A. Any person aggrieved by a direction made by a District Magistrate under sub-sec. (2) of S. 436 requiring any sub-divisional Magistrate or any other Executive Magistrate subordinate to him to make further inquiry into any proceedings in which an order of release or discharge has been made by him under S. 119. In S. 406-B, the figures and words 'S. 406 or and in Sch. III in Pt. IV, items (8) and (11) deleted *vide* Bombay Gazette, dated 5-11-59, Pt. IV, p. 523.

Uttar Pradesh.—After the words 'against such order' omit the comma and dash and the words following thereafter and add the words 'to the Court of Session'. *vide* U. P. Act 36 of 1948.

94. *Chet*, 27 A 623 ; *Banarsi Das v. Partab Singh*, (1912) 35 A 103, *Har Dut Panda*, 14 ALJ 268 : 17 Cr LJ 165 : 33 IC 645, *Suleman Adam*, (1909) 11 Bom LR 740 : 10 Cr LJ 375 : 3 IC 774 ; *Sham-*

rao, 19 NLR 160 : 25 Cr LJ 67 : 75 IC 979.

95. *Bhagwat Singh*, (1926) 48 A 501 : 24 ALJ 566.

3. Report of the Select Committee (1923).—“We note that there has been considerable criticism of this clause which provides for an appeal against an order refusing to accept a surety. But we think if no appeal is provided, most cases are bound to be taken up in revision and we would retain the clause. We have made a slight amendment consequential on our proposals regarding S. 122. We do not agree that all appeals under Ss. 406 and 406-A should lie to the Sessions Judge; Saiyad Raza Ali dissents from this view”. This section provides for an appeal from an order refusing to accept or rejecting a surety.

407. [*Appeal from sentence of Magistrate of the second or third class. Transfer of appeals to first class Magistrate.*] *Rep. by the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), Section 81.*

State Amendments.—

Madras.—After S. 406-A insert the following section namely.

“Section 407.—**Appeal from sentence of Magistrate of the second or third class and transfer of appeals to first class Magistrate.**—(1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under S. 349 or in respect of whom an order has been made or a sentence has been passed under S. 380 by a Sub-Divisional Magistrate of the second class may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the State Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Magistrate, or if already presented to the District Magistrate, may be transferred to such Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred—*vide* Madras Act 31 of 1956, S. 3.

Kerala.—Same as that of Madras, *vide* Kerala Act 23 of 1958, S. 2.

In S. 408 for the words “any other Magistrate” substitute the words “other Magistrate of the first class” and for the words “any Magistrate”, substitute the words “Magistrate of the first class” *vide* Kerala Act 23 of 1958, S. 3.

Madras.—Same as that of Kerala, *vide* Madras Act 31 of 1956, S. 4.

408. Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.—Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or any other Magistrate, or any person sentenced under Section 349 or in respect of whom an order has been made or a sentence has been passed under Section 380 by any Magistrate, may appeal to the Court of Session :

Provided as follows :—

(a) * * * * *

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under Section 30 passes any sentence of imprisonment for a term exceeding four years, the appeal of all or any of the accused convicted at such trial shall lie to the High Court ;

(c) when any person is convicted by a Magistrate of an offence under Section 124-A of the Indian Penal Code, the appeal shall lie to the High Court.

SYNOPSIS

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|---|---|
| <ol style="list-style-type: none"> 1. Corresponding sections in former Codes. 2. Legislative Changes 1923 and 1955. 3. State Amendments.
—Bombay
—Saurashtra.
—Uttar Pradesh. 4. Effect of 1923 Amendment.
—Effect of 1955 Amendment. 5. Scope. 6. "Convicted on a trial". 7. "Or any person sentenced under S. 349. | <ol style="list-style-type: none"> 8. 'Or a sentence has been passed under S. 380'. 9. Appeal to the Court of Session. 10. Proviso (b).
—"In any case".
—Magistrate invested with higher powers during course of trial.
—Specially empowered. 11. Sentence exceeding four years. 12. Concurrent sentences should not be added together.
—Clause (c). |
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1. Corresponding sections in former Codes.—This section corresponds to Ss. 409 and 422 of the Code of 1861 and Ss. 79, 269 and 271 of the Code of 1872.

2. Legislative Changes (1923).—Proviso (a) in the Code of 1898 was proviso (b) in the Code of 1882 which was omitted by S. 23 of Act XII of 1923. In the Code of 1898 in Cl. (b) the following words: 'Magistrate specially,' before the word 'empowered,' and the words 'imprisonment for a term exceeding four years, or any sentence of transportation, the appeal shall lie to the High Court' were inserted. Cl. (c) was new in the Code of 1898.

The words 'or in respect of whom an order has been made or sentence has been passed under S. 380' were added by S. 112 of Act XVIII of 1923.

The Criminal Law Amendment Act (XII of 1923) by S. 23 has deleted Cl. (a) of the proviso which stood thus:—

"Any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Session."

Legislative Changes (1955).—The words 'any Magistrate' have been substituted for the words 'a Magistrate of the first class' and the words 'imprisonment for a term of four years' in proviso (b) were also substituted for the word 'Transportation' by Act 26 of 1955.

3. State Amendments.—

Bombay.—S. 408 has been substituted by the Bombay Act 39 of 1955:—S. 408. Any person convicted on a trial by an Assistant Sessions Judge or a Judicial Magistrate or any person sentenced under S. 349 or in respect of whom an order has been made or a sentence has been passed under S. 380 by a Judicial Magistrate may appeal to the Court of Sessions.

Provided as follows:—

(1) When in any case an Assistant Sessions Judge or a Magistrate specially empowered under S. 30 passes any sentence of imprisonment for a term exceeding four years, the appeal of all or any of the accused convicted at such trial shall lie to the High Court.

(2) When any person is convicted by a Magistrate of an offence under S. 124A of the Indian Penal Code, the appeal shall lie to the High Court".

Saurashtra.—Same as the Bombay amendment with this modification that Cls. (1) and (2) should be read as (a) and (b) and omit the word 'Judicial' before the word 'Magistrate', *vide* Sau. Act 4 of 1952.

Uttar Pradesh.—For paragraph 1 of S. 408, the following is substituted "any person convicted on a trial held by any Assistant Sessions Judge, a District Magistrate or any other Magistrate or any person sentenced under S. 349 or in respect of whom an order has been made or a sentence has been passed under S. 380 by a Sub-Divisional Magistrate of the Second Class or a Magistrate of the First Class or the District Magistrate may appeal to the Court of Session" *vide* U. P. Act 38 of 1948, S. 5.

- (a) for the words "A Sub-Divisional Magistrate of the Second Class or a Magistrate of the First Class or the District Magistrate" the words "any Magistrate" shall be substituted; and
- (b) in the proviso in Cl. (b) the words "or any sentence of transportation" shall be deleted, *vide* U. P. Act 22 of 1955, S. 2.

Regarding the amendment of Cl. (b) *vide* *Statement of Objects and Reasons* (1914) which is to the following effect:—

"This amendment in Cl. (b) provides that in a trial in which more than one person are accused, and in which by reason of the sentences passed an appeal lies in the case of some persons to the Sessions Court and of others to the High Court, the appeal of all shall lie to the latter tribunal."

4. Effect of the 1923 Amendment.—Before the words "or in respect of whom an order has been made or a sentence has been passed under S. 380" were inserted by S. 112 of Act XVIII of 1923, the Bombay High Court held in *Bhimappa*⁹⁶ that where a Second Class Magistrate submitted a case to a First Class Magistrate in order that the accused might be dealt with under S. 562 and the latter Magistrate acting under S. 380 convicted the accused and sentenced him, an appeal lay to the Court of Session. The reason given was that as the sentence was passed by a First Class Magistrate under S. 380, there was what practically amounted to a trial before him. The amendment in 1923 has given effect to this view as has been pointed out in *Maganlal Jhaverchand*.⁹⁷

The words, in Cl. (b) "of all or any of the accused convicted at such trial" inserted by the amendment of 1923, have given effect to the following rulings under the old Code⁹⁸ which held that in cases of joint trial where an appealable sentence is passed upon one and non-appealable sentences on the others, all the convicted persons have the right of appeal, and the said amendment, has in effect superseded the following rulings⁹⁹ which held a contrary view.

The decision in *Job Solomon*¹⁰⁰ which turned on Cl. (a) now repealed need no longer be considered.

Effect of the 1955 Amendment.—By insertion of the words 'any Magistrate' for the words 'a Magistrate of the first class', now all appeals from Magistrates lie to the Court of Session. Under the old Code appeals from the order of second class and third class Magistrates lay before the District Magistrate under S. 407 and appeal from orders of the first class Magistrate only lay before the Court of Session. Now S. 407 has been deleted and the insertion of the words 'any Magistrate' is a consequential amendment, 'transportation' has been substituted for 'Imprisonment for 4 years' in proviso (b) as 'Transportation' as a sentence has been abolished.

5. Scope.—An appeal lies under Ss. 407 and 408 of the Code from an order passed under S. 562.¹ S. 408 distinctly lays down that any person

96. (1915) 17 Bom LR 895.

97. (1927) 29 Bom LR 482.

98. *Jaisukh*, 16 PR 1916 Cr; *Bathew*, (1908) 4 LBR 354: 9 Cr LJ 356 (FB); *Palani Korvan*, (1907) 17 MLJ 248; *Naurati*, (1915) 30 PR 1915 Cr; *Lal Singh*, (1916) 38 A 395; *Hardayal*, (1915) 37 A 471: 13 ALJ 719: 16 Cr LJ 606; *Devidin*, (1925) 24 ALJ 151.

99. *Muliya Nana*, (1868) 5 Bom HC Cr Ga 24; *Mittoor Moideen Hajee v. Edekkattu*

Chekkutti Haji, (1922) 43 MLJ 561 following *re Venkatakrishnayya*, (1917) 40 M 591; *Pha Kujha*, (1919) Pat Supp CWN 265: 4 PLJ 435: 20 Cr LJ 545.

100. (1889) 14 B 160.

1. *Bahadur Molla v. Ismail*, 52 C 463: 29 CWN 151, followed in *Madhab Raghavendra Kulkarni*, (1926) 28 Bom LR 671.

convicted on a trial by a Magistrate of the First Class may appeal to the Court of Session. S. 413 is an exception to the general rule laid down in S. 408. S. 415 is explanatory and apparently was entered in the Code to remove all possible doubts which might arise in the cases considered therein.² The operative portion of S. 408 speaks of persons, the proviso (b) speaks of cases.³

An appeal lies under S. 408 from an order of compensation and repayment of fine passed under S. 22 of the Cattle Trespass Act, 1871.⁴

A conviction followed by admonition under S. 3 U. P. First Offender's Probation Act IV of 1938 is appealable under this section and the appeal is not shut out by the provisions of S. 413.^{4a} Where accused is sentenced to a fine under each of two Sections of the Penal Code and the aggregate exceeds Rs. 50/- accused's right of appeal is not affected by S. 413.^{4b}

6. Convicted on a trial.—These words exclude appeals against an order of a District Magistrate under the Security sections (Ss. 107-110) for which the new Code has inserted Ss. 406 and 406-A.

Section 408 gives a right of appeal from an order of conviction. Therefore a person who is convicted but released under S. 562 of the Code has a right of appeal.⁵

7. Or any person sentenced under S. 349.—When the proceedings in a case tried by a Subordinate Magistrate are submitted, under S. 277 of Act XXV of 1861, to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such sentence before the District Magistrate.⁶

8. Or a sentence has been passed under S. 380.—A sentence passed by a Magistrate of the First Class under S. 380 in a case submitted to him under S. 562 of the Code is unquestionably a sentence passed by such Magistrate.⁷ The amendment has given effect to this decision.

9. Appeal to the Court of Session.—This section makes sentences of a Magistrate appealable to the Court of Session.⁸ It was held that an appeal lay to the Sessions Judge under the provisions of S. 408 against an order under S. 3 of Ordinance III of 1914.⁹ Section 408 referring to appeals from First Class Magistrates merely states that the appeal lies "to the Court of Session" without any further explanatory words.¹⁰

Court of Session refers only to the Court of the Sessions Judge.¹¹

2. *Alam*, (1911) 33 A 510 : 8 ALJ 524 : 12 Cr LJ 389 : 11 IC 253.

3. *Re Venkata Krishnayya*, (1916) 40 M 591—no longer good law in view of S. 415-A.

4. *Rodericks Burthol Duming v. Pepa Dada*, (1921) 46 B 58 : 23 Bom LR 836 : 23 Cr LJ 624 : 63 IC 160.

4a. *Sheo Narain Tandan*, A 1959 A 351 : 1959 Cr LJ 677.

4b. *Godala Sanyasi*, A 1948 M 251 : 49 Cr LJ 461 ; *Akabbar Ali*, 35 CWN 752 : 33 Cr LJ 90.

5. *Monohar Das*, (1904) 24 PR 1904 : 1 Cr LJ 1098 ; *Mi Shwe Nyun*, (1904) UBR 7 : 1 Cr LJ 543 ; *Bahadur Molla*, 52 C 463 and *Machit Su*, (1909) 11

Cr LJ 152 : 5 LBR 129 ; *Shankar Sukul*, A 1940 R 223 : 41 Cr LJ 877 ; *Madhab*, A 1926 B 382.

6. *Ragha Naranji*, (1870) 7 Bom HC Cr Ca 31 ; see *Rohimuddin Howladar*, (1908) 4 LBR 53 : 9 Cr LJ 72.

7. *Bhimappa Ulvappa*, (1915) 17 Bom LR 895 : 16 Cr LJ 738 : 31 IC 338.

8. *Nishi Chandra Choudhury v. Ramesh Chandra Sen*, (1913) 14 Cr LJ 195 : 19 IC 195 (C).

9. *Sher Singh*, (1916) 152 PLR 1916 : 10 PR 1916 Cr : 34 IC 641.

10. *Valia Ambu Poduval*, (1906) 30 M 136 distinguished in 23 MLJ 670.

11. A 1957 P 375 (FB).

10. Proviso (b).—See under the heading ‘Legislative Changes’ *supra*. The proviso contained the words ‘exceeding four years’. Where an Assistant Sessions Judge passed sentences upon an accused each of which is four years or under and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court.¹² The Allahabad High Court has however held a contrary view.¹³

In any case.—Whenever an Assistant Sessions Judge sentences any of the accused in a case to more than 4 years’ imprisonment the appeal always lies to the High Court, whether it be by the person who is sentenced to less than 4 years in the same case; and the Sessions Judge has no jurisdiction to entertain an appeal from persons sentenced to less than 4 years.¹⁴ This view has been adopted by the amendment in 1923.

Magistrate invested with higher powers during course of trial.—Where a case is taken cognizance of by a Magistrate who has Second Class powers, but who is since invested with First Class powers and a great part of the trial takes place before him after such investment, an appeal from him lies to the Sessions Judge.¹⁵

Specially empowered.—*i. e.*, under S. 30. Appeal from a sentence exceeding four years passed by a Magistrate specially empowered lies to the High Court.¹⁶

11. Sentence of imprisonment exceeding four years.—The phrase “sentence of imprisonment for a term exceeding four years” in Cl. (b) of S. 408 has reference to the substantive sentence of imprisonment apart from any sentence of fine or imprisonment in default of the payment of the fine.¹⁷

The appeal of all or any of the accused convicted at such trial.—See Commentary *supra* under the heading ‘Legislative Changes.’

12. Concurrent sentences should not be added together.—Where an assistant Sessions Judge convicted an accused of the offences under Ss. 304 and 147 I. P. C. and passed a sentence of imprisonment for four years on each convict and directed that the two sentences were to run concurrently, held that an appeal lay to the Sessions Judge as there could be no aggregation of sentences which run concurrently.¹⁸ A contrary view was held in *Abdul Khalek*,¹⁹ where the judgment gives no reasons. Under S. 35 (3) the aggregate sentences are to be deemed as one sentence for the purpose of appeal.²⁰

Clause (c).—An appeal lies under Ss. 35 (3) and 408, Cl. (c) directly to the High Court from a conviction and separate sentences under Ss. 124-A and 135-A of the Penal Code passed in the same trial.²¹

Where an appeal against conviction under S. 124-A, I. P. C. was wrongly admitted by the Sessions Judge and the sentence was reduced, the

12. *Lakshmi Ram Gagoi*, (1916) 23 CLJ 595, following *Tulsidas*, (1908) 11 Bom LR 544 and *Sher Muhammad*, 25 PR 1901.

13. *Hardayal*, (1915) 37 A 471.

14. *Palani Korvan*, (1907) 17 MLJ 248 : 5 Cr LJ 496. See *Alibux*, Rat, 655—decision under Act X of 1882; *Debi Din*, A 1926 A 160 : 27 Cr LJ 175; *Har Dayal*, 37 A 471.

15. *Maganlal Jhaver Chand*, (1927) 29 Bom

LR 482.

16. *In re Abdulla*, (1924) 2 R 386.

17. *Khuda Baksh*, (1918) 19 PR 1918 Cr : 19 Cr LJ 742 : 46 IC 518.

18. *Tulsiram*, (1913) 35 A 154 : 11 ALJ 111 : 14 Cr LJ 119.

19. 17 GWN 72 : 13 Cr LJ 877 : 17 IC 813.

20. *Shidlingappa*, (1926) 29 Bom LR 671.

21. *Joy Chandra Sarker*, (1910) 38 C 214.

accused again appealed to the High Court after the period of limitation. Time was extended under S. 5 Limitation Act.²²

All that this sub-section means is that where there is an appeal, the appeal shall lie to the High Court. It does not mean that you can prefer an appeal to the High Court in seditious cases and cases tried under S. 153-A I. P. C. against the order of a Magistrate when there is no appeal.

409. Appeals to Courts of Session how heard.—(1) Subject to the provisions of this section, an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge or an Assistant Sessions Judge :

Provided that no such appeal shall be heard by an Assistant Sessions Judge unless the appeal is of a person convicted on a trial held by any Magistrate of second or third class.

(2) An Additional Sessions Judge or an Assistant Sessions Judge shall hear only such appeals as the State Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

SYNOPSIS

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|---------------------------------------|----------------------------|
| 1. Legislative Changes—1923 and 1955. | —Madras. |
| 2. State Amendments. | —Effect of 1923 amendment. |
| —Uttar Pradesh. | 3. Scope. |
| —Kerala. | 4. Sub-section (2). |

This section was new in the Code of 1882.

1. Legislative Changes (1923).—The *proviso* printed in Italics was added by S. 113 of the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923).

Legislative Changes (1955).—The former proviso has been made sub-sec. (2) with the modification that after the words 'Additional Sessions Judge', the words 'or an Assistant Sessions Judge' have been inserted and a proviso has been added by Act 26 of 1955.

2. State Amendments.

Uttar Pradesh.—For S. 409 substitute the following :—

"409. Appeals to Court of Session how heard.—(1) Subject to the provisions of this section, an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge or an Assistant Sessions Judge :

Provided that no such appeal shall be heard by an Assistant Sessions Judge unless the appeal is of a person convicted on a trial held by any Magistrate of second or third class.

(2) An Additional Sessions Judge or an Assistant Sessions Judge shall hear only such appeals as the State Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him. *Vide* U. P. Act 22 of 1955, S. 3.

Kerala.—For S. 409 substitute the following :—

"409. Appeals to Court of Session how heard.—An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

22. *Krishna Chandra*, A 1937 A 466 : 38 Cr LJ 972.

Provided that an Additional Sessions Judge shall hear only such appeals as the State Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him. *Vide* Kerala Act 23 of 1958, S. 4.

Madras.—Same as the Kerala Amendment, *vide* Madras Act 31 of 1956, S. 4.

Effect of the 1923 Amendment.—An Assistant Sessions Judge has been empowered to hear an appeal from a conviction by a Second Class or Third Class Magistrate. As S. 407 has been deleted, this provision has been inserted.

Ordinarily a Sessions Judge will hear appeals. An Additional Sessions Judge will hear an appeal if he is directed by a general or special order of the State Government to hear appeals or if the appeal is transferred to him for disposal by the Sessions Judge of the division.

In view of the proviso added, the decision in *Nishi Chandra v. Ramesh Chandra*^{22a} which held that an Additional Sessions Judge could hear appeals to the Sessions Court, has been modified to this extent that he may hear such appeals if he is directed by the Sessions Judge to hear them.

3. Scope.—The effect of S. 193 (2) and S. 409, is that an Additional Sessions Judge shall hear all the appeals which lie to the Sessions Judge and the Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge.²³

In view of the insertion of the new proviso, the Sessions Judge can transfer any appeal from the order of the Second or third class Magistrate to an Assistant Sessions Judge.²⁴

4. Sub-section (2)—When an appeal was transferred by the High Court from one Sessions Judge to the Court of another Sessions Judge he has jurisdiction to transfer the case to the Additional Judge.²⁵ *See* Madras Cr. P. Code Amendment Act 31 of 1956.

410. Appeal from sentence of Court of Session.—Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Trial. |
| 2. Scope. | —Appeal if available against cases under (Special Courts) ordinance. |

1. Corresponding sections in former Codes.—This section corresponds to S. 80 and paragraph 3 of S. 270, and S. 271 of the Code of 1872 and S. 22 (1) of Act XI of 1874 and is the same as that of the Code of 1882.

2. Scope.—An appeal to the High Court lies against an order of the Sessions Court imposing a fine on a witness under S. 288 I. P. C.²⁶

Appeal to the High Court lies under this section. Cl. 27 of the Letters Patent need not be invoked for the exercise of the Criminal Appellate jurisdiction.²⁷ Appeal also lies to the High Court under S. 408 provisos (b) and (c), Ss. 411 and 411-A.

22a. 14 Cr LJ 195 : 19 IC 195 (C).

23. *Chandra Kumar v. Ramesh Chandra*, A 1942 Oudh 50 : 43 Cr LJ 50.

24. *Nishan*, A 1955 EP 65.

25. *Kedarnath*, A 1934 P 114 : 35 Cr LJ

1167.

26. *Chappu*, 4 MHCR 146.

27. *Sunil Chandra Roy*, A 1954 C 303 : *Shiv Bahadur Singh v. State of V. P.*

Where an Appellate Court has under S. 428 of the Code of Criminal Procedure taken additional evidence, the accused, whose appeal has been dismissed by such Court, has no right of appeal to the High Court.²⁸

There is no jurisdiction in the High Court to hear appeals in respect of sentences passed on conviction of offences committed within the districts known as the *Chittagong Hill Tracts*.²⁹

3. Trial.—Has reference to offences under special or local law *e. g.*, under the Excise Act.³⁰ The words “same trial” in S. 269, sub-sec. (3) of the Criminal Procedure Code can not be read as taking away the right of appeal given by S. 410. The section uses the words in a distributive sense.³¹

Appeal if available against cases under (Special Courts) Ordinance.—A Special Judge under the Vindya Pradesh Criminal Law Amendment (Special Courts) Ordinance is to be deemed a Court of Session for the purposes of appeal under this section by virtue of S. 5 (2) of that ordinance.^{31a}

411. Appeal from sentence of Presidency Magistrate.—Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. State Amendment.—Bombay. | 4. To imprisonment for a term exceeding six months or to a fine exceeding two hundred rupees. |

1. Corresponding sections in former Codes.—This section corresponds to S. 167 of Act IV of 1877 and is the same as that of the Code of 1882.

2. State Amendment.

Bombay.—In S. 411 the words “for a term exceeding six months” were deleted by Bombay Act 54 of 1959.

3. Scope.—No appeal lies from a sentence of six months’ rigorous imprisonment and a fine of Rs. 200/- or a further period of three months’ simple imprisonment passed by a Presidency Magistrate.³² The intention of the Legislature is that a person who is to suffer for more than a certain period, six months by a Presidency Magistrate, shall have the privilege of an appeal.³³

Constitutionality.—Section 411 is not *ultra vires* the Constitution. It is not a violation of the principle of equality before the law embodied in Art. 14 of the Constitution.^{33a}

No appeal lies as provided by this section from a sentence of six months’ rigorous imprisonment passed by a Presidency Magistrate,³⁴ nor from an order passed by him under S. 562.³⁵

28. *Isahak*, (1900) 27 C 372 : 4 CWN 497.
 29. *Sonai Mugh*, (1900) 27 C 654.
 30. *Upendra Nath Biswas*, (1913) 41 C 694 : 19 CLJ 53.
 31. *Karuppa Gounden*, 18 Cr LJ 346 : 38 IC 730 (M).
 31a. A 1953 SC 394 : 1953 Cr LJ 1480.
 32. *Schein*, (1889) 16 C 799 ; *Hari Sabha*,

(1895) 20 B 145.
 33. *Suknandan Singh*, 17 CLJ 392 : 13 Cr LJ 787 : 17 IC 31.
 33a. *In re Rajoo*, A 1963 M 82.
 34. *Kali Kumar Mitter*, A 1937 C 413 : 38 Cr LJ 376.
 35. *Binks*, 36 CWN 459 : 33 Cr LJ 639.

4. To imprisonment for a term exceeding six months or to a fine exceeding two hundred rupees.—These words in S. 167 of the Presidency Magistrates' Act are confined in their meaning to substantive sentences and cannot be extended to include an award of imprisonment in default of payment of fine, the operation of which is contingent only on the fine being paid.³⁶

Where the sentence was one month's rigorous imprisonment under S. 323 I. P. C. and a fine of Rs. 50/-, in default two weeks' rigorous imprisonment under S. 354 I. P. C. with the direction that the sentences would run concurrently, no appeal lies.³⁷

411A. Appeal from sentence of High Court.—(1) Any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in Section 418 or Section 423, sub-section (2), or in the Letters Patent or law by which the High Court is constituted or continued, appeal to the High Court—

- (a) against the conviction on any ground of appeal which involves a matter of law only ;
- (b) with the leave of the Appellate Court, or upon the certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the Appellate Court to be a sufficient ground of appeal ; and
- (c) with the leave of the Appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in Section 417, the State Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in Section 418, or Section 423, sub-section (2), or in the Letters Patent or law by which the High Court is constituted or continued, but subject to the restrictions imposed by Clause (b) and Clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two Judges, being Judges other than the Judge or Judges

36. *Jotharam Davay*, (1878) 2 M 30 (31, 32).

37. *Md. Soffi*, 58 CWN 189.

by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the State Government which shall take action with a view to the transfer of the appeal under Section 527 to another High Court.

(4) Subject to such rules as may from time to time be made by the Supreme Court in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to the Supreme Court from any order made on appeal under subsection (1) by a Division Court of the High Court in respect of which order the High Court certifies that the case is a fit one for such appeal.

SYNOPSIS

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| 1. Legislative Changes. | 6. Sub-section (2)—Appeal against acquittal. |
| 2. State Amendments. | 7. Enhancement of Sentence. |
| —Madras. | 8. Sub-section (4)—Supreme Courts appeals. |
| —Bombay. | 9. Limitation for filing appeal before the High Court. |
| 3. Scope. | |
| 4. Sub-section (1) Powers of Appellate Court. | |
| 5. Certificate and leave to appeal. | |

1. Legislative Changes.—The section was inserted by the Amending Act 26 of 1943, S. 2.

2. State Amendments.

Madras.—In sub-sec. (1), the words ‘in the exercise of its original criminal jurisdiction’ have been omitted by Madras Act 34 of 1955. In sub-sec. (2) for the words ‘in the exercise of’ ‘in a trial held by it’ were substituted by Madras Act 34 of 1955.

Bombay.—In S. 411 the words ‘for a term exceeding six months’ shall be deleted. *Vide*, Bombay Act 54 of 1959.

Right of appeal is governed by S. 411 as it stood before the amendment of S. 411 by Bombay Act 54 of 1959. S. 411 has no retrospective operation.³⁸

3. Scope.—Formerly appeal lay only upon a restricted view under Cls. 25 and 26 of the Letters Patent provided a certificate was granted by the Advocate General on a point of law. This section provides an appeal from the Judge sitting on the original Side Sessions to the Division Bench.³⁹

An appeal under S. 411-A on a matter of fact can only be brought on a certificate of the trial Judge or with the leave of the Court of Appeal. Leave once having been granted, however, the matter is at large and the Court of appeal must dispose of it upon the merits. If keeping in view the principles on which the Court of appeal always act in Jury cases, the Court hearing the appeal under S. 411-A come to the conclusion that the verdict of the jury was wrong, it is bound to reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable.⁴⁰ Section 411-A does not give the High Court power to interfere in an appeal against an order of conviction for contempt which has been dealt with by a Judge of the High Court sitting in Summary proceedings nor has

38. *Md. Idris*, 62 Bom LR 216 : A 1960 B 472.

39. *Sunil Kumar Roy*, A 1954 C 503.

40. *Thiagaraja*, 74 IA 132 : 51 CWN 732 PG : 48 Cr LJ 765 approving *Ganpat*

Jiwaji, ILR (1945) B 724 (FB) and not approving of *Inchya Fernandez*, A 1945 B 277 : 46 Cr LJ 635 (FB) reversing *T. Bhagwathar*, A 1946 M 271 : 47 Cr LJ 785.

the High Court an inherent jurisdiction to entertain an appeal in such a case.⁴¹

4. Sub-section (1)—Powers of Appellate Court.—The powers which are to be exercised by the High Court are not to be found in S. 411-A but reference has to be made to the provisions of S. 423.⁴² Where leave is granted under Cl. (b) to urge grounds of the facts the High Court in appeal have to consider not merely whether the verdict of the jury was reasonable and proper but also whether it was right.⁴³ Where accused is not charged under S. 149 I. P. C. the appellate Court should require strong reasons for using it even if it be possible to convict the accused.⁴⁴

5. Certificate and leave to appeal.—When the verdict of the jury is unanimous, if the Judge thinks it is wrong the Judge may give a certificate to enable an appeal on facts. If six of the jury are of one opinion and the Judge thinks that the verdict of the majority is not acceptable he is bound to discharge the jury under S. 305.⁴⁵

6. Sub-section (2)—Appeal against acquittal.—The considerations applicable are (1) the view of the jury as to the credibility of witnesses, (2) the presumption of innocence in favour of the accused, (3) the right of the accused to the benefit of doubt, (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by the trial Judge.⁴⁶

7. Enhancement of Sentence.—There is no provision in S. 411-A giving right to the Provincial Government to appeal for the enhancement of sentence.⁴⁷

8. Sub-section (4)—Supreme Court Appeals.—Although the Supreme Court will not interfere with the findings of the High Court because its conclusion on the evidence differ from the High Court, yet where the evidence is such that no Tribunal could legitimately infer from it that the accused is guilty it would set aside the conviction.⁴⁸

9. Limitation.—For filing appeal before the High Court is seven days from the date of sentence (*vide* Art. 150, Limitation Act), for appeals against acquittal under S. 411-A (2)—three months (Art. 157, Limitation Act).

412. No appeal in certain cases when accused pleads guilty.—Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a High Court, a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

SYNOPSIS

1. Corresponding sections in former Codes.	2. Legislative Changes.—1898 and 1943.
41. <i>Newraz Gow Pardy</i> , A 1947 B 184 : 48 Cr LJ 628.	47 Cr LJ 884 (SB).
42. <i>Parbati Devi</i> , A 1952 C 836 : 1952 Cr LJ 1672.	46. <i>Jhiagaraje Bhagarathan</i> , 74 IA 132 : 48 Cr LJ 765 : 51 CWN 732 ; <i>Krishnan</i> , A 1948 M 88 : 49 Cr LJ 17.
43. <i>Sudhindra Nath Dutt</i> , A 1952 C 422.	47. <i>H. I. Osmond</i> , ILR (1949) 2 C 231 : 50 Cr LJ 545.
44. <i>Pandurang v. State of Hyderabad</i> , (1955) SCR 1083 : A 1955 SC 215 : 1955 Cr LJ 572.	48. <i>Bhagwan Das v. State of Rajasthan</i> , 1957 SCJ 55 : A 1957 SC 589 : 1957 Cr LJ 889.
45. <i>Hashmatullah Prhatulla</i> , A 1946 B 465 :	

3. No appeal in certain cases when accused pleads guilty.
—Plea of guilty.
4. 'Or Magistrate of the first class.'
5. 'Except as to the extent or legality of the sentence.'
6. Revision.

1. Corresponding sections in former Codes.—This section corresponds to S. 273, last paragraph, of the Code of 1872, S. 167 of Act IV of 1877.

2. Legislative Changes (1898).—The words "or Magistrate of the first Class" were new in the Code of 1898. The word 'any' before the word 'Presidency Magistrate' was a consequential amendment.

Legislative Changes (1943).—The words 'a High Court' were added by the Criminal Procedure Amendment Act, 26 of 1943, S. 3.

3. No appeal in certain cases when accused pleads guilty.—The intention of the Legislature would appear to be to treat the plea of guilty as a waiver of the right to appeal except as to the justice and legality of the sentence itself.⁴⁹ But the accused can satisfy the court that there was in fact no plea of guilty.⁵⁰

The principle of this section should ordinarily be applied in cases in which the High Court is asked to exercise its revisional powers.⁵¹ An accused person, who pleads guilty before a Magistrate and is convicted, can contend, under S. 412 of the Code, in his application for revision, that his conviction is illegal.⁵² Appeal on merits is maintainable in case of conviction upon a plea of guilty, when the trial was before a Magistrate of the second class.⁵³

Plea of guilty.—Based on mistake will not shut out the appeal.⁵⁴

4. 'Or Magistrate of the first class'.—These words inserted in the Code of 1898 have superseded *Kalu Dosan*,⁵⁵ which held that the section provided for convictions by Courts of Session or Presidency Magistrates only.

5. 'Except as to the extent or legality of the sentence.'—See *Jaffar's case*,⁴⁹ discussed *ante*. The view in *Kalu Dosan*,⁵⁵ however, *viz.*, that the section provides for an exception not only as to the extent but also as to the legality of the sentence, has not been affected by the amendment of the Code in 1898.

Where a charge has been framed, under S. 221 (7) of the Code of Criminal Procedure 1898, against an accused person to the effect that he is a previous convict, and he has pleaded guilty to such charge. S. 412 of the above Code leaves the appellate Court without powers to reopen the question whether the accused is a previous convict.⁵⁶

6. Revision.—The powers of the High Court are not circumscribed by S. 412, they are as ample as if an appeal on the merits had been entertainable and had been dismissed.

413. No appeal in petty cases.—Notwithstanding anything hereinafter contained, there shall be no appeal by a

49. *Jafar M. Talab*, (1880) 5 B 85.

50. *Prafulla Kumar*, A 1944 C 120 : 45 Cr LJ 517.

51. *Akub Ali Mazumdar*, (1919) 31 GLJ 122 : 21 Cr LJ 547 : 56 IC 851.

52. *Chunilal Hargovan*, (1926) 28 Bom LR 1022 ; *Lianthlira*, A 1952 Ass 157 : 1952 Cr LJ 1272.

53. *In re Arunachala Goundan*, A 1948 M 492 : 49 Cr LJ 748 ; *Mohomed*, A 1943 P 380 : 45 Cr LJ 166.

54. *Sat Narain*, A 1931 A 265 : 32 Cr LJ 576 see *Niranjan*, A 1954 C 82.

55. (1896) 22 B 759.

56. *Kissan Yessu*, (1906) 4 NLR 163 (164) : 9 Cr LJ 56.

convicted person in cases in which a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only or in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

Explanation.—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Effect of 1923 Amendment. |
| 2. Legislative Changes. | 5. Object of 1943 Amendment. |
| 3. State Amendments. | 6. Scope. |
| —Bombay. | 7. Appeal when lies. |
| —Saurashtra. | 8. Concurrent sentences. |
| | 9. Order under the Court-Fees Act. |

1. Corresponding sections in former Codes.—This section corresponds to S. 411 of the Code of 1861, S. 273 of the Code of 1872 and the Code before its amendment by Act XII of 1923 was similarly worded as that of 1882.

2. Legislative Changes.—The words ‘or the District Magistrate or other Magistrate of the first class’ after the words ‘Court of Session’ in the first part of the section were omitted by S. 24 of the Criminal Law Amendment Act, 1923 (XII of 1923) and the words ‘*in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence*’ were inserted, and the words ‘or of whipping only’ after the words ‘fifty rupees only’ were omitted by the said Act.

Legislative Changes (1943).—The words ‘a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only’ before the words ‘a Court of Session’ were added by Act 26 of 1943.

3. State Amendments.

Bombay.—After the words ‘High Court’, the words ‘in the Court of Session for greater Bombay’, the words ‘any other Court of Session’, for the words ‘Court of Session’ the words ‘other than that for greater Bombay’ after the words ‘Court of Session’ where they occur for the second time, were substituted by Bombay Act 32 of 1948; and for the words ‘District Magistrate or other’, the letter “a” was substituted by Bombay Act 23 of 1951.

Saurashtra.—For the words ‘District Magistrate or other’, the letter ‘a’ was substituted by Saurashtra Act 4 of 1952.

4. Effect of the 1923 Amendment.—Under the amended section a right of appeal is provided against convictions by District Magistrates or Magistrates of the first class where they award sentence of imprisonment for one month or less or pass a sentence of fine of rupees fifty or upwards.

Sentence of whipping is deleted because the Whipping Act was repealed by Act XVII of 1914.

The amendment restores the view in *Ballavai*⁵⁷ which held that no appeal lay from a sentence of fine of Rs. 50/- passed by a first class Magistrate.

The following decision⁵⁸ under the old Code which held that in case of joint trial those who had been awarded non-appealable sentence can prefer an appeal because another co-accused had been awarded an appealable sentence seems to have been restored in view of S. 415A.

5. Object of 1943 Amendment.—"The alteration here made is to make applicable to appeals from a High Court exercising original criminal jurisdiction the same restriction as is imposed by S. 411 of the Code on Appeals from a Presidency Magistrate"—Statement of Objects and Reasons, *vide* G. I. 1943, Pt. V p. 219.

6. Scope.—The right of appeal against a conviction by a Magistrate of the first class is given by S. 408 but that right is restricted by the provisions of S. 413,⁵⁹ and must be very strictly construed in favour of the accused.⁶⁰ The language of S. 413 is so clear, expressed as it is in general terms, that it would be wholly wrong to try and limit it by reference to the wording of S. 405.⁶¹ The section does not apply to conviction by a Magistrate of the second class.⁶²

An order awarding compensation and payment of fines etc., under S. 22 of the Cattle Trespass Act, 1871, is appealable under S. 408 of the Cr. P. Code. The compensation so awarded is not a fine, and consequently the restrictive provisions of S. 413 of the Cr. P. Code do not apply.⁶³

7. Appeal when lies.—The test to be seen, in considering whether a case is hit by S. 413, is whether the sentence in question was one not exceeding the limit prescribed and whether it was a sentence passed by a court of the class mentioned therein. If these conditions are satisfied, S. 413 would apply whether the sentence was passed under S. 349 or S. 380 or otherwise.⁶⁴ Where the total fine does not exceed Rs. 50/- no appeal lies.⁶⁵ Where there is one sentence of imprisonment of one month only or one sentence of fine only, no appeal lies but where there are more than one such sentence, appeal lies.⁶⁶ Where two sentences of fine are passed, it is the aggregate which is to be looked into for the purposes of appeal.⁶⁷ There is no provision in the Code which gives a right of appeal when the order against one accused is of admonition and the other accused gets non-appealable sentence of fine.⁶⁸ Where the accused who were boys, were convicted under S. 457, I. P. C., but were convicted and released under S. 562 appeal lay to the Sessions Judge against the Order, by force of S. 415A.⁶⁹ Where a trial commenced before a second class Magistrate but before passing the sentence he was

57. 9 MLT 322 : 12 Cr LJ 63 : 9 IC 340.

58. *B. A. Thaw*, (1908) 4 LBR 354 : 9 Cr LJ 356 (FB).

59. *Shidlingappa*, 28 Bom LR 668.

60. *Akabbar Ali*, 35 CWN 752 : 33 Cr LJ 98 ; *Chotte*, A 1947 A 366 (Summary Trial under D. I. rules) *S. M. Chopra v. S. A. Hameed*, A 1945 Oudh 59.

61. *Kishori Singh*, 41 CWN 838 : 38 Cr LJ 990.

62. *In re Arunachala Goundan*, A 1948 M 492. Following *Krishna Chandra*, A 1943 C 313.

63. *Barthol Duming Rodricks v. Papa Dada*. (1921) 46 B 58 : 23 Bom LR 836 : 22

Cr LJ 624 : 63 IC 160 : AIR (1922) B 191.

64. *Kishori Singh*, 41 CWN 833 : A 1937 C 394.

65. *Khagendra*, A 1931 C 434 : 32 Cr LJ 706 ; *Nawab Ali*, 59 C 113.

66. *Banwari*, A 1949 A 210 : 50 Cr LJ 325 ; *Godala Sanyasi*, A 1948 M 251 : 49 Cr LJ 461 ; *see cases referred to*.

67. *Ali Hazi v. Jonab Bibi*, 36 CWN 407 : 33 Cr LJ 704 (2).

68. *Haricharan*, A 1951 A 442.

69. *Mayandi Nadar v. Pala Kudaban*, A 1935 M 157 : 36 Cr LJ 559.

invested with first class powers and the sentence passed by the first class Magistrate is a fine below Rs. 50/- no appeal would lie.⁷⁰

8. Concurrent sentences.—Shall not be added together for the purposes of an appeal, *see* Commentary on S. 35 *ante*.

9. Order under the Court Fees Act.—An order passed by a Magistrate under S. 31 of the Court-fees Act, directing an accused person to pay to the complainant the court-fee paid on the petition of complaint is no part of the sentence so as to make it a sentence of fine within the terms of this section, and an order, therefore, sentencing an accused person to 14 days rigorous imprisonment and directing him to pay the costs is not appealable.⁷¹ Fees ordered to be repaid under S. 31 of Act VII of 1870 are not fines and therefore no order awarding imprisonment in default of payment of such fees can be made.⁷² An order under S. 31 of the Court Fees Act directing the accused, on appeal against conviction, to pay the costs of the complainant is not an enhancement of the sentence.⁷³

414. No appeal from certain summary convictions.—Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of fine not exceeding two hundred rupees only.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Effect of the Amendment. |
| 2. Legislative changes. | 4. Scope. |
| | 5. "Empowered to Act." |

1. Corresponding sections in former Codes.—This section corresponds to S. 274, paragraph 1 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative Changes.—After the word "sentence" the words "of imprisonment not exceeding three months only" and after the words "two hundred rupees only," the words "or of whipping only" which were in the Code of 1898 had been omitted by S. 25 of the Criminal Law Amendment Act (XII of 1923).

3. Effect of the Amendment.—Under the present law an appeal lies against a sentence of 3 months or less, in a summary conviction whereas under the old law European British subjects could prefer an appeal from such sentence. An appeal lies under S. 407 of the Code of Criminal Procedure from a conviction by a Bench of Magistrates invested with second or third class powers.⁷⁴ There is a right of appeal to the Sessions Judge, under S. 408 of the Cr. P. Code, from an order of a Magistrate, passed in a summary trial, under S. 562 of the Cr. P. Code, and where no sentence is passed, S. 414 of the Code does not apply.⁷⁵

4. Scope.—The test under S. 414 is not the punishment in respect of an offence but the sentence actually passed. *Held*, the revision petition

70. *Bejoy Kumar v. Sitanath Kundu*, 44 CWN 677 : 42 Cr LJ 87.

71. *Madan Mandal v. Haran Ghose*, (1892) 20 C 687.

72. *Para Muniyan*, (1894) 1 Weir 724.

73. *Karuppana Pillai*, (1905) 29 M 188.

74. *Narayanasami*, (1885) 9 M 36 : 2 Weir 460.

75. *Hiralal*, (1924) 22 ALJ 751.

was not maintainable as no appeal lies from an order under S. 562.⁷⁶ Where in a summary trial under R. 81 (4) of the D. I. Rules an order imposing a fine of Rs. 100/- and an order of forfeiture of property worth more than Rs. 1,000/- is passed, the order of forfeiture not being a part of the sentence of fine, the case is outside the ambit of S. 414.⁷⁷

5. **“Empowered to Act.”**—Section 414 applies not only to cases in which the Magistrate has got powers under S. 261 but also to cases where he is otherwise empowered to act under this section.⁷⁸

415. Proviso to Sections 413 and 414.—An appeal may be brought against any sentence referred to in Section 413 or Section 414 by which any punishment therein mentioned is combined with any other punishment, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

SYNOPSIS

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|--|------------------------------|
| 1. Corresponding sections in former Codes. | 3. Effect of 1945 Amendment. |
| 2. Legislative changes. | 4. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 274, paragraph 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative changes.—The words ‘by which any punishment therein mentioned is combined with any other punishment’ were substituted for the words ‘by which any two or more punishments therein mentioned are combined,’ by Act 6 of 1945.

3. Effect of 1945 Amendment.—Prior to this amendment it was held in⁷⁹ that the punishments referred to in S. 415 include only punishments of different kinds and not punishments of the same kind. In view of the history of Ss. 413 and 414 as they originally stood before the amendment made in them in 1923 the phrase ‘any two or more of the punishments therein mentioned’ in S. 415 referred to two or more of the punishments of different kinds. S. 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate of fine does not exceed Rs. 50/-.⁸⁰ S. 415 as amended in 1923 refers to a combination of the punishments of imprisonment and fine i.e., of different kinds of punishment.⁸¹ The Oudh and Madras Courts held that combination of one kind of punishments would come within the ambit of S. 415.⁸² To settle the above conflict of opinion the section was amended in 1945.

This section is a proviso to the preceding Ss. 413 and 414. S. 408 distinctly lays down that any person convicted on a trial by a Magistrate

76. *Himantharaja Gupta*, A 1957 Mys 75 : 1957 Cr LJ 1150.

77. *Chhole*, A 1947 A 366.

78. *R. Desigan*, A 1949 M 647 : 50 Cr LJ 931.

79. *Daraghi*, 21 P 753 : A 1943 P 122.

80. *Gorakh Prasad*, A 1942 A 336.

81. *Kalicharan v. Adhar Mondal*, 43 CWN 360 : 40 Cr LJ 652.

82. *Makrand Singh*, A 1937 Oudh 524 : 38 Cr LJ 1062 ; *Kullur Dass*, 1936 MWN 213.

of the first class may appeal to the Court of Session. S. 413 is an exception to the general rule laid down in S. 408. S. 415 is explanatory and apparently was entered in the Code to remove all possible doubts which might arise in the cases considered therein.⁸³

4. Scope.—In cases which would come under S. 413 an appeal would be allowed under S. 415 in which a sentence of fine and a sentence of imprisonment or any sentence other than a sentence of fine are also passed. In cases which under S. 414, an appeal would be allowed under S. 415 if the sentence of fine is combined with any other sentence.⁸⁴

415A. Special right of appeal in certain cases.—Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

SYNOPSIS

1. Legislative Changes. appealable sentences.
2. Limitation for appeals in cases of non-

1. Legislative Changes.—This section was inserted by S. 114 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

See 'Report of Select Committee,' under the said heading to notes under S. 408 *supra*.

2. Limitation for appeals preferred by those who had been awarded non-appealable sentences.—Time will run from the date when their right to appeal accrued, that is the date on which a first appeal is preferred by a co-accused who received an appealable sentence. Section 415-A gives a right of appeal to an accused, whose sentence is not appealable, but who is convicted in one trial with other accused against whom an appealable judgment or order has been passed.⁸⁵

416. *Rep. by the Criminal Law Amendment Act, 1923 (XII of 1923), Section 26.*

417. Appeal in case of acquittal.—(1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the acquittal.

83. *Alam*, (1911) 33 A 510 : 8 ALJ 524 : 12 Cr LJ 389 : 1 IC 253 ; *Banwari*, A 1949 A 216 : 50 Cr LJ 325.

84. *Kunja Behari*, A 1947 A 109.

85. *Madhav Raghavendra Kulkarni*, (1926)

28 Bom LR 671 following *Bahadur Molla v. Ismail*, (1924) 52 C 463 ; *Akabar Ali*, 35 GWN 752 ; 33 Cr LJ 990 ; *Nayandi Nadar*, A 1935 M 157 ; 36 Cr LJ 589.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal.

(5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1).

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 11. When acquittal will be set aside. |
| 2. Legislative Changes. | 12. Principles governing interference. |
| 3. Effect of Amendment. | 13. Sub-section (3).
—Appeal by a Complainant instituted upon a complaint. |
| 4. Validity of the section. | Separate petition for leave. |
| 5. Scope. | 14. Several Cases. |
| 6. 'The State Government.' | 15. Principles governing grant of special leave |
| 7. 'May direct the Public Prosecutor.' | 15a. Acquittal. |
| 8. 'To present an appeal.' | 16. Order, if can be set aside on reference. |
| 9. Appeal by Government—delay.
—Condonation. | 17. Notice to Respondent. |
| 10. Original or appellate order of Acquittal. | 18. Motions against acquittal. |

1. Corresponding sections in former Codes.—This section corresponds to S. 272 of the Code of 1872, S. 168 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—This section was substituted by Act 26 of 1955 for the old section which read as follows :—

Appeal on behalf of Government in case of acquittal.—"The State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or Appellate order of acquittal passed by any Court other than the High Court".

3. Effect of Amendment.—In English Law there is no provision for an appeal against acquittal. It provides for an appeal against acquittal (a) by the Government and (b) by a private complainant in any case instituted upon complaint when special leave under sub-sec. (3) is obtained from the High Court. If special leave is refused, the complainant has no right of appeal. The private complainant has to present his petition of appeal under sub-sec. (4) within sixty days from the order of acquittal complained of and the limitation of three months is provided for an appeal by the State Government under Art. 157, Limitation Act.

4. Validity of the section.—Considering the special position held by the State in Criminal jurisprudence the Legislature was justified in placing the State on a special footing as regards appeals against acquittals. So the various provisions of S. 417 for appeals by the State Government and appeals by private complainant can be justified on the principle of reasonable classification and do not offend against Art. 14 of the Constitution.^{85a} There is no

85a. *Abdul Rahman v. Jannai*, A 1957 A 552 : 1957 Cr LJ 917.

doubt that the classification in favour of the State made in S. 417 inasmuch as the State can file an appeal against acquittal without first obtaining leave of the High Court but the private complainant cannot, is not unreasonable.⁸⁶ or about the period of limitation of 60 days in the case of the private complaint and 3 months in the case of the State was based on the ground of high policy. Hence S. 417 does not contravene Art. 14 of the Constitution.⁸⁷ The Code of 1861 did not contain a provision for an appeal by the Public Prosecutor against an order of acquittal *vide Gorachand Ghose*.^{87a}

5. Scope.—An appeal against acquittal by way of revision is not contemplated by the Code, and it should on public grounds be discouraged.^{87b} Prior to the amendment in 1955 it was held in⁸⁸ that appeal against acquittal is an extraordinary remedy and in order to protect the accused from the personal vindictiveness of a private complainant. Such right was restricted to the State only. The right should be used sparingly and with circumspection. An appeal should not be filed on a technical ground.⁸⁹ The jurisdiction is not ordinarily invoked because the Lower Court has taken a wrong view of the law or misappreciated the evidence on the record.⁹⁰

6. 'The State Government.'—S. 417 requires that such an appeal shall be (1) directed by the Government and (2) presented to the High Court. Hence the complainant cannot prefer an appeal to the High Court under this section.^{90a} But a private person may move the State Government to prefer an appeal under S. 417.⁹¹

7. 'May direct the Public Prosecutor.'—See Ss. 4 (t), 492, 270 and 423. Such directions may be given in a letter whereby the Public Prosecutor is appointed as such. The mere fact that a person has been directed to present an appeal against an order of acquittal does not involve his appointment as Public Prosecutor for the purposes of the case.⁹² The Remembrancer of Legal Affairs has the right to file an appeal under this section as he is appointed a Public Prosecutor in all cases heard by the High Court in its Appellate Jurisdiction.⁹³ It is only a Public Prosecutor who can file an appeal.^{93a}

8. 'To present an appeal.'—An appeal from an acquittal is not different with regard to the consideration of evidence, from an appeal from a conviction.⁹⁴ Both are governed by the same rules and subject to the same limitation.⁹⁵

Except where the trial is by a jury when the appeal does not lie on facts, appeal in other cases, lies both on points of law as also on facts. See S. 418

86. *State v. Nanja*, A 1958 Mys 481 : 1958 Cr LJ 529.

87. *Bokkasam Krishnayya, In re*, A 1957 AP 163 : 1957 Cr LJ 813.

87a. (1868) 11 WR (Cr) 29.

87b. *Thandavan v. Perianna*, (1890) 14 M 363.

88. *Karuna*, 22 C 164 (176) ; *Ganapati*, A 1944 N 136.

89. *Public Prosecutor v. Mayadi Nadar*, A 1935 N 230 : 34 Cr LJ 948 (1).

90. *D. Stephens v. Nasibullah*, A 1951 SC 196 ; *Logendra*, A 1951 SC 310 ; *Harihar*, A 1954 SC 266.

90a. *Rangasami v. Narasimhalu*, (1883) 7 M 213 (214) : see *Poona Churn*, 7 C 447.

91. *Mul Singh*, 24 Cr LJ 433 : AIR (1923)

L 160.

92. *Gaya Prasad*, (1913) 41 C 425 : 18 CWN 279 : 18 CLJ 51 : 15 Cr LJ 46.

93. *Superintendent and Remembrancer, Legal Affairs, Bengal v. Tularam Barodia*, (1918) 46 C 544 : 23 CWN 96 ; *Ganga Reddi*, A 1958 AP 571 : 1958 Cr LJ 1118.

93a. *Marfat Ali*, A 1958 Tripura 26 : 1958 Cr LJ 973.

94. *Deputy Legal Remembrancer v. Matukdhari Singh*, (1915) 20 CWN 128 (129) : 17 Cr LJ 9 ; *Sakharam Manaji*, 21 Bom LR 1054 : 54 IC 161.

95. *Bibhuti*, 17 C 1485 ; *Ghure*, (1914) 36 A 168 ; *In re Sinnu Goundan*, 38 M 1028 : 26 MLJ 160.

infra and the case of *In re Sinnu Goundan* and other cases.⁹⁶ Even in trials by Jury the High Court has interfered with an order of acquittal where the *procedure was entirely illegal*.⁹⁷ It is not in every case of misdirection that the High Court interferes but it would reverse the verdict of the jury when the misdirection has occasioned a failure of justice.⁹⁸ It is not necessary that a copy of the Government sanction should accompany the memorandum of appeal presented by the Public Prosecutor.⁹⁹

9. Appeal by Government—Delay—Condonation.—Before an appeal can be decided on merits, it is the duty of the Court to determine whether the delay in presenting the appeal should be condoned.¹

10. Original or Appellate order of Acquittal.—An appeal under S. 417 can be preferred by the Government under S. 417 although an appeal preferred by the accused against his conviction has been heard, and decided by the High Court.^{1a} Where accused is acquitted of more serious offences and convicted of some other charge, appeal lies under S. 417.² S. 417 (3) is applicable not only to a case in which the order of acquittal is that of an original Court but also where it is passed by the appellate Court.³ Where an appeal against conviction of the accused under S. 324 I. P. C. was dismissed by the High Court as the appellant did not press it, *held*, the order of the High Court is not such a judgment as would preclude the High Court from hearing the appeal by the State under this section.⁴

11. When acquittal will be set aside.—The Crown must show conclusively that an inference of guilt is irresistible.⁵ The High Court will not interfere when the appeal is based on doubtful weighing of facts,⁶ or unless it is clearly and palpably wrong,⁷ or the judgment of the Court below is wrong and perverse and without jurisdiction and based upon obvious error in procedure,⁸ or where the order appealed against is manifestly wrong and has resulted in a miscarriage of justice.⁹ The High Court will not interfere because another tribunal or another Judge might have arrived at a different view.¹⁰ The Magistrate in setting aside the order ought to record specifically the precise offence¹¹ and the High Court in upholding acquittal on a charge of murder can convict an accused of minor offence *i.e.*, of fabricating false evidence.¹²

It is not correct to say that unless the appellate Court in an appeal under S. 417 comes to the conclusion that the judgment of acquittal was

96. 38 M 1028 ; *Smither*, (1902) 26 M 1 (14).

97. *The Legal Remembrancer v. Jahey Sheikh*, (1927) 32 CWN 144.

98. *Superintendent, Legal Affairs v. Shyam Sunder Bhumji*, 26 CWN 558 : 24 Cr LJ 143 : AIR (1922) C 106 ; *In re Mulimayandi Thevan*, 45 MLJ 845.

99. *Public Prosecutor v. Chandanlal*, A 1955 HP 26 : 1955 Cr LJ 944.

1. *State v. Datta Ram*, A 1955 Punj 164 : 1955 Cr LJ 1204.

1a. *Md. Gul Rohilla*, A 1932 N 121 : 33 Cr LJ 849 (FB).

2. *Sitaram*, A 1925 Oudh 723 ; *Zamir*, A 1944 A 137.

3. *Chairman, Village Panchayet, Nagathisnalli v. Thuimareddy*, A 1956 Mys 62 : 1956 Cr LJ 1417.

4. *State v. Babulal*, A 1956 Raj 67 ; 1956

Cr LJ 550.

5. *Ghulam Nobi*, (1926) 6 P 768 : AIR (1928) P 146 ; *Pallia*, 12 PWR (Cr) 1919 : 20 Cr LJ 188.

6. *Bachinta*, 7 PWR 1916 (Cr) : 32 IC 833.

7. *Nabab*, 46 PWR 1916 (Cr).

8. *Dy. Superintendent v. Amulya Charan Awan*, 18 CWN 666 : 15 Cr LJ 160 ; *Muhammad Shaji*, 25 PR 1918 (Cr) : 19 Cr LJ 723 ; *Samand*, 22 Cr LJ 172 (L).

9. *Kiru*, 10 PR 1911 Cr : 205 PLR 1911 : 12 Cr LJ 864 ; *Chotu*, 9 A 523 (FB).

10. *Kunja Dosadh*, 3 PLJ 396 : 67 IC 506 ; see *Public Prosecutor v. Kotaparambuth*, 39 M 527 (FB) : 16 Cr LJ 593.

11. *Bihari Bhar*, (1928) 50 A 718.

12. *Ismail Khadirsab*, (1928) 52 B 385 following *Begu*, (1928) 6 L 226 : 27 Bom LR 707 (PC).

perverse it cannot set aside that order. It is well settled that the Court of appeal has as wide powers in an appeal against acquittal as in the case of an appeal against conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial Court continues even up to the appellate stage and that the appellate Court should attach due weight to the opinion of the trial Court which recorded the order of acquittal.¹³ The Privy Council in *Sheo Swarup's* case¹⁴ held that there is no foundation for the view apparently supported by the judgments of some courts in India that the High Court has no power or jurisdiction to revise an order of acquittal on a matter of fact except in cases in which the lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice. Ss. 417, 418 and 423 give to the High Court full power to review at large the evidence upon which the order of acquittal was founded.

The main point to be considered by the appellate Court is whether the appraisal of evidence made by the trial Court could be said to be an impossible appraisal.¹⁵ In an appeal by the Government against an acquittal the burden obviously lies on the appellant to show that the order of acquittal was wrong and to show conclusively that the inference of guilt against the respondent is irresistible.¹⁶

The power should be exercised sparingly by the Government.¹⁷

12. Principles governing interference.—Though the High Court has full power under S. 417 to review at large the evidence upon which an order of acquittal is founded and to reach its conclusion yet the presumption of innocence being further reinforced by his acquittal by the trial Court, the findings of that Court can be reversed only for substantial and compelling reasons. In exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of witnesses, (2) the presumption of innocence in favour of the accused, (3) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. The powers conferred by this section should be confined to cases in which the lower Court has obstinately blundered and produced a result mischievous to the administration of justice and interests of public.¹⁸ These principles are embodied in the following decisions of the Privy Council,¹⁹ of the Supreme

13. *Atley v. State of U. P.*, A 1956 SC 807 : 1955 Cr LJ 1653 ; *Sanwant Singh*, A 1961 SC 715 following *Sheo Swarup*, 61 IA 398 : A 1934 PC 227 : 36 Cr LJ 786 ; *Aher Raja v. State of Saurashtra*, A 1956 SC 217 : 1956 Cr LJ 426 ; *Murli*, A 1957 A 53.
14. *Sheo Swarup*, A 1934 PC 227 ; *Nur Mohammad*, A 1945 PC 151 ; 50 CWN 1 ; *Rai Singh*, A 1938 L 871 ; *Maung Tun Nayan*, A 1931 R 58 ; *Deputy Legal Remembrancer v. Matukdhar Singh*, 20 CWN 128 ; 17 Cr LJ 9 ; *Paran*, A 1953 SC 439 ; 1953 Cr LJ 1925 ; *Zinglu Arial v. State of M. P.* A 1954 SC 15 ; *Bangar Singh v. Krishna Kari*

Vyas, A 1957 MP 162.
15. *Har Prasad Sharma*, A 1958 A 334 : 1958 Cr LJ 586.
16. *State v. But Nath*, A 1957 HP 37 : 1957 Cr LJ 631.
17. *Motikhodu*, (1923) 26 Bom LR 113.
18. *Ramaswamy J. in Public Prosecutor v. A. Thomas*, (1960), 1 MLJ 334 : A 1959 M 169 (170) ; 1959 Cr LJ 484 ; *Narayan Singh*, A 1961 MP 12 ; 1961 (1) Cr LJ 91.
19. *Nur Mohammad*, A 1945 PC 151 : (1945) MWN 560 ; *Sheo Swarup*, 61 IA 398 : A 1934 PC 227 : 36 Cr LJ 786 followed in *Sanwant Singh*, A 1961 SC 715.

Court²⁰ and of the Madras High Court.²¹ The cases of the Supreme Court²⁰ and the decision in *Sanwant Singh's* case²² held that the High Court will not set aside an order of acquittal unless there are substantial or compelling reasons. It has been held in a recent decision in the case of *Harbans Singh v. The State of Punjab*²³ that in emphasising the necessity of 'compelling reason' to justify an interference with an order of acquittal the Supreme Court did not in any way try to curtail the power bestowed on appellate Courts under S. 423 when hearing appeals against acquittal. The Court was anxious to impress upon the appellate Courts the importance of bestowing special care to the sifting of evidence. What may be called the Golden thread running through all the decisions of the Supreme Court is the rule that in deciding appeals against acquittal, the Court of appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order of acquittal only when the view taken by the lower Court is clearly an unreasonable one that itself is a compelling reason for interference.²³

The test suggested by the expression "substantial and compelling reasons" for reversing a judgment of acquittal should not be contrued as a formula which has to be rigidly applied in every case.^{23a}

It is settled law that the High Court will be chary to interfere, if on the evidence two views are possible and one view has been accepted by the trial Court. But in case on the evidence two views are not possible and the only conclusion that can be arrived at that the guilt has been brought home to to the accused, the order of acquittal will not be allowed to stand.^{23b}

13. Sub-section (3)—Appeal by a Complainant instituted upon a complaint.—Where the appellant filed a petition of complaint and the Magistrate ordered the petition to be sent to the police for necessary action and the investigation by the police resulted in a charge-sheet, held that it could be safely concluded that the case was instituted upon complaint.²⁴ When complainant's case is amalgamated with police case, the case cannot be said to be instituted upon a complaint.²⁵ Where the petitioner made a written complaint to the police and a charge-sheet was filed, the case is not instituted on a complaint and no appeal lies.²⁶

20. *Serajpal Singh v. State*, (1952) SCR 193 : A 1952 SC 52 ; *Biyabanni v. State of Madras*, A 1954 SC 645, *Zinglu Ariel v. State of M. P.*, A 1954 SC 15 ; *Wilayat Khan v. U. P. State*, A 1953 SC 122 ; *Shiv Bahadur Singh v. State of V. P.*, A 1953 SC 694. *Timbak v. State of M. P.*, A 1954 SC 39 (40) ; *Puran*, A 1953 SC 489 ; *Premdas*, A 1954 SC 36. See also *Bansidhar Mohanty v. State of Orissa*, A 1955 SC 585.
21. *Pocha Sanjivi Reddi*, 1931 MWN 105, *Public Prosecutor v. Mayadi Nadar*, A 1933 M 230.
22. A 1961 SC 715 ; *State v. Babulal*, A 1958 MP 55 ; *Aher Raja v. State of Saurashtra*, A 1956 SC 217 ; *Pundlik*, A 1959 B 543.
23. A 1962 SC 439 where *Suraj Pal Singh*, A 1952 SC 52 ; *Ajmeer Singh v. State of Punjab* (1952) SCR 418 : A 1953 SC 76 and *Pusan v. State of Punjab*, A 1953 SC 459 ; (1953) Cr LJ (1925) referred to.

- 23a. *M. G. Agarwal v. State of Maharashtra*, A 1963 SC 200 where *Harbans Singh v. State of Punjab*, A 1962 SC 439 referred to.
- 23b. *Ambala Municipality v. Basappa Ram* A 1963 Punj 175. 1962 Raj 3 ; *M. G. Agarwal v. State of Maharashtra*, A 1963 SC 200 following *Shiva Swarup*, 61 IA 398 : A 1934 P 227 ; *Nur Muhammad*, A 1945 PC 151 : 47 Cr LJ 1.
24. *Khetrabashi v. Lalit Kumar*, A 1959 C 595 ; *Md. Ibrahim v. Alfred*, A 1960 Mys 173 ; See contra *Osman Gani v. Barandeo Singh* ; *Premdas v. Lallu Ram*, A 1961 63 CWN 181 MP 143 : 1961 (1) Cr LJ 684.
25. *Harbans Singh v. Daroga Singh*, 39 P 320 : A 1962 P 27.
26. *Harnarain Singh v. Nawab Chand Lal*, A 1958 P 10 : 1958 Cr LJ 70 ; *Premdas v. Lallo Ram*, A (some persons as accused and acquitted). A 1961 MP 143 : 1961 (1) Cr LJ 604.

It is only the person, who makes the allegation orally or in writing to the Magistrate, who has been given the right under sub-section (3) to make an application for leave.²⁷

Having regard to S. 7 Hindu Marriage Act, it is arguable whether want of evidence as to Nirak Hom and Saptapadi disproves a marriage. Where in a case instituted upon complaint under S. 6, Child Marriage Act, the accused were acquitted on appeal on that ground alone, *held* that this is a fit case where special leave to appeal under S. 417(3) must be granted.^{27a}

Separate petition for leave.—Has to be filed with the petition of appeal.²⁸ Delay in filing an appeal under S. 417 (3) cannot be condoned.²⁹

Section 417(3) and (4) Limitation—S. 29(2) Limitation Act does not apply to special procedure which is prescribed by S. 417(4). If a revision petition is filed by the applicant before the Sessions Judge and that revision petition is dismissed, the time taken for presenting the revision petition has to be condoned under S. 5, Limitation Act.^{29a}

14. Several Cases.—Separate applications for special leave should be filed in each of the cases.³⁰ The attack on an acquittal may be either on grounds of law or on facts, where the attack is on a ground of law two conditions may arise (1) the point of law involved may be new one not previously settled by authority (2) the lower Court has decided it wrongly and the wrong decision has affected the result of the case.³¹

In order that the jurisdiction of the High Court may be involved under this section there has to be an order of acquittal from an original or appellate order of acquittal and no leave can be granted where the lower Appellate Court made an order of retrial.³²

15. Principles governing grant of Special leave.—The power which the High Court will be called upon to exercise in case special leave is granted will be the power which the High Court exercises in an appeal against acquittal and must be kept in view in granting leave.³³ Where there is no record of evidence or summary of evidence in a case under S. 504, I. P. C. the High Court set aside the order of acquittal.³⁴

'Acquittal.'—No appeal lies against an order under S. 118 as the terms of conviction and acquittal are not applicable to the same.³⁵

The words 'appellate order of acquittal' mean and include all judgments of an Appellate Court by which a conviction is set aside.³⁶

27. *In re Syed Ibrahim*, A 1959 M 32 ; *Chandlal*, A 1958 P 10 : 1958 Cr LJ 70 ; *Harnarain Singh v. Nawab Chandlal*, A 1958 P 10 : 1958 Cr LJ 70.

27a. *Khushal Chaud v. Sahankar Pandey*, A 1963 M P 126.

28. *Khetrabashi v. Lalit Kumar*, A 1959 C 595.

29. *Anjanerin v. Yeshwant Rao*, A 1962 B 154 (FB) see cases referred to.

29a. *Rabingsui Tangkhel v. Yangmas*, A 1963 Man 17 following *Rajjanlal*, A 1961 A 139 FB, *Premkanta Subba Reddi v. D. Papireddi* A 1957 AP 406, *Balkrishna Nambiar v. Gopalan Nambiar*, A 1961 Kr 18 and not following the contrary view in *Anjambhai Yeshwant Rao*, A 1961

A 154 followed in *Mst Koshalya Rani v. Gopal Singh*, A 1963 Punj 145 and S. 5 Limitation Act is not applicable under S. 417 (4).

30. *Prasemachary v. Chikkapinachari*, A 1958 Mys 106.

31. *Jairam v. Mangla*, A 1956 Raj 159 : 1956 Cr LJ 1230.

32. *Binapani v. Samsuddin*, 65 CWN 1087.

33. *Dangar Singh v. Krishna Kant Vyas*, A 1957 MP 162 : 1967 Cr LJ 1143.

34. *Kanchan Bhusan Dutta v. Sailendra Nath Sen*, A 1958 C 595 : 1958 Cr LJ 1315.

35. *Babu Ram*, AIR (1928) A I.

36. *Gokool Chandra Chowdhry*, (1875) 24 WR (Cr) 41.

16. Order, if may be set aside on reference.—When a Magistrate, having called on the prisoners for their defence, takes the evidence of a witness, and finally acquits them of the charge, the High Court has *no power to interfere upon a reference* made to it under S. 296 of Act X of 1872.³⁷ A reference under S. 438 should be treated in the same way as an application by a private party and should not be entertained.³⁸ The Patna High Court, however, has held that it may interfere with an order of acquittal even on reference by a District Magistrate.³⁹

When a mistake is discovered by the Sessions Judge after acquittal by the Assistant Sessions Judge, Reference is competent.⁴⁰

17. Notice to respondent.—See S. 422.

The Appellate Court can order the accused to be arrested pending the appeal.⁴¹

18. Motions against Acquittal.—The High Court can interfere in revision at the instance of a private party (complainant) under S. 439.

See Commentary on S. 439 *infra*. In motions against acquittal the High Court will not ordinarily take upon itself the task of weighing evidence afresh and what it would consider is whether the trial was regularly conducted and that the law has been clearly understood and applied to the facts.⁴² Rule should not be granted in a case of acquittal in a jury trial except on strong grounds.⁴³

418. Appeal on what matters admissible.—(1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

(2) Notwithstanding anything contained in sub-section (1) or in Section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

Explanation.—The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. 'Except where the trial was by jury.' |
| 2. Legislative changes. | 7. 'Appeal shall lie on a matter of law only.' |
| 3. Statement of Objects and Reasons. | 8. Sub-section (2). |
| 4. Scope. | 9. Powers of Appellate Court. |
| 5. 'On a matter of fact.' | |

1. Corresponding sections in former Codes.—This section corresponds to the last paragraph of S. 271 of the Code of 1872, S. 22 of Act XI of 1874. The Code of 1898 before the introduction of sub-sec. (2) by S. 115 of Act XVIII of 1923 was similarly worded as that of the Code of 1882.

37. *Okhoy Teli v. Madhoo Sheikh*, (1873) 19 WR (Gr) 55.

38. *Dabiruddin Nasker v. Shaikh Molla*, (1928) 33 CWN 258.

39. *Wazir Kunjre*, (1928) 7 P 579; *Saban Rai v. Bhagwat Dass*, (1926) 5 P 25.

40. A 1953 M 259 : 1953 Gr LJ 520.

41. *Mongu*, (1879) 2 A 340 FB.

42. *Kalluri Verma Reddi v. Ganga Reddi*, A 1958 AP 571 : 1958 Cr LJ 1118.

43. *Makbul*, A 1952 C 494.

2. **Legislative changes.**—Sub section (2) is new.

3. **Statement of Objects and Reasons.**—“Clause 98 provides that when in the case of a trial by jury one person is sentenced to death and another to a lower punishment, the second accused may appeal on a matter of fact as well as on a matter of law. This is intended to remove the anomaly under the existing law that a High Court acting under S. 374 could consider the facts of the case as regards the former accused, but on appeal of the second accused could only intervene on a point of law.”

4. **Scope.**—Under S. 418 (2) when a person is sentenced to death, any other person convicted in the same trial with the condemned prisoner may appeal on fact and law.⁴⁴ Powers of the High Court in a reference under S. 374 are not affected by S. 418 (1) and S. 423 (2).⁴⁵ In a reference under S. 307 even if there is no misdirection or non-direction the entire case is before the High Court and facts can be gone into. The Privy Council has held that it cannot be said that it is not permissible for the appellate Court to go into the merits of the case in an appeal under Chapter 31 because of S. 418. An appeal may be entertained only on a question of law, but once it has been held by the appellate Court that there has been an error in law it is open to it to interfere with the jury's verdict.⁴⁶

In view of S. 418 it is not competent to the High Court to go into questions of fact in an appeal against a conviction as a result of a verdict by a jury.⁴⁷

5. **‘On a matter of fact.’**—See S. 299 *ante*.

6. **‘Except where the trial was by jury’.**—See S. 423 (d).

7. **‘Appeal shall lie on a matter of law only.’**—Where a case was legally tried by a jury, *held*, that appeal would lie only on a matter of law.⁴⁸ See Commentary on Ss. 297 and 298 *supra*.

Where the appeal has been entertained the powers of Appellate Court are those laid down in S. 423.⁴⁹

8. **Sub-section (2).**—is new and seems to remove the anomaly expressed in *Jafar Ali*⁵⁰ approved of in *Chatradhari*⁵¹ where the hardship to the accused was sought to be remedied by a recommendation to the Local Government under S. 401 of the Code. S. 423 (2) does not narrow down the scope of S. 418 of the Code.⁵²

9. **Powers of Appellate Court.**—Prior to the Privy Council decision in *Abdul Rahim's* case,⁴⁶ if the High Court in an appeal under S. 418 held that there were misdirections or non-directions affecting the verdict of the jury but now the appellate Court will consider the evidence and may maintain the conviction or acquit the appellant or direct a retrial. The Supreme Court in⁵³ has followed the Privy Council decision in *Abdul Rahim's*⁴⁶ case.

44. *Benoyendra Chandra Pandey*, 40 CWN 432 ; 37 Cr LJ 394.

45. *Rash Behari Lal*, A 1932 P 302 ; 34 Cr LJ 82 ; A 1948 B 244 ; 49 Cr LJ 348 ; *Abdul Rahim*, 73 IA 77 ; 50 CWN 692.

46. *Abdul Rahim*, 73 IA 77 : 47 Cr LJ 616 : 50 CWN 692.

47. *In re Omayan*, A 1950 M 377 : 51 Cr LJ 134 ; *Wahiduzzalar Khan*, A 1947 A 72 : 48 Cr LJ 539 ; 61 Bom LR

1161 see *Nazir Ahmed*, 47 Bom LR 1245 PC.

48. *Wafader*, 21 C 955.

49. *Dhiraji v. Akasi*, (1926) 24 ALJ 506 : 27 Cr LJ 785 : 95 IC 385.

50. 19 WR (Cr) 57.

51. 2 CWN 49.

52. *Fitz Maurice*, (1926) 27 Cr LJ 793 : 95 IC 393.

53. *Mushtak Hussain*, 1953 SGR 809 ; *Ramkishan*, A 1955 SC 104.

See notes under S. 423. An erroneous verdict due to misdirection, non-direction or any other error of law is not enough to reverse a verdict as the section has to be read with S. 537 (d), which forbids the reversal of the verdict unless it has in fact occasioned failure of justice.⁵⁴

419. Petition of appeal.—Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under Section 367, or a copy of the transcript of the charge to the jury delivered in English.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. 'Presented'. |
| 2. Form of petition of appeal. | 5. 'Unless the Court to which it is presented otherwise directs.' |
| 3. Appeal from acquittal—Memorandum of Appeal. | 6. 'A copy of the heads of the charge.' |
| | 7. Copy of the Judgment. |

1. Corresponding sections in former Codes.—This section corresponds to S. 416 of the Code of 1861, S. 275 of the Code of 1872 and S. 169 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Form of petition of appeal.—This section prescribes the form of appeal as distinguished from the next section which deals with the presentation of the appeal.⁵⁵ The petition of appeal against the verdict of a jury should state specifically in what respect the law has been contravened,⁵⁶ but the Court will not allow a petition of appeal containing defamatory allegations to be filed.⁵⁷

3. Appeal from acquittal—Memorandum of appeal.—A memorandum of appeal with a bald ground such as the order of acquittal is against the weight of evidence on the record and contrary to law is of no help to any of the parties or to the Court. Such a certificate if any and prevailing in any Court deserves to be discontinued and a more efficient way of drawing up grounds of appeal have to be developed.⁵⁸

4. 'Presented.'—As regards presentation, no special method is enjoined.⁵⁹ A petition of appeal sent by post is not presented to the Court within the meaning of this section. Collins, C. J., held that the words used in the section being "every appeal . . . presented by the appellant or his pleader", the word 'presented' evidently means that such petition shall be delivered to the proper officer of the Court either by the appellant or his pleader. Shephard, J., although had doubts did not differ.⁶⁰ This view was followed in *Vasudevayya*,⁶¹ where a petition of appeal was not presented to the Court, but was deposited in petition-box kept for the convenience of parties. But the *presentation by the clerk of the appellant's pleader* has been held to be sufficient.⁶²

54. *Budul*, 1957 ALJ 963; *Abdul Rahim*, 73 IA 77; A 1946 PC 82; 50 CWN 692.

55. *Pohpi*, 13 A 171 (FB); (1891) AWN 48.

56. *Gopal Bhereewalla*, 1 WR (Cr) 21.

57. *Durant*, 15 B 485.

58. *Kapil Das Shuak v. State of U. P.*, (1958) SCR 641; A 1958 SG 121;

1958 Cr LJ 262.

59. *Public Prosecutor v. Kadiri Koya*, (1915) 39 M 527.

60. *Ablappa*, (1891) 15 M 137 (138); *Allappa*, Weir p. 1006.

61. (1896) 19 M 354.

62. *Karuppa Udayan*, (1896) 20 M 87; *Ravaswami*, (1897) 21 M 114.

The appeal must be presented before the last date *i.e.* period of limitation although the Appellate Court may excuse the delay under S. 5 of the Limitation Act.

5. 'Unless the Court to which it is presented otherwise directs.'—The Court may dispense with the filing of the copies of the judgment and this discretion should be exercised where injustice might result from a strict compliance with the law.⁶³

6. 'A copy of the heads of the charge.'—See S. 371 (2) and S. 367 (5).

7. Copy of the Judgment.—Having regard to the context and the purpose of S. 419 the copy to be filed with the petition must be a certified copy.⁶⁴ Where an appeal filed before the Sessions Judge was not accompanied by a copy of the Magistrate's judgment it was held to be incompetent since it violated the provisions of this section.⁶⁵ In a Criminal application of several accused if a certified copy has been filed in one case the co-accused may pray for dispensing with the certified copy.⁶⁶ A joint appeal by persons with common interests convicted at the same trial is in accordance with law. Rejection of the appeal for not filing the copy of the judgment⁶⁷ is no bar to the consideration of the appeal on the merits as the order amounts to rejection and not dismissal of appeal.⁶⁸

420. Procedure when appellant in jail.—If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Appellate Court may send for the appellant from Jail. |
| 2. Scope. | 4. Jail Appeal and Regular Appeal. |

1. Corresponding sections in former Codes.—This section corresponds to S. 418 of the Code of 1861, S. 277 of the Code of 1872 and S. 171 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Scope.—Where an accused person is in jail and makes the appeal through the Jailor under S. 420, it is not necessary to issue a notice of hearing to him and the Court is competent to dismiss the appeal summarily after perusal of the papers submitted to it.⁶⁹ "It is not sufficient that no difficulties should be thrown in the way of prisoners but facilities should be given to them (by the officer in charge of the jail) to enable them to prepare a defence".⁷⁰

See the Calcutta High Court Circular 9, August 7, 1897 which says that petitions of appeal from jail should be presented to the Officer-in-charge of jails and shall be forwarded by such officers direct to the Registrar of the High Court.

3. Appellate Court may send for the appellant from Jail.—The High Court can send for an appellant from jail to appear before it to explain

63. *Sitaram*, 5 Bom LR 704; *Paramanand*, A 1929 L 614; 30 Cr LJ 625.

64. *State of U. P. v. O. Lobit*, A 1958 SC 414; 1958 Cr LJ 809.

65. *Sambhu*, A 1956 A 633.

66. *Batasha*, 18 Cr LJ 512; *Paramanand v. Mohanlal*, A 1929 L 614.

67. *Mulho*, A 1936 L 859; 38 Cr LJ 115.

68. *Sahadeo v. Jagannath*, A 1950 N 77: 51 Cr LJ 612; *Pratap Singh*, (1961) 2 SCR 509 A 1961 SC 586; 1961 (1) Cr LJ 733.

69. *Loung*, (1926) 27 Cr LJ 933: 96 IC 389.

70. *Nitto Gopal Palia*, 13 WR (Cr) 69; *Sheikh Dadabhai*, 1 B 10.

any difficulty in the case under appeal⁷¹ but the Oudh practice is not to allow appellants from jail to argue in person in their own interests.⁷² It seems once a jail appeal is admitted there is no bar to the High Court hearing the appellant in person. See *Lal Bahadur*⁷³ where *Pohpi's* case⁷¹ was overruled.

4. Jail appeal and Regular appeal.—By preferring an appeal through the jail authorities, the accused exercises the right of appeal and if it is disposed of he cannot claim to have another right of appeal because the previous order of the High Court dismissing the appeal is final under S. 430.⁷⁴ The practice of the Allahabad High Court is to hear a represented appeal presented within the period of limitation even when there has been a summary dismissal passed upon a jail appeal.⁷⁵ The practice of the Madras High Court is not the same as that of Allahabad High Court.⁷⁶ A Court cannot dispose of a jail appeal without affording an opportunity to the accused person to argue his case if he is represented by a counsel.⁷⁷ In view of the decision of the Supreme Court in⁷⁴ the decision⁷⁶ is no longer good law.

421. Summary dismissal of appeal.—(1) On receiving the petition and copy under Section 419 or Section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that no appeal presented under Section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Withdrawal of appeal. |
| 2. Legislative Changes—1898. | 7. Hearing a pleader. |
| 3. Scope. | 8. Appeal from jail. |
| —Power should be exercised with caution. | —if rejected second petition not entertainable. |
| 4. Dismissal for default. | 9. Practice in the mofussil. |
| 5. 'May dismiss the appeal summarily.' | 10. Reasons for dismissal. |
| | 11. Sub-section (2). |

1. Corresponding sections in former Codes.—This section corresponds to S. 417 of the Code of 1861, S. 278 of the Code of 1872 and S. 172 of Act IV of 1877.

2. Legislative Changes (1898).—The words "dismiss" and "dismissing" in sub-secs. (1) and (2) were substituted for the words "reject" and "rejecting" respectively occurring in S. 421 of the Code of 1882.

3. Scope.—It was held in *Ekcowrie Mukherjee*⁷⁸ that even in summary dismissals of appeals the judgment must notice clearly the objections urged

71. *Pohpi*, 13 A 171 (186) FB ; *Kolina*, 2 Weir 472.

72. AIR (1927) Oudh 369 (2).

73. (1927) 50 A 543 (FB) : 26 ALJ 275.

74. *Putta Rangama Kulu*, In re, 1958 An WR 456 ; *Khalil*, 44 A 759 (FB) ; *Prem Mahton*, A 1935 P 426 : 37 Cr LJ 58 ; *Ram Jas*, A 1930 Oudh 219, *Judha*, A 1940 Oudh 369 ; *Neeladri*

Appadu, A 1947 M 243 (1).

75. *Gokul*, A 1958 A 616 ; 1958 Cr LJ 996 ; *Lachman Chandra*, A 1934 A 988 (1).

76. In re *Neeladri Appadu*, A 1947 M 243 (1).

77. *Kantu Gowamma*, In re, 1952 Cr LJ 1057 (Madras).

78. 32 C 178.

on appeal and how they were disposed of. The practice of Summary dismissal of Criminal appeal prevails in almost all the High Courts in India and had the sanction of the statute law as contained in the Criminal Procedure Code.⁷⁹ It is not right for the High Court to dismiss an appeal preferred by the accused to that Court where important or complicated questions of fact and law are involved.⁸⁰ Even in cases where an appeal filed under S. 419 has to be dismissed summarily, the provisions of S. 421 are to be followed.⁸¹ Where the appeals by different accused arise out of the same trial and are from one judgment and relate to the same charge to the jury and what is more that they raise substantially the same points, the High Court should not dismiss one of them summarily and admit the other appeal by the other accused and write a reasoned judgment.⁸² While an Appellate Court may, acting under this section dismiss an appeal in its entirety summarily, it cannot dismiss it in part as regards conviction or as regards sentence.⁸³ It was held in⁸³ that even if the appeal has been admitted on the question of sentence, it is open to the High Court to allow the appeal to be heard on the merits. A summary dismissal of an appeal or revision does involve an adjudication by the High Court just as a dismissal after a full hearing does.⁸⁴

Power should be exercised with caution.—The powers conferred by this section should be exercised sparingly and with great caution.⁸⁵

4. Dismissal for default.—Once an appeal is received the Appellate Court is bound to proceed under either S. 421 or S. 422. It cannot merely dismiss in default of appearance.⁸⁶

5. 'May dismiss the appeal summarily.'—Although the Court has jurisdiction to dismiss an appeal summarily⁸⁷ it has been held that it ought not to do so if the appeal on the face of it involves a question of law or if the judgment under appeal is a long and intricate one requiring careful consideration.⁸⁸

6. Withdrawal of Appeal.—Once the appeal has been admitted, it cannot be withdrawn either by the State or accused. The Court must proceed under S. 421 or S. 422 and S. 423 to decide the appeal on merits.⁸⁹

7. Hearing a Pleader.—Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity of appearing.⁹⁰ This principle was followed in *Ram Gopal*.⁹¹ The Appellant has a *right of reply* to the Court on hearing of an appeal.⁹² The Bombay

79. *Sidheswar Ganguly v. State of West Bengal*, 1958 SCR 749; A 1958 SC 143; 1958 Cr LJ 273.

80. *Mushtak Hussain v. State of Bombay*, 1953 SCR 809; A 1953 SC 282; 1953 Cr LJ 1127.

81. *Prabhakaran Nair*, ILR (1960) Ker 164; A 1960 Ker 314.

82. *Ramayya v. State of Bombay*, (1955) 1 SCR 1117; A 1955 SC 287; 1955 Cr LJ 857.

83. *R. P. Khanna*, A 1957 C 663; *Kuldip Das*, A 1933 P 38; 34 Cr LJ 118; *Dahut Ram*, 62 IA 129; 39 CWN 626; 36 Cr LJ 838 (2).

84. *per Das J. in U. J. S. Chopra v. State of Bombay*, (1955) 2 SCR 94; A 1955 SC 633; 1955 Cr LJ 1410.

85. *Ram Narain*, 8 A 514; *Padarath Kurmi*, 24 Cr LJ 477; 72 IC 893.

86. *Koura*, 21 PR 1895; *Pohpi*, (1891) 13 A 171 (FB) but see *contra*; *Kabir Shau*, AIR (1923) P 237; *Balmal Hotchand*, A 1938 S 171; 39 Cr LJ 890; *Roora*, A 1930 L 650; 31 Cr LJ 970.

87. *Panchi Mandar*, 1 PLT 318; 57 IC 273.

88. *Sukhdeo Pathik*, 3 PLJ 389; 19 Cr LJ 209; *Rahimadi*, 22 Cr LJ 349 (C).

89. *Ghulam Mohammad*, A 1942 L 296; 44 Cr LJ 14 (FB).

90. *Rangacharlu*, (1905) 29 M 236 followed in *Tuka Hussain Saheb*, (1924) 48 M 385; *Jitendranath*, A 1936 C 294; 37 Cr LJ 83.

91. 36 C 385.

92. *Amanat Sardar v. Nagendra Biswas*, (1910) 38 C 307; *Gurushida*, 7 Bom LR 89.

High Court however has held that the Court may hear the appellant's pleader at the time when he presents the appeal if he desires that course. If the Court then desires to send for record, summary dismissal of the appeal without giving the pleader opportunity of being heard is not necessarily illegal.⁹³ This case considered the view of the Calcutta High Court in *Lalit*⁹⁴ and *Surendra's* case⁹⁵ which held that after the record was sent for and received, the Appellate Court should have heard the pleader and should not have dismissed the appeal summarily without hearing him. Asking the appellant's pleader to support the appeal the moment it is filed is not giving him an opportunity of being heard.⁹⁶

When, in the appeal preferred by the accused on two charges, in one trial, the Appellate Court summarily dismissed the appeal in respect of one charge whilst admitting the appeal in respect of the other charge, *held*, that the practice was not illegal, though it was undesirable.⁹⁷

8. Appeal from jail.—A pleader for an appellant should not be called upon, immediately on the filing of an appeal to support it, but should be afforded a reasonable opportunity.⁹⁸

If rejected—Second petition presented through counsel—not entertainable.—A second petition of appeal on behalf of a convict is not entertainable if the jail appeal had already been summarily dismissed.⁹⁹

9. Practice in the mofussil.—The practice in the mofussil is to admit appeals, which are supported by pleaders, without any hearing, except on a question of bail, the only cases which are dealt with under S. 421 being jail appeals.⁹⁸ See *Mewa Ram's* case.¹

10. Reasons for dismissal.—Reasons however concise should be given² although the Appellate Court is not required by law to write a judgment.³ The omission to give such reasons would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court on appeal⁴ but a contrary view has been held in *Nga Banyit*⁵ and other cases⁶ where it has been *held* that "appeal rejected" is a sufficient judgment.

An order dismissing an appeal under this section is final.⁷ Where a judgment does not give reason but contains only the words 'Heard. I see no reason to interfere' *held*, it is not a sufficient compliance with the provisions of this section, where the memorandum of appeal contained a number of grounds that admitted of argument.⁸ Giving reason for dismissing the

93. *Basavenappa Basava*, (1927) 29 Bom LR 488.

94. (1925) 42 CLJ 551.

95. (1925) 42 CLJ 554.

96. *Ramtohal Dusadh*, 36 C 385 : 9 Cr LJ 401 ; *Ponnaswami*, A 1941 M 604.

97. *L. M. Ismail*, (1927) 5 R 274 ; *Jagat*, 5 GWN 320.

98. *Ramtohal Dusadh*, (1909) 36 C 385.

99. *Khiali*, (1922) 44 A 759 : 20 ALJ 739 ; *Pratap Singh*, A 1961 SC 586 ; 1961 (1) Cr LJ 733 ; *U. J. S. Chopra v. State of Bombay*, A 1955 SC 633 ; *Prem Mahton*, A 1935 P 426 ; *Rabari Rana Raja*, A 1955 Sau 9 ; *Madho Singh*, A 1957 Raj 204 : 1957 Cr LJ 797.

1. (1925) 48 A 208.

2. *Ram Narain*, 8 A 514 ; *Nanhua*, 17 A 241 (FB) ; *Amanat Sardar*, (1909) 38 C 307 ; *Ekkowrie Mukherji*, (1904) 32

C 178 ; *Padarath Kurmi*, 24 Cr LJ 477 ; *Bala Bux*, A 1938 P 366 : 39 Cr LJ 732 ; *Abdul Latif*, 37 GWN 235 ; *Brij Mohan Lal*, A 1925 Oudh 290.

3. *Gurubari Behara*, 2 PLJ 695, *see cases referred to*,

4. *Ramkant Pandit*, 19 Cr LJ 304 : 44 IG 208 (P) following *Gurubari*, 2 PLJ 695 ; *Ekkowrie Mukherjee*, (1904) 32 C 178 ; *Chhotu Gope*, A 1938 P 176 ; 37 Cr LJ 380.

5. 19 Cr LJ 316 (R).

6. *Rashbehari v. Balagopal*, 21 C 92 ; *Krishnayya*, 25 M 534 ; *Nitya v. Beni*, 9 CWN 623 ; *Warubai*, 20 B 540 ; *Ram Rao*, 13 NLR 169 : 18 Cr LJ 993 ; *Kala Chand Ghose*, A 1929 C 773 : 31 Cr LJ 474.

7. *Kunhammad*, 24 Cr LJ 439.

8. *Barjoon Mahto*, A 1935 P 37 : 36 Cr LJ 261 (1) ; *Chhatu Gope*, A 1938 P 176.

appeal summarily where important or complicated questions of fact and law are involved applies to the High Court.⁹ The Supreme Court felt embarrassed in considering of the constitution.

11. Sub-section (2).—Provides that before dismissing the appeal under this section the Court may call for the Record but shall not be bound to do so. Provision is made only for one opportunity. Consequently, the Appellate Court, before dismissing the appeal summarily after calling for record and perusing the same is not bound to hear the appellant or his pleader again.¹⁰ The other view is that he is entitled to be heard after the record is called for.¹¹

422. Notice of appeal.—If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the State Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under Section 411A, sub-section (2), or Section 417, the Appellate Court shall cause a like notice to be given to the accused.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Jail appeal. |
| 2. Rules. | 5. Appeal cannot be restricted to selected grounds. |
| 3. Notice of appeal. | 6. Notice in appeal against acquittal. |

1. Corresponding sections in former Codes.—This section corresponds to S. 62 and paragraph 2 of S. 269 of the Code of 1872, S. 173 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Rules.—In Bengal, District Magistrates have been appointed officers to whom notices of appeal to the Court of Sessions shall be given—Cal. *Gazette*, 1883 Pt. I, p. 200.

3. Notice of appeal.—After the appeal is admitted reasonable notice must be given.¹² Notice to all parties of the time fixed for hearing is obligatory.¹³

Under S. 422 it is quite clear that it is the Court that should furnish the Public Prosecutor with a copy of the grounds of appeal.¹⁴ Failure to issue notice to the State and allowing the appeal cannot be sustained.¹⁵

It has been held that the disposal of an appeal from conviction without notice to the complainant who has been awarded compensation out of 'fine'

9. *Mushtak Hussain v. State of Bombay*, 1953 SCR 809 : A 1953 SC 282 : 1953 Cr LJ 1127.
 10. *Manmotha Nath Sarkar v. U. B. of Dhatrigram*, 40 GWN 128 : 37 Cr LJ 904 ; *Akramuddin*, A 1939 C 541 : 40 Cr LJ 839 ; *Badri Prasad Agarwala*, A 1950 Ass 5 : 51 Cr LJ 241. *Deval Mohan*, A 1930 P 499 ; *Basavappa Basava*, A 1927 B 361.
 11. *Surendra Nath*, A 1926 C 161 : 27 Cr LJ 412 ; *Lalit Kumar Sen*, A 1926 C 174 : 27 Cr LJ 382.

12. *Hari Pershad*, 24 WR (Cr) 60 ; *Venkataramadu*, 2 Weir 475.
 13. *Devendra Marappa v. Shettappa*, 25 Bom LR 251 ; *Hitanda Mech v. Anumuta Chettyar*, A 1940 R 247 : 37 Cr LJ 832 ; *Shivalingappa*, A 1923 B 74.
 14. *Chirumanilla Tirupattaya*, 1956 An WR 998.
 15. *Karuppana Kone*, A 1942 M 365 : 42 Cr LJ 968 ; *Bharasa Naw v. Sukdeo*, 53 C 969 : 27 Cr LJ 1086 ; *Prabhakaran Nair*, A 1960 Ker 314.

or to the Crown, is bad in law.¹⁶ The Madras High Court however held that in appeals under S. 250, it is not imperative that notice should be given to the accused.¹⁷

Though it is proper and desirable in an appeal under S. 417 to give notice to a complainant in a complaint case and more particularly where compensation of costs are given to a complainant, failure to give such notice does not render an appellate order illegal.¹⁸ If the accused is acquitted on his appeal against his conviction and notice was sent only to the State and not to the complainant who had been awarded compensation it would be grossly unfair to the accused to go through another ordeal by setting aside the order.¹⁹

4. Jail appeal.—When notice has been given the convict has a right to appear in person at the hearing of the appeal if he is not represented by a lawyer.²⁰

5. Appeal cannot be restricted to selected grounds.—An order in a criminal appeal restricting the appellant to a selected ground *e. g.* 'sentence' is *ultra vires*.²¹

6. Notice in appeal against acquittal.—Notice must be served on the accused. Where notice is served on some of the accused the appeal may be split up and the hearing of the appeal will proceed against person served.²² The complainant may ask the High Court to issue notice in the manner provided in Ss. 70 and 71.

423. Powers of Appellate Court in disposing of appeal.—(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under Section 411A, sub-section (2), or Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of

16. *Bharasa Naw v. Sukdeo*, (1926) 53 C 969 : 43 GLJ 583; *Belwant*, A 1936 N 144; *Ranga*, A 1943 M 565; *Mangalchand v. Mohan*, A 1917 N 122 : 19 Cr LJ 927.

17. *Vellayan*, (1915) 39 M 505; *Ambakkagari Nagi Reddi*, 33 M 89; *Palaniappa Velan*, (1906) 29 M 187; *Krishna Kone v. Narayan Das*, 41 MLJ 172.

18. *Harsukh Ramlal*, A 1953 N 305; 1953 Cr LJ 652.

19. *Marta Sossai v. Aroklam*, A 1942 M 465 : 43 Cr LJ 743; *Kartikrani*, A 1937

N 123 (Practice in Central Provinces is to issue notice on complainant); *Kalathi Mudali v. Venkatesh Mudali*, A 1933 N 277.

20. *Lal Bahadur*, (1927) 50 A 543 (FB) : 26 ALJ 275.

21. *Nafar Sheikh*, (1913) 41 C 406 : 18 CWN 147; 18 CLJ 582 : 20 IC 741; followed in, *Gaya Singh*, 4 P 254 : 26 Cr LJ 862; *Sudhir*, A 1942 P 46; *Rijhu Sheikh*, A 1931 P 351 (1) : 32 Cr LJ 1017.

22. *Golak*, A 1944 C 234.

competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provisions of Section 106, sub-section (3), not so as to enhance the same;

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(1A) Where an appeal from a conviction lies to the High Court, it may enhance the sentence, notwithstanding anything inconsistent therewith contained in clause (b) of sub-section (1):

Provided that the sentence shall not be so enhanced, unless the accused has had an opportunity of showing cause against such enhancement.

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Appeal cannot be admitted on restricted grounds. |
| 2. Legislative Changes. | 15. Summary Dismissal of appeals. |
| 3. Effect of 1923 and 1955 Amendments. | 16. Dismissal for default. |
| 4. Powers of Appellate Court in disposing of appeal. | 17. Appeal cannot be restored. |
| 5. Scope. | 18. Death of the Appellant. |
| 6. Criminal as distinguished from Civil Appeal. | —Duty of Court. |
| 7. Power of the Court to set aside an order of acquittal. | 19. Adjournment of appeal. |
| 8. Power of the Appellate Court to alter conviction. | —Absence of appellant or his Counsel. |
| 9. Two appeals in two separate cases tried together. | 20. Appellate Court's power to rehear appeal after signing the judgment. |
| 10. Appeal if lays open the whole case. | 21. Duty of appellate Court. |
| 11. Distinction between the powers of the Appellate Court in appeals from conviction and appeals from acquittal. | 22. Appreciation of Evidence. |
| 12. Appeal against acquittal is on the same footing as an appeal from a conviction. | 23. Sentence. |
| 13. Limitation for filing appeal. | —Interference. |
| —before Sessions Court. | 24. Sub-section (1). |
| —before High Court. | —Appellate Court shall then send for the record. |
| —Power to excuse delay is not within the section. | —'Then'. |
| 14. Is the appellant limited to the grounds of appeal. | —'After perusing such record'. |
| | 24a. Record lost. |
| | 25. Hearing of appellant or his pleader, if he appears. |
| | 26. Right of Reply. |
| | 27. 'And the Public Prosecutor if he appears'. |
| | 28. And in case of an appeal under S. 417 the accused if he appears. |

29. 'May if it considers that there is no sufficient ground for interfering, dismiss the appeal'.
—Appeal disposed of on the merits.
—Pleader not heard.
—Power to revise judgment.
30. Sub-section (1-a) 'in an appeal from acquittal.'
—Interference.
31. 'Reverse such order and direct that further enquiry be made.'
32. 'Or that the accused be retried or committed for trial.'
33. 'Or find him guilty and pass sentence according to law.'
34. Sub-section (1-b).
—"In an appeal from conviction."
35. Reverse the finding and sentence.
—acquit or discharge.
—Or order him to be retried by a competent Court.
—Power to order further inquiry.
36. 'And acquit or discharge the accused'.
37. 'Or order him to be retried or committed for trial'.
—Perfunctory cross-examination is a good ground for retrial.
—Evidence omitted by lower Court, if retrial should be ordered.
38. Retrial.
—Whole case is re-opened.
—Retrial cannot be directed on a charge on which the accused was acquitted.
—Co-accused should also be retried.
39. Order of retrial without notice to the accused is bad.
40. Power of the Appellate Court to try the offender itself.
41. Power to direct commitment for trial before the Court of Session.
—Further inquiry cannot be directed under Sub sec. (1) (b).
42. Sub-section (1) (b) (2).
—Altering the finding, maintaining the sentence or with or without altering the finding reduce the sentence.
43. 'Maintaining the sentence'.
44. Alter the finding.
- 44a. Illustrative cases.
45. Alteration of charge.
46. Reversal of acquittal on appeal.
47. Power of Appellate Court to alter a finding of acquittal into one of conviction.
48. Sub-section (1) (b) (2).
49. Sub-section (1) (b) (3).
50. Alteration of the sentence whether amounts to enhancement or not.
51. Order under S. 106 (3).
52. Appellate Court's power to order accused to repay complainant's Court-fee.
—If enhancement of sentence.
53. Sub-section (1) (c).
—In an appeal from any other order, alter or reverse such order.
54. Sub-section (1) (d).
—"May make any amendment or any consequential or incidental order that may be just and proper.
55. Power to order expunging of remarks from judgment of lower Courts.
56. Sub-section (1-A).
57. Sub-section (2).
—Order him to be retried.
58. Ss. 423 (2) and 439 (6).
59. Difference between S. 423 (2) and S. 307.

1. Corresponding sections in former Codes.—This section corresponds to S. 419 of the Code of 1861, Ss. 271 and 272, paragraph 3, Ss. 280, 284 and 299 of the Code of 1872 and S. 174 of Act IV of 1877.

2. Legislative Changes (1898).—The power to enhance the punishment conferred on the Court of Appeal by the Code of 1872 was taken away by the introduction of the words in Cl. (b) in the Code of 1898, *viz*, 'not to enhance the same' and was vested only in the High Court acting under S. 439. Cl. (d) was inserted for the first time in the Code of 1898; Sub-sec. (2) corresponds to Cl. (d) of the Code of 1882.

Legislative Changes (1955).—Sub-section (1-A) has been added by Act 26 of 1955.

3. Effect of 1923 and 1955 Amendments.—For 'Effect of 1923 Amendments' see notes *infra* under Cl. (d). Prior to the insertion of this clause the Appellate Court could not enhance the sentence which the High Court could exercise under S. 439 (6). The Appellate Court has been given the same powers.

4. Powers of Appellate Court in disposing of appeal.—This section does not confer the right of appeal but prescribes the powers and the mode of the appellate Court in disposing of an appeal.

Notwithstanding the omission of the clause which formerly found a place in S. 272 (Act X of 1872) that "in no other case shall there be an

appeal from a judgment of acquittal" no Court except the High Court can entertain such an appeal.²³

5. Scope.—The primary duty of the Court on an appeal is indicated in S. 423 (1). It is to consider with the record before it whether there is 'sufficient ground for interfering', that there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection and has occasioned a failure of justice.^{23a}

6. Criminal as distinguished from Civil Appeal.—White, J., observed :—"I admit that the sound rule to apply in trying a Criminal appeal where questions of disputed fact are in issue, is to consider whether the conviction is right and that in this respect a Criminal appeal differs from a Civil one. There the Court must be convinced before reversing a finding of fact by a lower Court that the finding is wrong".²⁴

7. Power of the Court to set aside an order of acquittal.—See Commentary on S. 417 *supra*.

8. Power of the Appellate Court to alter conviction.—An Appellate Court cannot alter conviction from a principal offence to one of abetment.²⁵ This view does not seem to be right after the decision in *Begu's* case.²⁶ But the Calcutta High Court, in case,²⁷ followed the earlier decisions²⁸ and distinguishing *Begu's* case,²⁶ held that the conviction of an accused person for one offence cannot be altered on appeal to a conviction for a different offence with which he was not charged where such alteration would prejudice the accused.

9. Two appeals in two separate cases tried together—Illegality of procedure.—Where two appeals were preferred in two separate cases in each of which the accused were convicted and the appeals were tried together as one case, *held*, the duty of the appellate Court was to keep each appeal absolutely separate and to deal with it on its merits confining itself to the evidence given in that case and that case alone.²⁹

10. Appeal if lays open the whole case.—When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the Appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences.³⁰ The Appellate Court can under the provisions of S. 423 in an appeal from a conviction alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court.³¹ This view was distinguished in *Sami Ayyar's* case³² which seems to have overlooked the expression "alter the finding" in Cl. (b) (2).

The power of an Appellate Court under S. 423 (1) (b) to alter the finding while maintaining the sentence is not confined to cases falling under Ss. 237 and 238 of the Code.³³

23. *Rangasami v. Narasimhulu*, (1883) 7 M 213.

23a. *Abdul Rahim*, 73 IA 77 ; 50 CWN 692 PG (699).

24. *Protap Chandra Mukherji*, 11 CLJ 25 : (27, 28) following *Milan Khan v. Sagai Bepari*, (1898) 23 C 347 (349).

25. *Mahabir Prasad*, (1926) 49 A 120.

26. 52 IA 191 (PC).

27. *Dibakar Das v. Saktidhar Kabiraj*, (1927)

54 C 476.

28. *Lala Ojha*, 26 C 863 : 3 CWN 653 ; *Fata Singh*, (1900) 27 C 660.

29. *Doat Ali v. Muhammad Syedali*, (1927) 32 CWN 328 : 47 CLJ 201.

30. *Krishna Dhan Mandal*, (1894) 22 C 377.

31. *Jabanulla*, (1896) 23 C 975.

32. (1902) 26 M 478.

33. *Golla Hanumappa*, (1911) 35 M 243.

11. Distinction between the powers of the Appellate Court in appeals from conviction and appeals from acquittal.—The powers of an appellate Court are defined in S. 423 and in that section a clear distinction is drawn between the powers which may be exercised in an appeal from an order of acquittal and in an appeal from a conviction.³⁴

12. Appeal against acquittal is on the same footing as an appeal from a conviction.—The Code of 1861 contained no provision for an appeal by the Local Government against acquittal and the right of appeal against an acquittal was first introduced in the Code of 1872.

“Indeed it is not easy to see any distinction in the Criminal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction”.^{34a} The difference seems to be as was pointed out in the following cases³⁵ that the extraordinary powers conferred by S. 417 should be most sparingly enforced, or as was pointed out in *Fouzder v. Kasi*,³⁶ the High Court would interfere when it is urgently demanded in the interests of justice.

13. Limitation for filing appeal.—before Sessions Court.—30 days from the date of the order of conviction by the trial Court, together with the time requisite for obtaining a copy of the judgment.

See II Art. 154 of the Limitation Act.

This is also the practice prevailing in *Mofussil Courts*.

Before High Court.—60 days together with the time requisite for obtaining a copy of the judgment—Art. 155, Limitation Act.

Appeal of Court against the order of acquittal preferred under S. 417.—Six months from the date of the order.

Power to excuse delay is not within the section.—An Appellate Court cannot excuse the delay in presenting an appeal, under S. 423 (1) (d) as an order excusing the delay is neither a consequential nor an incidental order,³⁷ but it may excuse the delay if an application is presented under S. 5 of the Limitation Act.

14. Is the appellant limited to the grounds of appeal.—It has been held that the Code does not contemplate the admission of an appeal for a limited purpose and that a restrictive order of admission of an appeal is not contemplated by S. 422.³⁸

Appeal cannot be admitted on a restricted ground.—Appeal cannot be admitted on the ground of sentence only,^{38a} if the appeal is admitted the appellant is entitled to be heard on the merits of the whole case.^{38b}

15. Summary Dismissal of appeals.—See S. 421.

16. Dismissal for default.—After an appeal has been admitted and notice has been issued the appeal cannot be dismissed because the pleader

34. *Darbari Mal*, (1911) 8 ALJ 1129: 12 Cr LJ 575: 12 IC 839.

34a. *Prag Dat* (1898) 20 A 459; see *Deputy Legal Remembrancer v. Matukdhari Singh*, (1915) 20 CWN 128: 32 IC 137.

35. *Chotu*, 9 A 52, see also *In the matter of the petition of Govt. Pleader*, 7 MHG 339; *Dukaran*, 7 NWP 196; *Ranajirav Jibbajirav*, 12 Bom HCR 1; *Balwant*, 9 A 134; *Gobardhan*, 9 A 528.

36. 42 C 612.

37. *In re Mitoor Moideen Hojee*, (1922) 43 MLJ 561: 16 LW 764: 24 Cr LJ 89:

AIR (1923) M 95.

38. *Nafar Sheikh*, (1913) 41 C 406 (410) following *Lukhi Narain Serowji v. Sri Ram Chandra*, (1911) 15 CWN 921; *Kesoav Lal Virchand*, (1911) 35 B 418.

38a. *R. G. Jadav v. State of Bombay*, 62 Bom LR 518: A 1960 SC 748: 1960 Cr LJ 1156 approving of *Dahu Raut*, A 1935 PC 89; *Sudhir Kumar*, A 1942 P 43; 43 Cr LJ 27 and *Gaya Singh*, A 1925 P 453.

38b. A 1959 SC 436.

or the party is absent. The Court is bound to peruse the record³⁹ and to hear the appellant or his pleader if he appears before disposing of the appeal.⁴⁰ It is illegal to record an order dismissing an appeal "in default" as such an order is not contemplated by the provisions of S. 423.⁴¹

17. Appeal cannot be restored.—Appeal Court has no power to restore appeal dismissed at the preliminary hearing.⁴²

18. Death of the Appellant—Duty of Court.—It is not necessary for a Court because of the appellant being unable to be heard owing to his death not to proceed with the appeal. The Court should peruse the record and dispose of the appeal.⁴³

19. Adjournment of appeal—Absence of appellant or his Counsel.—In a proper case, where it is found that the appellant or his counsel could not be present in Court when the appeal was heard for no fault of theirs it is the duty of the Appellate Court to adjust the appeal.⁴⁴

20. Appellate Court's power to rehear appeal after signing the judgment.—An Appellate Court has no power to rehear a criminal appeal after the judgment has been signed by him.⁴⁵

The case of *Pohpi*⁴⁶ which was a decision under the Code of 1872 and which held that the words "and hearing the appellant or his pleader if he appears" meant that if present they must be heard, or the case of *Dangaji*⁴⁷ where Kempball, J., observed: "the hearing of the appellant, his counsel or agent is not an indispensable condition to considering an appeal" seem to be still good law.

21. Duty of appellate Court.—*Judgment of an Appellate Court.* For judgments of subordinate Appellate Courts, i.e., other than a High Court S. 424 read with S. 367 and Commentary on the next section and see *Jamait Mullick* and other cases.⁴⁸

Forum.—*Where appealable and non-appealable sentences passed.*—See S. 415-A, introduced by the Amending Act (XVIII of 1923) under which all or any of such persons convicted at the trials hall have a right of appeal. Once an appeal is admitted, it cannot be dismissed for non-prosecution nor can it be allowed to be withdrawn. The appellate Court is to proceed in accordance with the provisions contained in S. 423. In this connection it makes no difference whether the appeal is against an order of acquittal or conviction.⁴⁹

22. Appreciation of Evidence.—It is the duty of the Appellate Court as the final Court of fact to bear in mind the real fact in dispute and it should not be carried away by imaginary discrepancies which have no bearing on the truth or falsity of the prosecution case.⁵⁰

39. *Trimbuk Balwant Vaidya*, (1926) 29 Bom LR 1022 : 50 B 673 ; *Pohpi*, following 13 A 171 and other cases ; *Bansi Mirdha*, (1923) 50 C 972 : 27 CWN 947 : 39 CLJ 278 : AIR (1924) C 95 ; *Ram Chunder*, (1922) 21 ALJ 100 : 24 Cr LJ 662.

40. *Kuldip Singh*, (1926) 6 P 16, *Balwant*, A 1926 B 548 ; *Bansi Mirdha*, A 1924 C 95 ; 25 Cr LJ 1150 ; *Md. Mistakin v. Sakh Ranj*, A 1945 Oudh 52.

41. *Balakram Singh*, (1919) 6 O LJ 370 : 20 Cr LJ 744 : 53 IC 152.

42. *Sankatha Singh v. State of U. P.*, A 1962 SC 1208.

43. *Pearsey*, 1957 ALJ 718.

44. *Rajed Sheikh*, 62 CWN 129 ; A 1957 A 736.

45. *Maung Saw v Ma Bwin Pya*, (1925) 4 R 188 ; *Kabir Shah*, (1923) Pat Supp. CWN 237 : AIR (1923) P 297 (2).

46. 13 A 171 (FB) Mahmood J., dissenting.

47. 2 B 564.

48. *Jamait Mullick*, (1907) 35 C 138 followed in *Kalu Mirza*, (1909) 37 C 91 (97) ; *Fidoi Hossain*, (1912) 40 C 375 : 14 Cr LJ 419 : 20 IC 403 ; see *Devendra*, (1915) 17 Bom LR 1085.

49. *Biswanath Chakravorty v. Haripada Dhara*, A 1959 C 443 ; 1959 Cr LJ 83 ; *Sudhindra Nath Dutt*, A 1957 C 677 ; 1957 Cr LJ 1245 ; *Banko Singh v. State of U. P.* 1959 MWN 422 (SC) ; *Chittar*, 1957 Cr LJ 155 (Raj).

50. *J. B. Rai v. Kharga Singh*, A 1958 C 263 : 1958 Cr LJ 758.

23. Sentence—interference.—The appellate Court will not interfere with the order of sentence unless it is satisfied that the order of sentence represents an improper exercise of his discretion by the trial Judge.⁵¹ The words 'pass sentence according to law' in S. 423 (1) (a) mean any sentence that could be given for the offence.⁵²

24. Sub-section (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court.—The language in S. 421 (2) is 'may' but the language here is 'shall' which is mandatory.

'Then'—means if the appeal has not been dismissed summarily under S. 421 and after notice has been issued under S. 422 to the appellant or his pleader or to the Crown prosecutor and this is clear from the subsequent part of S. 423 (1) *viz.*, 'hearing the appellant or his pleader etc.'

'After perusing such record.'—(Mahmood, J., dissenting), a full bench of the Allahabad High Court held that the only limitation placed by S. 423 on the powers of the Appellate Court is that the Court, before disposing of the appeal, must peruse the record and if the appellant is present or is represented by a pleader the appellant in person must be heard or the pleader must be heard.⁵³ It is the duty of an Appellate Court on an appeal from an order under Ss. 110 and 118, to look into the evidence for the defence, and after dealing with it to come to a decision thereon notwithstanding that the counsel for the appellant has practically ignored it during argument.⁵⁴ When, in a criminal appeal, no one appears on behalf of the appellant, the Court must peruse the record. A decision upon a perusal only of the judgment appealed against is not legal.⁵⁵

24-A. Record lost.—Where the record is lost—new trial is ordered.⁵⁶

25. Hearing of appellant or his pleader, if he appears.—See Commentary *supra*—under the heading 'Dismissed for default.'

When a criminal appeal has been rejected without hearing the Appellant's pleader, and it is afterwards proved to the satisfaction of the Appellate Court, that an adequate excuse has been made for the pleader's non-appearance, it is open to the Appellate Court to rehear the appeal on its merits.⁵⁷

'Pleader' now includes a *mukhtar*. See S. 4 (r) as amended by Act XVIII of 1923.

26. Right of Reply.—The appellant has a right of reply to the Crown on the hearing of an appeal.⁵⁸

27. 'And the Public Prosecutor if he appears.'—The Public Prosecutor if he appears must be heard before disposing of the appeal. But what is the position of the pleader retained by the complainant? A complainant cannot claim as of right to be heard in appeal. The matter is one which may be left in each case to the discretion of the Court.⁵⁹

51. *State v. Lachman Kevalram*, A 1955 B 373 : 1955 Cr LJ 1324.

52. *Public Prosecutor v. Annamalai Udayan*, A 1955 M 608 : 1955 Cr LJ 1363.

53. *Pohpi* (1891) 13 A 171 (FB) : (1891) AWN 48.

54. *Fidoi Hossain*, (1912) 40 C 376.

55. *Abbash Ali*, (1913) 14 Cr LJ 182 : 19 IC 182 (C).

56. *Khunat*, (1889) AWN 85 ; (1885) AWN 117.

57. (1873) 2 Weir 471 : 7 MHCR App xxix.

58. *Amanat Sarkar v. Nagendra Biswas*, (1910) 38 C 307 ; *Butta Singh* (1916) 21 PR (Cr) 1917 : 18 Cr LJ 3.

59. (1874) 7 MHCR App xlii : 2 Weir 465.

The Calcutta High Court heard a Counsel feed by the complainant appearing on behalf of the Crown.⁶⁰

28. 'And in case of an appeal under S. 417, the accused if he appears.'—Section 417 contemplates appeal by the State Government to be preferred to the High Courts against orders of acquittal and S. 427 *infra* provides that in such cases the High Court may issue a warrant directing that the accused be arrested, or admit him to bail or direct notices to issue to the accused calling upon him to shew cause why he should not be convicted.

29. 'May, if it considers that there is no sufficient ground for interfering, dismiss the appeal.'—It is obvious from the provision of this section that an Appellant is not precisely in the same position before an appellate Court as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction; and if no sufficient ground is shown, it is the duty of the Appellate Court not to interfere.⁶¹

Appeal disposed of on the merits—Pleader not heard—Power to revise judgment.—The High Court has no power under S. 439 to set aside order of the lower Appellate Court merely on the ground that the appellant's pleader or counsel was unavoidably prevented from being heard.⁶²

30. Sub-section (1-a)—'In an Appeal from Acquittal'—Interference.—See commentary on S. 417 *supra* which has to be read with this section. It is now well settled that though the High Court has full power to review the evidence upon which an order of acquittal is founded, it is equally well settled that the presumption of innocence is further reinforced by his acquittal by the trial Court and the views of the trial Judge as to the credibility of the witnesses must be given proper weight and consideration and the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses must also be kept in mind and there must be substantial and compelling reasons for the appellate Court to come to a conclusion different from that of the trial Judge.⁶³ An appeal from acquittal need not be treated differently from an appeal from conviction and if the High Court in appeal finds that the acquittal is not justified by the evidence on record, it can set aside the acquittal without coming to the conclusion that there were compelling reasons for doing so.^{63a}

60. *Bhuttu Singh v. Sukhoo Mahmed*, (1905) 9 CWN lxxiv.

61. *Sajiwan Lal*, (1883) 5 A 386 : (1833) AWN 72.

62. *Olyyet Khan*, (1922) 1 P 589 : 4 PLJ 98 : 24 Cr LJ 118 (2) : 71 IC 246 (2) : AIR (1922) P 587.

63. *Balbir Singh v. State of Punjab*, A 1957 SC 316 : 1957 Cr LJ 431 ; *Atley v. State of U. P.*, A 1956 SC 807 ; *Sanwant Singh*, A 1961 SC 715 ; *Ajmeer Singh v. State of Punjab*, 1953 SCR 418 : 1953 Cr LJ 521 ; *Harbans Singh v. State of Punjab*, A 1962 SC 439 ; *State of Bihar v. Deodar Jha*, A 1958 P 51 : 1958 Cr LJ 81 ; *State v. Prakash Chand*, A 1955 MB 209 : 1955 Cr LJ 1600 ; *State v. Kanu Dharma Patil*, A 1955 B 390 : 1955 Cr LJ 1313 ; *State v. Indra Bhuyan*, A 1955 Ass 54 : 1955

Cr LJ 444 ; *State v. Ram Autar*, A 1955 A 138 : 1955 Cr LJ 394 ; *State v. Narayan Assan*, A 1956 TC 89 ; *Surajpal Singh*, A 1952 SC 52 ; *Sat Ram Dass*, A 1959 Punj 497 ; *State v. Shiv Singh*, A 1962 Raj 3 ; *M. G. Agarwal v. State of Maharashtra*, A 1963 SC 200 following *Shiva Swarup*, 61 IA 398 : A 1934 P 227 ; *Nur Muhammad*, A 1945 PC 151 : 47 Cr LJ 1.

63a. *Radhakrishnan v. State of U. P.*, A 1963 SC 822 see also *M. G. Agarwal v. State of Maharashtra*, A 1963 SC 200 where *Harbans Singh v. State of Punjab*, A 1962 SC 439, *Surajpal Singh*, 1953-2 SCR 198 : A 1953 SC 52 and *Ajmer Singh v. State of Punjab*, 1953 SCR 418 : 1953 Cr LJ 521, *Sanwant Singh v. State of Rajasthan*, A 1961 SC 715 referred to.

At the same time it must be pointed out that there is nothing to prevent the High Court from convicting the accused for murder if upon a careful review of the evidence the High Court comes to the conclusion that the crime with which the accused stands charged is explicable on the hypothesis of guilt and in no other reasonable manner.⁶⁴ On acquittal by the trial Court the presumption of innocence remains and the fact that one Court has doubted or disbelieved the evidence strengthens the hands of the accused. It behoves the High Court in such cases to furnish strong reasons why the benefit of the doubt should not go where it has already been placed in the lower Court.⁶⁵ The High Court should not brush aside the view taken by the trial Court which is by no means patently absurd or unreasonable merely because as a result of an elaborate process of reasoning the High Court came to think that it is possible to take a different view of the evidence.⁶⁶

Reconsideration of Evidence by High Court—Where criticism made by the trial court is not so much in relation to the demeanour of the witnesses as in regard to their partisan character and the over statements which they made as partisan witnesses are generally apt to do, there is no justification for considering that the finding of the High Court based upon reconsideration of the evidence should not be accepted.^{66a}

In an appeal against acquittal, where the High Court finds an accused person guilty the High Court is to pass sentence in accordance with law, the sentence to be passed should not be in excess of the punishment exercisable by the trial Court.⁶⁷ It was further held in *Bansidhar Mohanty v. State of Orissa*^{67a} that the High Court has full power to review the evidence and will give proper weight and consideration to such matters as (i) the views of the trial Judge as to the credibility of witnesses, (ii) the presumption of innocence in favour of the accused reinforced by the fact of his acquittal at the trial, (iii) the right of the accused to the benefit of the doubt and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by the Judge who has the advantage of seeing the witnesses.

The appellate Court will reverse an order of acquittal on a matter of fact where it finds the lower Court's findings extremely perverse and shocking to conscience,⁶⁸ or unreasonable,⁶⁹ or based on an erroneous view of the law.⁷⁰ It is not right to interfere with order of acquittal to enable state to patch up defects in the case.⁷¹ High Court may convert an order of acquittal into one of conviction of an offence for which he was not charged.⁷² In an appeal from an appellate order of acquittal where the appellate Court does not discuss the evidence at all nor does give any reasons why the evidence should be discarded the order of acquittal is liable to be set aside.⁷³

64. *State v. Mohanlal*, A 1958 Raj 338 ; 1958 Cr LJ 1540.

65. *Ramjan Singh v. State of Bihar*, A 1956 SC 643 : 1956 Cr LJ 1254.

66. *Bansidhar Mohanty*, A 1955 SC 585 : 1955 Cr LJ 1300.

66a. *Jaidev v. State of Punjab*, A 1963 SC 612. S. 423 (1) (b). In re *Jedayandi*, A 1963 M 83 following *Abdul Kadir*, 50 CWN 88 (96) : A 1946 C 452.

67. *Boddepelli Lakshminarayan v. Somvari Sannayasi*, A 1959 AP 530.

67a. A 1955 SC 585 ; *State v. Bhawanesh Kumar*, A 1958 MP 205 : 1958 Cr LJ 129 ; *State v. Dayava Girda*, A 1962 Mys

124.

68. *State v. Shiva Bahadur Singh*, A 1931 VP 17 ; 52 Cr LJ 56.

69. *Government of Mysore v. Malvalli Thimoniah*, A 1951 Mys 51 : 52 Cr LJ 590 ; *Harbans Singh v. State of Punjab*, A 1962 SC 439.

70. *Barka Jetha Majhi*, A 1942 P 190.

71. *Superintendent and Remembrancer of Legal Affairs v. Moazem Hossain*, A 1947 C 318 : 48 Cr LJ 815.

72. *Ramaswamy Nadar*, (1959) Part II SCA 228 ; A 1958 SC 56 ; 1958 Cr LJ 728.

73. *Harilal v. Vishwanath*, A 1957 A 777 ; 1957 Cr LJ 1360.

Clause (a)—applies to the High Court only⁷⁴—See S. 417 *supra*.

31. 'Reverse such order and direct that further enquiry be made'.—Can the Appellate Court after the finding under sub-sec. (1) (a) as it can do under Cl. (b) (2)? Although such power is not expressly given it has been held that it has got such powers and an Appellate Court can in an appeal from conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court.⁷⁵

32. 'Or that the accused be retried or committed for trial'.—The Appellate Court has full discretion to order a retrial whether it acts under Cl. (a) or Cl. (b).

Under the wide powers conferred upon the High Court by S. 423 (1) (a) the High Court is authorised to direct a lower Appellate Court to retry an appeal which was before it for determination.⁷⁶

Grounds for ordering a retrial.—Where on an examination of the record of a case, as it stands the evidence of the complainant and witnesses seems to point to the fact that there has been a miscarriage of justice in a serious case and the judgment of the Sessions Judge does not satisfactorily review the evidence, the High Court will direct a retrial.⁷⁷

33. 'Or find him guilty and pass sentence according to law'.—The High Court in an appeal against acquittal preferred under S. 417 can act as an original Court and after setting aside the order of acquittal may, instead of directing a retrial or committing the accused to take his trial before the Court of Session as the case may be, convict the accused and pass the proper sentence.

34. Sub-section (1) (b)—“In an appeal from conviction”.—For difference between the powers of an Appellate Court against an order of acquittal and that of conviction, see Commentary *supra* under the heading “4. Power of appellate court in disposing of appeal”. For ‘Scope’ of this clause see *Rangasami’s* case.⁷⁸

35. “Reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a competent Court, or committed for trial”.—“It has been suggested that the word ‘reverse’ means to change to the contrary, and that to reverse a verdict of guilty is to change it into a verdict of not-guilty; and that although the Court, as a Court of Revision, may grant a new trial, as a Court of Appeal it has no power to do so. But I am of opinion that this is not so.”⁷⁹

Reverse the finding and sentence in S. 423 (1) (b).—Sir Arnold White, C. J., held:—“The words ‘reverse the finding and sentence’ in cl. (1)(b) mean reverse the finding upon which a conviction is based and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High

74. *Rangasami v. Narashinhulu*, (1883) 7 M 213 : 2 Weir 477.

75. *Jabanulla*, (1896) 23 C 975 followed in *Sardara*, (1911) 34 A 115.

76. *Chanda Singh*, (1912) 2 PR 1913 (Cr) : 43 PWR 1912 (Cr) : 7 PLR 1913 : 13 Cr LJ 737 : 17 IC 49 where *Ganesh Khandera*, 13 B 506 was referred to.

77. *Nanda Ram v. Khazan*, (1921) 19 ALJ

589 : 22 Cr LJ 337 : 61 IC 161.

78. *In re Rangasami Kanda Pillai*, (1926) 53 MLJ 694, see cases referred to *In re Jedayandi*, A 1963 M 83 following *Abdul Kadir*, 50 CWN 88 (96) : A 1946 C 452.

79. *Elahee Buksh*, (1866) 5 WR (Cr) 80 (89) FB.

Court) to reverse or set aside an order of acquittal.”⁸⁰ This view was dissented from in *Appanna v. Pithani Mahalukshmi*.⁸¹

Power to order further inquiry,—is not expressly given under this clause as is given under S. 423 (1) (a) in an appeal against an order of acquittal.

Remand.—There is no power under S. 423 to retain the case on the file when asking for a judgment which the Magistrate has failed to record. The correct procedure to adopt is to remand the case to the Magistrate for hearing *de novo*.⁸²

36. ‘And acquit or discharge the accused’.—The Appellate Court has the power to acquit or discharge the accused. The question of ‘discharging’ the accused does not arise in cases under S. 423 (a).

Where the accused were convicted by the Sessions Judge on a different finding of fact from that to which they were called upon to plead and defend themselves at the trial, *held* they are entitled to an acquittal.⁸³

37. ‘Or order him to be retried or committed for trial’.—The Appellate Court has full discretion to order a retrial.

It has been held in *Govinda Parshad Pandey v. Garth*⁸⁴ that the Appellate Court cannot order a retrial except where there has been a want of jurisdiction. A contrary view has been held by the same High Court in *Abdul Ghani’s* case⁸⁵ *Govinda’s* case⁸⁴ was explained in *Sarat’s* case⁸⁶ by saying that there it was doubted whether the Appellate Court had a general power to order a new trial but the question did not really arise, and it was held in *Satish’s* case and other cases⁸⁷ that apart from the general power a Sessions Judge is empowered to order a retrial under S. 232.⁸⁶

It is open to an Appellate Court to acquit the accused if it sets aside a verdict on the ground of misdirection but the Court will do so only in special circumstances as where the accused has been harassed by repeated trials or when the evidence is so clearly insufficient or incredible that no jury can reasonably convict, otherwise as a matter of practice the proper course is to direct a retrial.⁸⁸

Perfunctory cross-examination of prosecution witness is a good ground for trial.—A full bench of the Calcutta High Court has held in a case where cross-examination of prosecution witnesses was perfunctory owing to Counsel’s inaptitude and facts were not ascertained before the sentence for an offence under S. 302 read with S. 34, I. P. C., was determined, retrial should be ordered.⁸⁹

80. *Sami Ayya*, (1902) 26 M 478 (479, 480) : 13 MLJ 263 : 2 Weir 483 where *Jabanulla*, (1896) 23 C 975 was distinguished.

81. (1910) 34 M 545 : (1910) MWN 474 : 11 Cr LJ 534.

82. *In re Karupiah Pillai*, (1920) MWN 120 : 21 Cr LJ 52 ; see *Gajanand Thakur*, (1916) 1 PLJ 99 : 3 PLW 175 : 17 Cr LJ 332 : 35 IC 508 ; *Mir Sarwerjan*, 3 CLJ 303 : 3 Cr LJ 304.

83. *Rahimaddi v. Asfer Ali*, (1900) 27 C 990 : 5 CWN 31, followed in *Poreshnath Sircar*, (1905) 33 C 295 (304) : 2 CLJ 516 (523)—where common object not made out.

84. (1900) 28 C 63 : 5 CWN 819, see *Hamdu Meah*, (1909) 3 Bur LT 9 : 8 IC 594.

85. (1902) 29 G 412 (414) : 6 CWN 640 (641).

86. (1902) 7 CWN 301.

87. *Satish Chandra*, 27 C 172 ; *Maula Baksh*, (1893) 15 A 205 overruling *Sukha*, (1885) 8 A 14.

88. *Dhiraj v. Akasi*, (1926) 24 ALJ 506 : 27 Cr LJ 785 : 95 IC 385 : AIR (1926) R 429.

89. *Barendra Kumar Ghose*, (1923) 28 CWN 170 : 38 CLJ 411 (560) : AIR (1924) C 257 (FB).

Evidence omitted by lower Court—if retrial should be ordered.—Where the only defect in the procedure of the Court of first instance is that certain evidence has not been brought upon the record which ought to have been there, it is quite unnecessary to do anything more than to have that evidence taken and brought upon the record. It is unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined.⁹⁰

38. Retrial—whole case is re-opened.—When a conviction is set aside and a retrial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed.⁹¹

Unless the appellate Court directs otherwise, retrial must be taken to be upon all the charges originally framed including those of which there was acquittal by the jury.⁹² If an accused is to be retried, his co-accused who was tried at the same trial should also be retried.⁹³

*Retrial cannot be directed of an offence of which the accused was acquitted.*⁹⁴ Co-accused is to be retried. In the instant case⁹⁴ the accused was acquitted of the charge under S. 304 and convicted under S. 325, I. P. C.

In an appeal against acquittal High Court is not justified in directing a retrial because a lawyer is prosecuted under S. 409, I. P. C., by his client where complainant was not refused by the trial court an opportunity to prove his case.^{94a}

39. Order of Retrial without notice to the accused is bad.—An order of retrial is bad in the absence of notice to the accused giving him an opportunity of urging his objections to the same.⁹⁵

40. Power of the Appellate Court to try the offender itself.—The words “order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court” in S. 423 (1) (b) read with S. 528 are not words of limitation, and do not preclude the Appellate Court from itself trying the offender, if the offence is one within the ordinary jurisdiction of the Appellate Magistrate.⁹⁶

41. Power to direct commitment for trial before the Court of Session.—This power is common both to cl. (a) as also to cl. (b). An Appellate Court under sub-sec. (1) (b) has power to commit the accused for trial to the Court of Session.⁹⁷ The appellate Court may either itself commit the accused or it may direct a Magistrate to do so.⁹⁸ The power of the Appellate Court to order commitment for trial is not limited to cases exclusively triable by a Court of Session.⁹⁹

The Court has full powers to order a retrial whether the ground is based on the merits, a question of law or want of jurisdiction.¹

90. *Ishwar Prasad*, (1918) 16 ALJ 325 : 19 Cr LJ 485 : 45 IC 149.

91. *Nazimuddi*, (1912) 40 C 163 : 13 Cr LJ 497 : 15 IC 641.

92. *Krishnadhan*, 22 C 975 followed in *Jabanulla*, 23 C 975 ; *Jaban Sheikh*, 52 CWN 561 (Dacca).

93. *Darshan*, A 1953 SG 83.

94. *Indranath*, 58 CWN 374 following *Kishan Singh*, 55 IA 390 ; 33 CWN 1 (PC). See cases referred to ; *State of Andhra Pradesh v. T. Narayana*, A 1962 SC 240 ; (1961) ALJ 865 affirming A 1960 AP 1 (FB).

94a. *Abinash Chandra Bose*, A 1963 SC 316.

95. *Gaman*, 49 PLR 1918 : 6 PWR (Cr) 1918.

96. *Manikka Gramani*, (1900) 30 M 228 : 16 MLJ 546 : 5 Cr LJ 104 ; *Vedakadeth Kernaram*, (1891) 2 Weir 481.

97. *Manshram Gian Chand*, A 1941 S 36 ; 42 Cr LJ 460.

98. *Sahdeo Ram*, 58 A 23 ; A 1935 A 579.

99. *State of Uttar Pradesh v. Shanker*, 1962 (II) SCA 487 ; where *Abdul Rahman*, 16 B 581, *Maula Baksh*, 15 A 205 and *Satish* 27 C 172 approved.

1. *Maula*, 15 A 205 ; *Abdul*, 16 B 580, followed in *Dani*, 16 PR 1895.

Further inquiry cannot be directed under cl. (b) as it can be done under cl. (a). The power to order further inquiry is given by S. 423 (1) (a) in appeals from acquittals. But this power is omitted in cl. (b). Power to order retrial is set out in both the clauses but it cannot be said that the power to order retrial includes the power to direct a further enquiry.^{1a}

42. Sub-section (1) (b) (2) 'altering the finding, maintaining the sentence or with or without altering the finding reduce the sentence'.—"Section 423 as it stands empowers the Court to alter the finding, maintaining the sentence, and if it be conceded that a finding of acquittal may be altered to a conviction on a point of law, we can conceive no valid reason for limiting the word 'finding' to a finding upon a point of law as distinct from a finding upon a point of fact."²

The Appellate Court can under the provisions of S. 423 in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court,³ but this clause does not authorise an Appellate Court to pass a finding which the first Court could not have passed.⁴

The clause opens with the words 'in an appeal from a conviction.' The words preclude any idea of an order of acquittal. Hence the word 'finding' in S. 423 (1) (b) (2) must mean a finding of conviction and not of acquittal.⁵ The words 'alter the finding' in cl. (1) (b) (2) mean the finding can be altered to any other finding that the Court considers proper on the findings of fact at which it arrives in appeal.⁶

Where one of several accused is convicted and the others are acquitted and the convicted accused prefers an appeal, the appellate Court can find that the others have been wrongly acquitted although it cannot interfere with acquittal.⁷ It is clear from the wording of S. 423 (1) (b) that the power of the appellate Court to acquit or discharge or order retrial could be exercised only with regard to a person who has preferred an appeal. A Sub-Divisional Magistrate has no jurisdiction in an appeal preferred by some of the accused to set aside the conviction also of co-accused who have not preferred an appeal and order the retrial. In such cases, it is the duty of the lower court to make a reference to the High Court to exercise the powers of revision to pass suitable orders.^{7a} The appellate Court can alter the finding but cannot convict the appellant of an offence not charged except in a case governed by Ss. 237 and 238.⁸ Section 423 (1) (b) (1) is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed

1a. *Sawaranna*, A 1957 AP 472 ; 1957 Cr LJ 937.

2. *Mahangu Singh*, (1917) 3 PLJ 565 ; (1918) Pat Supp CWN 192 : 19 Cr LJ 735.

3. *Jabanulla*, (1896) 23 G 975 ; *Sardara*, (1911) 34 A 115 ; *Appanna v. Pithani Mahalakshmi*, (1910) 34 M 545 ; (1910) MWN 474 ; *Janki Prasad*, (1926) 96 IC 213 : 27 Cr LJ 901 : AIR (1926) A 700 ; *Dulli*, 16 ALJ 918 : 20 Cr LJ 22 : 48 IC 502.

4. *Ahmed Din*, (1916) 4 PR Cr 1917 : 18 Cr LJ 511 : 39 IC 479 ; *Pershad*, (1885) 7 A 414 (FB) ; *Jatu Singh v. Mahabir Singh*, (1900) 27 C 660.

5. *Panu Nayak v. Chintai Mullick*, A 1948

P 435 : 49 Cr LJ 589 ; *Zamir*, A 1944 A 137 (FB) ; *Fulu Singh*, A 1956 P 170 ; *Jalo Rahim*, A 1938 S 202 : 40 Cr LJ 93. *Contra Hanuman Sarma*, 60 C 179 : A 1932 C 723.

6. *Bawa Singh*, A 1941 L 465 ; 43 Cr LJ 265 (FB) *Bijo Gope*, A 1945 P 376 ; 47 Cr LJ 69 ; *Prabat Laxman*, A 1962 Guj 51.

7. *In re Ningappa*, A 1960 Mys 294 ; 1960 Cr LJ 1472, following *Gulab*, A 1951 A 660 ; 52 Cr LJ 924.

7a. *In re Jedayandi*, A 1963 M 83 following *Abdul Qadir*, 50 CWN 88 (96) : A 1946 C 452 and *Ara Gehiga Dharam Sena*, A 1951 MWN Cr 178.

8. *Rajendra Singh*, A 1960 A 887 (892).

in favour of a party in respect of an offence charged, in dealing with an appeal preferred by him against an order of conviction in respect of another offence charged and found preserved. The assumption that the whole case is before the High Court when it entertains an appeal against conviction is well-founded and as such it cannot be pressed into service in construing the expression 'alter the finding' in S. 423 (1) (b) (2). The expression 'alter the finding' has only one meaning and that is 'alter the finding of conviction and not the finding of acquittal'. In exercising the powers conferred on it by S. 423 (1) (b) the High Court cannot convert acquittal into conviction, that can only be done by adopting the procedure prescribed in S. 439. Hence the High Court acts without jurisdiction in altering the finding and order of acquittal passed in favour of the accused in respect of offences under Ss. 302 and 392, I. P. C., when it is dealing with the appeal preferred by the accused against her conviction under S. 411-A.⁹

43. Maintaining the sentence.—The appellate Court can alter the finding maintaining the sentence. So long the sentence is maintained it is of little importance and it causes no prejudice whatsoever to the accused if the appellate Court alters the finding.¹⁰ When an accused convicted under Ss. 363 and 476, I. P. C., was given 18 months' imprisonment under S. 363 only and the appellate Court altered the conviction into one under S. 498, I. P. C. the same sentence can be maintained.¹¹

Alternative of death sentence to life imprisonment.—Where the deceased developed illicit intimacy with the daughter of the accused which had put the latter to greater infirmity, *held* life sentence is sufficient.^{11a}

44. Alter the finding.—Alteration means a change. A change must necessarily be to some other offence of which the accused was either being charged in the lower Court and acquitted or of which he could be charged under the provisions of S. 236 or 238 and an acquittal is implied though no definite finding in respect of it is given by the first Court.¹² The word 'alter' has merely to do with some change while maintaining the form, the shape or figures. It has the shade of meaning similar to the word 'modify' and is opposed to such meaning constituted by words like 'reverse' 'annul' or 'rescind'.¹³

Where there is a conviction for more offences than one, there are distinct findings in respect of each of them and when S. 423 (1) (b) speaks of a finding being reversed or altered by the Court of appeal it has reference to the finding in respect of each of the offences.¹⁴ It has been held by the Supreme Court in the case of *State of Andhra Pradesh v. Narayan*¹⁵ that 'Alter the finding' refers to the finding of conviction and not a finding of acquittal which can be done only by adopting the proceeding under S. 439.

44a. Illustrative Cases.—Conviction under S. 302/149 I. P. C. can be altered to one under S. 302/34 I. P. C.¹⁶ Conviction under S. 307 can be

9. *State of Andhra Pradesh v. T. Narayan*, A 1962 SC 240 affirming A 1960 AP 1 (FB).

10. *Lakshmiah, L. In re* A 1952 M 101 : *Nga Po Nyin*, A 1941 R 340 ; 43 Cr LJ 426 ; *Ganpat Lal*, A 1927 P 199 ; 28 Cr LJ 529 ; *Jado Rahim*, A 1938 S 202.

11. *Hossain*, 42 CWN 1040.

11a. *Nizamuddin*, A 1963 J & K 84.

12. *Lakshmiah, L. In re*, A 1952 M 101.

13. *Fullo Singh*, A 1956 P 170 ; 1956 Cr LJ 762 (FB).

14. *Jayaram Vitholia v. State of Bombay*, A 1956 SC 146 ; 1956 Cr LJ 318—(Case under Sections 4 and 5 of Bombay Prevention of Gambling Act).

15. A 1962 SC 240.

16. *Lachman Singh*, A 1952 SC 107 ; 1952 Cr LJ 863.

altered to S. 399 I. P. C.¹⁷ Conviction under S. 302/34 was altered to one under S. 326/149 I. P. C.¹⁸ Conviction under S. 403 on a charge under S. 380,¹⁹ is a proper conviction under Ss. 411 and 411/109 and cannot be altered to one under S. 384/114 where the Magistrate had no doubt as to the offence.²⁰ The High Court has power under S. 423 (1) (a) to convict an accused under S. 302/34 I. P. C. even though there was no specific mention of S. 34 I. P. C.²¹

In the absence of facts which constitute the offence of abetment, a conviction for substantive offence cannot be substituted by the Appellate Court.²² The powers under Ss. 236, 237 or 238 can be exercised by the appellate Court while exercising powers under S. 423 (1) (a) or 1 (b).²³ It is open to the appellate Court to alter the conviction under S. 302 to 326 I. P. C.²⁴

Section 423 (1) (a) and (d)—*Appellate court's power to alter finding.* Held, alteration of finding from one under Ss. 302 and 201 to S. 364 I. P. C. would operate to the prejudice of the accused.^{24a}

45. Alteration of charge.—The only limit that can be put upon this clause is that the Appellate Court *cannot alter the finding so as to enhance the sentence.* The concluding words of S. 423 (1) (b) viz., “not so as to enhance the same” governs or qualifies sub-cl. (1), (2) and (3).

Where a person has been charged and convicted of abetment of forgery by named persons, who, on their appeal are acquitted by the High Court of the crime of forgery, the High Court, on his appeal, has power under S. 423 and in particular sub-sec. 1 (d) thereof to amend and alter the charge against him and on sufficient evidence to convict him of abetment of forgery by a person or persons unknown.²⁵ Clause (d) of sub-sec. (1) does amplify the power of the appellate Court.²⁶ Where the proceedings are *ab initio* void, and indeed could not be commenced, the appellate Court could resort to the power conferred by cl. (d) to sub-sec. (1) and make a consequential order upon the view that the trial was void.²⁷ It is open to the appellate Court hearing an appeal in a case under S. 107 to remand the proceedings for a retrial.²⁸ Sitting in revision the High Court has jurisdiction to make a complaint under S. 195. They have power, if they do not wish to inquire themselves under S. 476, to order the trial Court under S. 423 (d) as an incidental order.²⁹

For Commentary see *infra* ‘Enhancement of Sentence’. The power of an Appellate Court under S. 423 to alter a finding must not be used arbitrarily but in accordance with the provisions of Ss. 237 and 238.³⁰ An order

17. *Amir Shah*, A 1950 L 71.

18. *Tikeshwar Singh v. State of Bihar*, A 1956 SC 238; 1956 Cr LJ 441.

19. *Mangal Singh*, A 1949 A 599; 50 Cr LJ 923.

20. *Biru*, A 1929 L 508.

21. *Babulal*, A 1956 Raj 47; 1956 Cr LJ 550.

22. *Puroshatma Chant v. Subramanayan*, A 1955 An WR 716.

23. *Rameswar Nadar v. State of Madras*, A 1958 SC 56; 1958 Cr LJ 228; *E. G. Dorsay*, A 1958 B 354, *Thakur Singh*, A 1948 PC 192; *Roshan*, A 1954 A 51; *Damal*, A 1954 Or 145.

24. *Narain Das*, A 1955 HP 20; 1955 Cr LJ 688.

24a. *Mardan Singh*, A 1963 MP 97.

25. *Thakur Shah*, 70 IA 196 (200) : A 1943 PC 192; 45 Cr LJ 126 following *Bagu*, 52 IA 191 and *Appa Subbana Mendre*, (1884) 8 B 200.

26. *Maung Khim Maung*, A 1940 R 278; 42 Cr LJ 218.

27. *Gopal Krishna Naidu v. State of M. P.*, A 1952 N 170; 1952 Cr LJ 845.

28. *Bhailal Khubchand*, A 1949 N 222; 50 Cr LJ 549.

29. *Iver Henry Bridgnell*, A 1937 S 193; 38 Cr LJ 1002.

30. *In re Padamanka Payi Kanmiah*, (1909) 33 M 264; 20 MLJ 84; 11 Cr LJ 49, following *Chand Nar Purbhai Adamji*, 11 Bom HCR 240; *Gollu Hanumappa*, (1911) 35 M 243; 21 MLJ 805; (1911) MWN 106; 10 IC 372.

of conviction under S. 302 I. P. C. may be changed on appeal to one under S. 201 I. P. C. without a charge to that effect.³¹

The Appellate Court is not justified in altering the conviction when the petitioners are not called upon to answer the charge of a different nature.³² The new finding must not conflict with the provisions of S. 233.³³

46. Reversal of acquittal on appeal—Powers of Appellate Court.—Provisions of cl. (b) of sub-sec. (1) of S. 423 are very wide and enable a Court in disposing of an appeal from a conviction upon the facts to alter a finding. There is no express restriction to the effect that a finding of acquittal cannot be converted into one of conviction upon the facts which have resulted in a conviction in the First Court under another provision of law.³⁴

47. Power of Appellate Court to alter a finding of acquittal into one of conviction.—When an accused charged under Ss. 147 and 325 I. P. C. is convicted of the former and acquitted of the latter offence, the Appellate Court has power to acquit him of rioting and convict him of hurt under S. 323 I. P. C.³⁵

48. Sub-section (1) (b) (2).—“Or with or without altering the finding, reduce the sentence”.—“Reverse” evidently means “to set aside;” ‘to make null’ but the word ‘alter’ means to substitute one finding for another.³⁶

49. Sub-section (1) (b) (3) “with or without such reduction and with or without altering the finding, alter the nature of the sentence but subject to the provisions of S. 106 sub-section (3) so as not to enhance the same.”—Section 106 (3) has been amended by Act XVIII of 1923 by including the Appellate Court there to include a Court hearing appeals under S. 407.

The Code of 1872 conferred powers of enhancing sentence on the Appellate Courts. Hence the rulings under the Code of 1872 are no longer good law.

This sub-section cannot apply to High Courts which while dismissing an appeal may enhance the sentence under S. 439 *infra*. See the full bench decision in *Ramkuria's* case.³⁷

A High Court when hearing an appeal against a conviction may as a Court of appeal under S. 423 (b) alter the finding and then as a Court of revision under S. 439 enhance the sentence so as to make it appropriate to the altered finding.³⁸ Under sub-sec. 1A introduced by Act 26 of 1955 which is an exception to Cl. (b) of sub-sec. (1) the High Court can enhance the sentence in an appeal from conviction.

31. *Begu*, (1925) 52 IA 191 : 6 L 226 (PC) followed in *Ranun* (1926) 7 L 84, but distinguished in *Dibakar Bene v. Saktidhar Kabiraj* (1927) 54 C 237 : 31 CWN 527.

32. *Manaranjan Chowdhury*, (1899) 3 CWN 367.

33. *Sahib Singh*, (1905) 35 PR 1905 : 115 PLR 1905.

34. *Dhanpat Singh*, (1917) 2 PLW 188 : (1917) Pat Supp CWN 297 : 18 Cr LJ 982 : 42 IC 598, following *Satish Chandra Das Bose*, (1899) 27 G 172 : 4 CWN 166 ; *Sardara*, 34 A 115 : 8 ALJ

1239 ; *Dulli*, (1918) 16 ALJ 91.

35. *Kunja Bhuiya*, (1912) 39 C 896 (902) : 16 CWN 1053 : 13 Cr LJ 481 ; *Hanuman*, (1922) 20 ALJ 213.

36. *per* Benson, J., in *Smither*, (1902) 26 M 1 (15).

37. (1884) 6 A 622 (FB) : (1884) AWN 252.

38. *Manabam Bali Reddy*, (1913) 37 M 119 : 15 Cr LJ 180 : 22 IC 756 ; *Karan Bahedin*, (1911) 5 SLR 179 : 13 Cr LJ 31 ; *Ramcharan Bhikaji Moharir*, (1928) 30 Bom LR 967 : AIR (1928) B 346.

50. Alteration of sentence whether amounts to enhancement or not.—The Calcutta High Court has held that no general rule can be laid down to determine what is or is not an enhancement of sentence, when only a portion of the sentence is altered to a punishment of a lesser degree of severity. In each case the Court has to consider what is the effect of the alteration.³⁹ The Allahabad High Court in *Mehar Chand*⁴⁰ preferred this view to the Bombay view in *Chagan's* case⁴¹ and the Madras view in *Bakthavatasalu Naidu*⁴² which held that the sentence passed by a Magistrate on appeal did not amount to an enhancement of the punishment inasmuch as the aggregate period of imprisonment which the accused person might have to undergo even in default of fine did not exceed the total amount of imprisonment awarded by the trying Magistrate and pointed out that *Meda's* case⁴³ overlooked the fact that a sentence of fine is not wiped out by undergoing the alternative sentence of imprisonment but is still liable to be enforced under the process of the Court. Alteration of a sentence of 4 months' rigorous imprisonment to one of 3 months' rigorous imprisonment with a fine of Rs. 10/- or in default a further term of six weeks' rigorous imprisonment, has been held to be an enhancement.⁴⁴ Mitter, J., held "granting that whipping is generally looked upon as a more degrading punishment than imprisonment, it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not under any circumstances amount to enhancement of punishment".⁴⁵ A Sessions Judge has no power to enhance a sentence in appeal by altering a sentence of fine to one of imprisonment.⁴⁶ An Appellate Court cannot pass on appeal a sentence which the lower Court is not competent to pass.⁴⁷ The Bombay High Court held that an analogous alteration of the sentence did not amount to an enhancement of the sentence within the meaning of S. 423.⁴⁸ But the Calcutta and Allahabad High Courts⁴⁹ have declined to follow *Chagan's* case⁴⁸ and pointed out that under S. 70 I. P. C. the law does not release a person who has undergone an alternative sentence of imprisonment from liability to pay the fine and to have his property seized and sold for its realisation. Upon a consideration of these cases⁴⁸ and⁴⁹ the Nagpur Judicial Commissioner's Court held that an alteration of a sentence of simple imprisonment for one month to a sentence of simple imprisonment for three weeks and a fine of Rs. 50/- and further imprisonment for one week in default of payment of fine is an enhancement of the sentence.⁵⁰ A full bench of the Madras High Court held that it was not necessary to consider whether they were prepared to adopt the Bombay view⁴⁸ but they held that when the aggregate period of imprisonment which the accused may have to undergo is to any extent less than the period of the original sentence the fact that a fine is imposed by the Appellate Court would not in law be an enhancement of the sentence.⁵¹

51. Order under S. 106 (3).—The following rulings⁵² which held that

39. *Rakhal Raja v. Khirode Pershad Dutt*, (1899) 27 C 175.

40. (1914) 36 A 485.

41. *Chagan Jagannath*, (1898) 23 B 439.

42. (1906) 30 M 103.

43. (1887) Awn 100

44. *Ishri*, (1894) 17 B 67; see *In re Appanda Natha Nainer*, (1915) MWN 275: 16 Gr LJ 271.

45. *Bunda Ali*, (1871) 15 WR (Gr) 7 (8); see *Kyaing Nga Hwe*, AIR (1928) R 265.

46. *Dansang Dada*, (1893) 18 B 751.

47. 2 Weir 487.

48. *Chagan Jagannath*, 23 B 439.

49. *Rakhal Raja v. Khirode Pershad Dutt*, 27 C 175; *Sagwa*, (1901) 23 A 497; *Mehda*, (1887) Awn 100.

50. *Shamlay*, (1906) 3 NLR 90: 6 Cr LJ 100.

51. *Bhakthavatsalu Naidu*, (1908) 30 M 103 FB; see *Megu*, 36 A 485: 12 ALJ 827: 15 Cr LJ 519.

52. *In re Aslu*, 16 C 779, *Lachman*, (1890) Awn 201, *Ishri*, (1894) 17 A 68, *Peranasiva Pallai*, (1906) 30 M 48: 5 Cr LJ 88; *Miran Baksh*, (1905) 6 PLR 148; 21 PR 1905: 2 Cr LJ 190.

a Magistrate when acting as an Appellate Court cannot make an order under S. 106 are no longer good law.

The Appellate Court is wrong in directing an accused to enter into a bond under S. 106 when there is no finding that any breach of the peace occurred.⁵³

52. Appellate Court's power to order accused to repay complainant Court-fee—order not an enhancement of sentence.—An order passed by an Appellate Court directing the accused under S. 31 of the Court-fees Act (Act VII of 1870) to repay the complainant the Court-fee paid on the petition of complaint does not amount to an enhancement of the sentence but is only an incidental order which an Appellate Court can make under S. 423 (d) of the Code to bring the judgment into conformity with the law.⁵⁴

53. Sub-section (1) (c)—‘in an appeal from any other order, alter or reverse such order.’—‘Order’ contemplated here is an order other than that of acquittal or conviction. No retrial can be ordered in appeals from an order under S. 110,⁵⁵ but the ‘order’ in this section contemplates an order under S. 515 or 514 of the Code.⁵⁶

54. Sub-section (1) (d)—‘may make any amendment or any consequential or incidental order that may be just or proper.’—This clause was inserted in the Code of 1898 and supersedes *Basudev* and other cases.⁵⁷ This clause was necessary to give effect to the amendment of S. 106 *supra* by the insertions of sub-sec. (3) in 1898 which amendment has also necessitated the addition of the words in cl. (b) (3) of the present section *viz.*, “but subject to the provisions of S. 106 sub-sec. (3)”.

Compare the language of S. 520 *infra viz.*, ‘and make any further orders that may be just’ inserted for the first time in the Code of 1898 which have in effect superseded *Annapurnabai* and other cases.⁵⁸

Under S. 423 (1) (d) the High Court has power as a Court of Revision to interfere with an order passed by a Magistrate under S. 522.⁵⁹

See Commentary on S. 522 *infra*.

55. Power to order expunging of remarks from judgments of lower Courts.—The nature of consequential or incidental orders under this sub-section was discussed in *Mehi Singh v. Mangal Khandav*⁶⁰ by a full bench of the Calcutta High Court which considered that the only consequential or incidental orders within the purview of the provision were orders which follow as a matter of course being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective

53. *Thirumal Reddy*, (1922) 30 MLT 348 : AIR (1923) M 133 : 25 Cr LJ 294 : 76 IC 966.

54. *Ediga Thiniah*, (1924) 47 M 914 ; following *In re Vemuri*, (1903) 26 M 421.

55. *Chandan*, AIR (1929) L 28 (1).

56. *Karam Bahedin*, (1911) 5 SLR 179 : 13 Cr LJ 31.

57. *Basudeb Sarma Gossain v. Naziruddin*, (1887) 14 C 834 ; *Ram Chandra Mistry v. Nabin Mirdha*, (1898) 25 C 630—declared obsolete in *Gourhari Gope v. Alay Gopini*, (1902) 29 C 724 : 6 CWN 713.

58. (1877) 1 B 630 ; *Basudeb Surma Gossam v.*

Naziruddin, (1887) 14 C 834 ; *Fattah*, 24 C 499 (503), *Bachcha*, (1896) AWN 56.

59. *Ahmed Ali v. Kenoo Khan*, (1908) 36 C 44, following *Manki v. Bhagwati*, (1904) 27 A 415 and referring to *Ram Chandra Mistry v. Nabin Midha*, (1898) 25 C 630 ; *Ujir Sheikh v. Syed Ali Sheikh*, (1915) 19 CWN 990 : 16 Cr LJ 607 : 30 IC 159 ; *Birch*, (1902) 24 A 306.

60. (1911) 39 C 157 (FB) : 16 CWN 10 ; 14 Cr LJ 437 : 12 Cr LJ 529 : 12 IC 297 over-ruling 14 CWN 212 : 5 IC 72.

(such as directions as to the refund of fines realized from acquitted appellants or on the reversal of acquittals as to the restoration of compensation paid under S. 250) for which no separate authority is needed and ordered which though ancillary in character require more than the support of a criminal Court's inherent jurisdiction and could not be passed without express authority. The Allahabad High Court agreed with this view and held that the High Court has no power to expunge from the judgments of lower Courts remarks reflecting unfavourably upon the credibility or the character of witnesses in cases in which the effective orders of the Courts are not before the High Court either in appeal or in revision.⁶¹ See however Commentary on S. 561A *infra*.

An order for composition is in no sense a consequential or incidental order within the meaning of this clause.⁶² This view seems to be no longer good law, *vide* Commentary on S. 250 *ante*.

56. Sub-section (1-A)—Has been added by Act 26 of 1955, *vide* 'Effect of 1955 Amendment' noted *supra*.

57. Sub-section (2).—The amendment of S. 418 has modified *Waman's* case⁶³ to this extent that the verdict can be set aside even on a question of fact in cases coming under S. 418 (2). The provisions of this sub-section are imperative.⁶⁴

When a person is tried by a Judge and a jury and acquitted and there is no appeal against his acquittal, the Appellate Court is not bound to order retrial but may find him guilty on the evidence before the Court and pass a sentence on him.⁶⁵

The High Court cannot, in law, on appeal from the verdict of the jury, interfere with it in the absence of a misdirection by the Judge when there is some circumstantial evidence of guilt, *e. g.* a finger-print of the accused found on a cash box broken open by the robbers during the occurrence of the offence.⁶⁶

Both Cl. (d) S. 423 and S. 537 require that before the verdict of a jury can be reversed on the ground of a misdirection by the Judge the High Court must be satisfied that the misdirection was of such a nature that it may reasonably be supposed that the verdict was erroneous by reason of such misdirection or in other words, that there has been a failure of justice by reason of such misdirection.⁶⁷

See in this connection Commentary on S. 297 heading "Effect of misdirection".

"The words 'in fact' in S. 537 were introduced in the Code of 1898, apparently in order to emphasise the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error, but I think the duty existed just the same before those words were added".⁶⁸

61. *C. Dun.* (1922) 44 A 401 : 20 ALJ 261 : 23 Cr LJ 349 : AIR (1922) A 107.

62. *Akshoy Singh v. Rameswar Bagdi*, (1916) 43 C 1143 : 20 GWN 1171 : 17 Cr LJ 339 : 35 IG 515 ; *Sanker Rangaya v. Sankar Ramayya*, (1915) 39 M 604 : 29 MLJ 621 : 16 Cr LJ 750, following *Ram Chandra*, (1914) 37 A 127 : 13 ALJ 104 : 16 Cr LJ 247 which did not accept the contrary decision in *Ram Piyari*, 32 A 153 : 7 ALJ 103 ; *Md. Alam*, A 1939 S 321 : 41 Cr LJ

53.

63. *Waman*, (1903) 27 B 626 (632) : 5 Bom LR 599.

64. *Ramchariter Singh*, (1928) 7 P 15.

65. *Saran*, (1926) 28 Cr LJ 66 : 99 IC 98 : AIR (1927) Sind 104.

66. *Mohini Mohan Ghose*, (1918) 46 C 635 : 21 Cr LJ 8 : 54 IC 56.

67. *Ali Fakir*, (1897) 25 C 230 (232, 233), following *Wafader Khan*, (1894) 21 C 955.

68. *Edward William Smither*, (1902) 26 M 1.

In a trial by jury that there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. The Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted. An Appeal may be entertained on a question of law, but once it has been held by the appellate Court that there has been an error in law it is open to it to interfere with the jury's verdict and it will then consider which of the various forms of interference it will adopt and is not bound to order a retrial. Therefore the Court in an appeal can, when there has been a serious misdirection or non-direction consider the evidence and maintain the conviction if the evidence already establishes the guilt of the accused.⁶⁹ What has got to be done in cases where inadmissible evidence has been admitted and has been incorporated in the Judge's Charge to the Jury is to exclude the inadmissible evidence from the record and consider whether the balance of evidence remaining thereafter is sufficient to maintain the conviction. The Court of appeal is entitled to examine the evidence for itself and to substitute its own verdict for the jury if on examining the record for itself it comes to the conclusion that the verdict of the jury was erroneous or that there has been a failure of justice.⁷⁰ Sub-section (2) of S. 423 does not override S. 418. A question of law may be taken up in appeal even if there is no misdirection by Judge or misunderstanding of the law by the Jury as laid down by him.⁷¹ If conviction rests on the verdict of the jury it would not be permissible to the High Court to go into evidence unless there are misdirections.⁷² The law requires that when misdirection is established the High Court should enter into evidence and decide whether it justifies the verdict in spite of the misdirection that has occurred.⁷³ Where the misdirection was in favour of the prosecution and the appeal under S. 417 was by the State, the Supreme Court held that the High Court could not enter into evidence and convict the appellants under Ss. 302/34 I. P. C. on which charge they had been acquitted by the Sessions Judge in agreement with the verdict of the jury.⁷⁴ Unless there was a misdirection or non-direction amounting to a misdirection in the charge to the jury which, in fact, had occasioned a failure of justice the jury's verdict cannot be interfered with.⁷⁵

“Order him to be retried”—The High Court is entitled to go into the whole evidence for deciding for itself whether in fact one or more misdirections have occasioned a failure of justice in the sense that a guilty man has been acquitted or an accused person has been convicted and then to decide for itself whether there should be conviction or acquittal, wherever the evidence on the record permits it to come to a definite finding. But that is no reason for holding that the High Court will be debarred from ordering a re-

69. *Abdul Rahim*, 739 A 77 : 50 CWN 692 (PC) followed in *Mushtak Hussain*, 1953 SCR 809 ; A 1953 SC 282 ; 1953 Cr LJ 1127 and *Ram Kishan v. State of Bombay*, A 1955 SG 104 ; *Sheikh Gaffor*, A 1959 MP 132 ; 1959 Cr LJ 478 ; *Narahari Borkar*, A 1946 B 446.

70. *Ram Kishan v. State of Bombay*, A 1955 SG 104 : 1955 Cr LJ 196.

71. *Ganesh*, A 1955 Ass 51 : 1955 Cr LJ 437.

72. *Srirang Krishna Gholay*, A 1956 B 198 : 1956 Cr LJ 483.

73. *Nidhan Misra*, A 1962 C 173 : 1962 (1) Cr LJ 315.

74. SCA 8 of 60 decided on 26. 4. 62 by K. C. Das Gupta and Mudholkar JJ.

75. *Janendranath Ghose v. State of West Bengal*, A 1959 SG 1199 : 1959 Cr LJ 1492 ; *Yeshwant Sukharam*, A 1956 B 409 : 1956 Cr LJ 715.

trial where it is not in a position to come to a definite finding.⁷⁶ It is the normal course to order retrial when a jury trial is set aside on the ground of misdirection or non-direction. In the instant case the accused were ordered by the Supreme Court to be discharged and it was left to the Government either to drop the entire matter or to proceed in such manner as it might be advised.⁷⁷

58. Ss. 423 (2) and S. 439 (6).—In the case of trials by jury where an accused person has been convicted on the verdict of a jury and is called upon under S. 439 (2) to show cause why the sentence should not be enhanced he is entitled under S. 439 (2) to show cause against his conviction, but only so far as S. 423 (2) allows and has not an unlimited right of impugning the conviction on the evidence.⁷⁸

59. Difference between S. 423 (2) and S. 307.—There is some fundamental difference between Ss. 307 and 423 (2) regarding the question of reversal of the verdict of the jury, while a misdirection by the Judge plays an important role in an appeal arising out of a jury trial it is a matter of little moment in a reference under S. 307 where the chief concern of the High Court is to examine the reasonableness of the verdict in order to ascertain whether the reference is justified for the ends of justice.⁷⁹

424. Judgments of subordinate Appellate Courts.—The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

SYNOPSIS

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|--|------------------------------------|
| 1. Corresponding sections in former Codes. | Courts. |
| 2. Scope. | 3. Judgment under Section 476-B. |
| —Judgments of subordinate Appellate | 4. Contents of Appellate Judgment. |
| | —Illustrative cases. |

1. Corresponding sections in former Codes.—This section was new in the Code of 1882 and is the same as that section.

2. Scope—Judgments of subordinate Appellate Courts.—This section must be read subject to S. 367 *supra* which provides for contents of a judgment by the trial Court.

Section 367 having been amended in 1923 and an order under S. 118 or under S. 123 (3) having been declared to be a judgment, the following decision,⁸⁰ under the old Code which doubted whether the provisions of Ss. 367, 424 are applicable to an order under S. 123 of the Code is no longer good law on the point. The view in *Sunshri*⁸¹ is still good law.

76. *Kaminikanta Das*, A 1959 C 342 ; 1959 Cr LJ 694.

77. *Ramayya v. State of Bombay*, A 1955 SC 287 ; 1955 Cr LJ 857.

78. *U. J. S. Chopra v. State of Bombay*, A 1955 SC 633 ; 1955 Cr LJ 1410.

79. *Supdt. and Remembrancer of Legal Affairs*

v. Bhupati Bhusan Biswas, 60 CWN 114.

80. *Kalu Mirza*, (1909) 37 C 91 : 14 CWN 49 : 11 Cr LJ 23 : 5 IC 29.

81. (1921) 19 ALJ 921 : 23 Cr LJ 378 : 67 IC 262.

The provisions of S. 367 have been made applicable to appellate judgments by S. 424 and it is the duty of an Appellate Court to decide the points raised in appeal and to write a judgment in accordance with law.⁸¹ An appellate Court has no power to review or restore an appeal disposed of. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing.^{81a}

Where in a murder trial the High Court rejected the plea of self-defence set up by the accused on the ground that it was inconsistent with the portion of a document filed in the case but which had been excluded from the evidence in the case and the High Court failed to consider the evidence of injuries sustained by the parties, *held* that the judgment of the High Court suffered from a serious infirmity and therefore the conclusions of the High Court could not be accepted.^{81b}

3. Judgment under Section 476-B.—Where a Judge in dismissing an appeal under S. 476-B against the order of the subordinate Judge directing the prosecution of the petitioners recorded the following judgment:—“Heard arguments for appellants and read the Subordinate Judge’s reply to the points referred to in my order (*i.e.* instruction to the Subordinate Judge to frame a proper complaint etc.) I am not prepared to interfere or order withdrawal”. Chotzner, J., held that the appeal must be dealt with as an ordinary appeal under the Code as is provided for in S. 424. Duval, J., though agreed that the appeal must be heard according to law held that inasmuch as the order making the complaint was passed by a Civil Court, an appeal against such order must be regulated by the provisions of Or. 41 of the Civil Pro. Code and not by the provisions of Ss. 422 to 424 of the Code.⁸²

4. Contents of Appellate Judgment.—The Judgment of a Criminal Appellate Court must show that the Court has fully considered the evidence on both sides and the pleas raised in appeal and its conclusions are well supported by reasons.⁸³

No judgment of a Court other than a High Court which purports to dispose of an appeal under S. 423 is a legal judgment unless it contains at least:—(1) the point or points for determination raised in the memorandum of appeal; (2) the decision thereon and (3) the reasons for the decision.⁸⁴ There must be sufficient material in the appellate judgment itself to show that the appeal has been properly tried.⁸⁵ A judgment of an Appellate Court affirming a conviction by the lower Court need not re-state or state in different words the evidence or the conclusions at which the Court of first instance has arrived, but it must contain sufficient materials to enable the High Court in revision to come to a decision upon the points arising

81a. *Sankather Singh v. State of U. P.* A 1962 SC 1208; *Jodha*, A 1940 Oudh 369.

81b. *Bokaru Singh*, A 1963 SC 430 : (1963) 1 SCJ 71.

82. *Hamid Ali v. Madhusudan Sarkar*, (1926) 54 C 355 : 31 CWN 281 : AIR (1927) C 284.

83. *Sarwan*, 14 ALJ 279 : 33 IC 647; *Lal Behari*, 38 A 393 : 35 IC 485; *Nga Po Ham*, (1913) UBR 169 : 14 Cr LJ 570 : 21 IC 170 (1). *In re Bonthu Appadu*, A 1943 M 66; 41 Cr LJ 287.

84. *Kafiuddin Sarkar*, 20 Cr LJ 238 (b) : 49 IC 862; *Mangla Manjhi*, (1920) 2 PLT 616 : 22 Cr LJ 656; *Ramlal Singh*

v. Haricharan Ahir, (1909) 37 C 194 : 11 CLJ 410 : 11 Cr LJ 348; *Dasarathi Mahapatra v. Raghu Sahu*, (1908) 36 C 158. *Md. Hossain*, A 1945 N 116 : 46 Cr LJ 595; *N. Malayya*, 1935 MWN 653 (1); *Manicka Reddi*, 1931 MWN 119; *Dwaraka*, A 1926 S 275; *Mangla Majhi*, A 1921 P 504; *Malik Usman v. Md. Azim*, 48 Cr LJ 473 (Lah); *Kalicharan v. Priyanath*, A 1938 C 522.

85. *Maroti v. Mt. Kasabai*, (1926) 98 IC 716 : AIR (1927) N 88; *Dalip Singh*, 2 L 308 : 23 Cr LJ 9; *Pandeh Bhut*, 19 A 506 (FB) : (1897) AWN 142; *Lal Behari*, 38 A 393.

in the case.⁸⁶ It is the duty of the Appellate Court on an *appeal from an order under Ss. 110 and 118*, to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments.⁸⁷ It would be manifestly most unreasonable to expect an appellate Court to dot every 'i' and cross every 't'. If therefore it is possible for the High Court to reasonably understand what has been found in the court below it is not necessary that the High Court should capriciously and capriciously set aside the judgment of the Court below.⁸⁸

The judgment of an Appellate Court dealing with the case of several accused who were convicted in a joint trial, must show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary to show that the Appellate Court has devoted judicial attention to the case of each accused.⁸⁹ An Appellate judgment must be quite independent and stand by itself. It ought not to be read in connection with or as supplementary to the judgment of the Court of first instance.⁹⁰

The provisions of S. 367 *apply to appeals against an order directing a complainant to pay compensation.*⁹¹

Illustrative cases.—The following judgments were held insufficient and rehearing was ordered:—(1) "No one appears. I see no reason to interfere. I dismiss the appeal".⁹² (2) "Read proceedings. I see no reason for interfering with the decision or sentence, appeal dismissed".⁹³ (3) "After reading the evidence and hearing the learned Counsel for the appellant and the learned Government pleader I am convinced that the Deputy Magistrate has decided the case rightly and the appeal is dismissed". Rehearing was not ordered as the accused was acquitted on other points.⁹⁴ (4) "It is urged that the evidence was quite untrustworthy, and that the decisions should be reversed. The depositions have been gone through and commented on at a considerable length. The Court finds no ground for interference. The appeal is dismissed".⁹⁵ (5) "I see no reason to distrust the finding of the lower Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to 15 days. The fines and terms of imprisonment in default will stand."⁹⁶ (6) "After hearing the arguments of the pleader for the appellant and examining the record I am of opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe",⁹⁷—appeal was ordered to be re-heard. (7) "The affray was a faction between members of the two parties into which the society of Dhunshi seems to be split up. There is no good ground for doubting the justice of the Magistrate's finding that the two appellants took part in the affray, and that the party to which they

86. *Arindra Rajbanshi*, (1916) 20 GWN 1296; 18 Cr LJ 294; 38 IC 326; *Bhola Nath Mullick*, (1902) 7 CWN 30; *Inatullah Sarkar*, (1923) 39 CLJ 117. *Aghore Dutta*, 11 P 143; 32 Cr LJ 1197; *Abdul Rahman*, 62 C 749; 36 Cr LJ 982.

87. *Fidoi Hossain*, (1912) 40 C 376.

88. *Abdul Rahman*, 62 C 749; A 1935 C 316.

89. *Jamait Mullik*, (1907) 35 C 138; 12 CWN 134; 6 Cr LJ 427; *in re Bapu Naidu*, (1915) 2 LW 958; 16 Cr LJ 735; 31 IC 175; *Jatra Mohan Bysack v. Akhil Chandra Bysack*, (1911) 12 Cr LJ

43; 9 IC 261.

90. *Bhola Nath Mullick*, (1902) 7 CWN 30; *Narayan Parayan*, 1 PLT 716; 57 IC 664; *Bhag*, 1 R 301; 24 Cr LJ 920.

91. *Deonarain Mahto v. Chhantoo Raut*, (1920) 3 PLT 203; 23 Cr LJ 261; AIR (1922) P 157.

92. *Ram Bharos*, (1916) 14 ALJ 327; 17 Cr LJ 353; 35 IC 657.

93. *Sameshar*, (1888) AWN 280.

94. *Girish Mythe*, (1896) 23 C 420.

95. *Kamaruddin Dai*, 11 C 449.

96. *Ram Das Maghi*, (1886) 13 C 110.

97. *Farkoon*, 22 C 241.

belonged were the aggressors. The appeal is dismissed and the conviction and sentence are confirmed".⁹⁸ Section 424 is not restricted to the provisions of Chapter 26 but also to S. 371 and the Appellate Court can direct a free copy of the judgment for reasons mentioned in the order.⁹⁹

425. Order by High Court on appeal to be certified to lower Court.—(1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded and passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court; and, if necessary, the record shall be amended in accordance therewith.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Rules and Circulars.

1. Corresponding sections in former Codes.—This section correspond to S. 406 of the Code of 1861 and S. 299 paragraphs 1 and 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. Rules and Circulars.—When a case is decided on appeal or revised by the High Court, the Court or Magistrate to which the High Court certifies its order will proceed under the provisions of this section or S. 44, to issue when necessary, a fresh warrant or order to the jailor—Bom. H. C. Cr. Cir. P. 54.

426. Suspension of sentence pending appeal. Release of appellant on bail.—(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(2A) When any person other than a person convicted of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient

98. *In re Shivappa bin Shidilingappa*, (1888) 15 B 11.

99. *Anil Kumar Biswas*, A 1954 C 29; 1953 Cr LJ 1883.

in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(2B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained, the High Court may, if it so thinks fit, order that pending the appeal the sentence or order appealed against be suspended, and also, if such person is in confinement, that he be released on bail.

(3) When the appellant is ultimately sentenced to imprisonment, or imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Sub-section (2B). |
| 2. Legislative Changes—1945 and 1955. | 7. Stay pending leave to Supreme Court. |
| 3. Sub-section (1)—Suspension of sentence pending appeal. | 8. Sub-section (3). |
| 4. Sub-section (2). | 9. Order of detention under Reformatory Schools Act is not a sentence. |
| 5. Sub-section (2A). | |

1. Corresponding sections in former Codes.—This section corresponds to S. 421 of the Code of 1861 and Ss. 281, 297 paragraph 8, of the Code of 1872, S. 175 of Act IV of 1877 and is the same as S. 426 of the Code of 1882.

2. Legislative Changes.—Sub-section (2A) was added by Act 2 of 1945. Sub-section (2B) was inserted by Act 4 of 1946.

Legislative Changes (1955).—In sub-sec. (2A) the word ‘convicted’ has been substituted for ‘accused’ and in sub-sec. (3) the words “imprisonment for life” have been substituted for “transportation” by Act 26 of 1955.

3. Sub-section (1)—Suspension of sentence pending any appeal.—The existence of an appeal by a convicted person is a condition precedent to grant bail under this section.¹ After conviction, even if the offence is bailable, the accused is not entitled as of right to be released on bail the matter being left entirely to the discretion of the Appellate Courts.^{1a} Application for bail can be renewed pending appeal. It does not attract operation of S. 369.²

Section 426 does not restrict the operation of the bail only for the period the appeal is pending.³ City Sessions Court, Calcutta, can exercise powers under S. 498 in cases in which it has jurisdiction to try particular offences. The power under S. 426 which relates to granting of bail when entertaining an appeal cannot, of course, be exercised by the City Sessions Court.⁴ Bail granted under this section can be cancelled in the same way as bail granted under S. 497.⁵

1. *Chandra Mahto*, A 1934 P 274 ; 31 Cr LJ 958.

1a. *Krishnamurthy*, (1957) MLJ (Cr) 799.

2. *Govindlal*, A 1951 Ajmer 81 ; 52 Cr LJ 1456.

3. *Bhanwarlal*, A 1953 MB 266.

4. *Jainlalkhan*, A 1962 C 368 : 66 CWN 676.

5. *George Williams*, A 1951 M 1042 ; 1952 Cr LJ 242.

4. Sub-section (2).—The power can be exercised by the High Court in the case of an appeal to the Subordinate Court.

5. Sub-section (2A).—The amendment of this sub-section by Act 26 of 1955 by substituting “convicted of a non-bailable offence” for the words “accused of non-bailable offence” made the alteration to bring out the underlying intention of S. 426, which is that a person convicted by a Court can apply for bail or suspension of the sentence pending appeal. It is under S. 497 that the ‘accused of a non-bailable offence’ can move Sessions Judge for bail while the trial is pending or ‘in any case or whether there be an appeal on conviction or not’ under S. 498, can move the Sessions Judge for bail.

6. Sub-section (2B).—Was inserted to give effect to the decision of the Privy Council in *Lala Jaiaram Das’ Case*⁶ which held that there being an express provision in this section to grant bail, there is no inherent power in the High Court under S. 561-A to grant bail during the pendency of an appeal.

7. Stay pending special leave to Supreme Court.—This section empowers the High Court to stay the proceedings only in cases when the High Court is satisfied that special leave to appeal has been granted. Indeed except for the purpose of granting a certificate under Art. 132 (1) or Art. 134 of the Constitution or granting bail or suspending the sentence under S. 426 (2B) the High Court becomes *functus officio*.⁷ The cases where the Special leave petition has been made are dealt with by S. 426 (2B). There is no provision either under the Allahabad High Court Rules or under the Cr. P. Code which gives power to the High Court to grant bail or suspend the operation of the sentence pending the proposed application for Special leave to appeal to the Supreme Court against the judgment of the High Court.⁸

8. Sub-section (3).—The result of the suspension of sentence is only that if the appeal finally fails the convicted person only serves the original period of his sentence less the period of suspension.⁹

9. Order of detention under Ss. 8 and 10, Reformatory Schools Act (1897).—An order of detention passed by a District Magistrate under S. 10 of the Reformatory Schools Act (VIII of 1897) is not a “sentence” within the meaning of S. 426. A Sessions Judge therefore has no power to suspend its operation nor is it a punishment enumerated in S. 53 of the Indian Penal Code.¹⁰

427. Arrest of accused in appeal from acquittal.—When an appeal is presented under Section 441-A, sub-section (2), or Section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

6. 72 IA 120 : 49 CWN 477 ; A 1945 PC 94 distinguished in *Taleb Hussain*, (1958) SGR 1226 : (1959) SCB 1226 see also *Shawkat Ali Khan*, A 1956 A 523 : 1956 Cr LJ 1035.
7. *Gorelal*, A 1958 A 667 : 1958 Cr LJ 1107 ; *Bhagwan Singh*, A 1956 MB 129.

8. *Shawkat Ali Khan*, A 1956 A 523 ; 1926 Cr LJ 1035.
9. *S. K. Karim*, A 1926 N 279 : 27 Cr LJ 319.
10. *Krishna Pandaram*, (1915) 16 Cr LJ 134 : 27 IC 198.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Arrest of accused in appeal from acquittal.

1. Corresponding sections in former Codes.—This section corresponds to S. 168 paragraph 3 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Arrest of accused in appeal from acquittal.—The language 'may' suggests that it is discretionary with the High Court on an appeal being presented under S. 417 to order the arrest of the accused after the admission of such appeal. See *Gobin Tiwari*.¹¹

Edge C.J. observed : "In capital cases in which Government was appealing under S. 417, it was, speaking generally, and without laying down any inflexible rule, undesirable that the prisoner's fate should be discussed while he remained at large. In such cases, the Government should apply for the arrest of the accused, under S. 427 of the Code.¹² See also S. 411 (2).

428. Appellate Court may take further evidence or direct it to be taken.—(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken ; but such evidence shall not be taken in the presence of jurors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

SYNOPSIS

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|---|--|
| 1. Corresponding sections in former Codes. | Chapter. |
| 2. Legislative Changes—1898 and 1955. | 10. Shall record its Reasons. |
| 3. State Amendments. | 11. May either take it himself or direct it to be taken by a Magistrate. |
| —Bombay. | 12. Sub-section (2). |
| —Saurashtra. | —Proceed to dispose of the appeal. |
| 4. Scope. | 13. Section 342 whether applicable. |
| 5. Object. | —Admission of Pleader. |
| 6. Applicability. | —Accused cannot be examined as a witness. |
| 7. Remand by Appellate Court for additional evidence and finding—whether legal. | —Unless he offers himself for examination under S. 342-A. |
| 8. Sub-section (1)—if it thinks additional evidence to be necessary. | 14. Sub-section (3). |
| 9. Power limited to appeals under this | 15. Sub-section (4). |

11. (1876) I C 281, followed in *Manga*, (1879) 2 A 340 (FB).

12. *Gobordhan*, (1887) 9 A 528 (529).

1. Corresponding sections in former Codes.—This section corresponds to S. 422 of the Code of 1801 and S. 282 paragraphs 1, 3 and 4 of the Code of 1872 and S. 176 of Act IV of 1877.

2. Legislative Changes.—The words “shall record its reasons” in sub-section (1) were new in the Code of 1898, otherwise S. 428 is similarly worded as that of the Code of 1882.

Legislative Changes (1955).—In sub-section (3) the words ‘or assessors’ after ‘juror’ have been omitted by Act 26 of 1955.

3. State Amendments.

(1) **Bombay.**—In sub-section (1), for the words ‘by a Magistrate’ the words ‘by a Judicial Magistrate’ were substituted by Bombay Act 23 of 1951.

(2) **Saurashtra.**—Same as in Bombay, *vide* Saurashtra Act 4 of 1952.

4. Scope.—Under S. 428 an Appellate Court, if it thinks additional evidence to be necessary shall record its reasons and may either take such evidence itself or direct it to be taken by the Court of Session.¹³

An Appellate Court is not precluded from taking additional evidence to ascertain value of statement made by defence witnesses.¹⁴

5. Object.—Kemp, J., held that S. 422 of Act X of 1872 to which the present section corresponds, only authorizes an Appellate Court to direct *additional evidence* to be taken where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused but not where there is no evidence at all.¹⁵

The *object* is not to enable the prosecution having failed once, to have an opportunity of trying the case over again.¹⁶

6. Applicability.—This section does not apply to a proceeding under S. 488.¹⁷

The object is the prevention of guilty man’s escape through some carelessness or ignorant proceedings of a trial Court or the vindication of an innocent person wrongly accused.¹⁸ This section applies to convictions by Assistant Sessions Judge just as it applies to convictions by a Magistrate.¹⁹ This section also applies to an appeal under S. 250 (3).²⁰ The provisions of this section can be invoked even when the evidence is not purely formal.²¹

High Court has power under S. 307 read with S. 428 to call further evidence.²² High Court can take additional evidence by virtue of S. 439 read with S. 423.²³

7. Remand by Appellate Court for additional evidence and finding whether legal.—Section 428 does not empower an Appellate

13. *Nagina*, (1921) 19 ALJ 947 : 27 Cr LJ 813 : 95 IC 477.

14. *Subramaniya Ayyar*, (1928) MWN 777 : AIR (1928) M 1174.

15. *Wooday Chand Mookhopadhaya*, (1872) 18 WR (Cr) 31 : 9 BLR App xxxi.

16. *In re Hanmanthappa*, A 1937 M 181 : 38 Cr LJ 257; *Bansi* 52 B 686 ; *Rathnavalu*, 1930 MWN 47.

17. *Vithaldas Bharubhai*, (1928) 52 B 768, following *Sheikh Fakiruddin*, 9 B 40 (45).

18. *Jain Prakash*, A 1959 A 129 ; 1959 Cr LJ 156.

19. *Ibid.*

20. *Santah Haider v. Abdul Wahed Sahib*; A 1930 M 483.

21. *Ajit Kumar*, A 1946 N 99 ; *Aktar Hussain*, A 1925 P 526 : 26 Cr LJ 1171.

22. *Debendra Narayan*, 56 C 566 ; 30 Cr LJ 1031.

23. *Gour Chandra v. Public Prosecutor*, A 1962 Or 197 : 1962 (2) Cr LJ 617.

Magistrate to call for a fresh finding from a Subordinate Magistrate nor can he act upon the finding if submitted by the Sub-Magistrate.²⁴

8. Sub-section (1)—‘if it thinks additional evidence to be necessary’.—The powers conferred by S. 282 of Act X of 1872 are not intended to be exercised in cases in which the prosecution *having had ample opportunities to produce evidence and having done so*, the entire evidence falls short of sustaining the charge.²⁵ Additional evidence can be ordered to be taken only if the Appellate Court thinks it necessary.²⁶ S. 428 empowers the Magistrate only to call for evidence and *not for a finding*²⁷ or for a formal defect.²⁸ Additional evidence can however be admitted where formal proof of a document is necessary.²⁹ If in an appeal application is made for further evidence after fourteen months of the decision and the case is not so important on the record the decision is not faulty, the application is liable to be refused.³⁰ Where the Magistrate issues a summons to a defence witness and if the witness is not examined, the Appellate Court should give an opportunity under S. 428 to examine the witness.³¹ Where prosecution witnesses not having been recalled after charge were not cross-examined and the accused was convicted, if in appeal, the accused wishes that such witnesses should be cross-examined the Appellate Court has jurisdiction to direct the Magistrate that the witnesses should be cross-examined and their evidence submitted to him.³² The Appellate Court can examine a hand-writing expert.³³ It is not the duty of the Appellate Court to fill up the gap in the prosecution evidence, *e.g.*, where the Government Pleader did not examine an eye-witness,³⁴ but can order the examination of Investigating Police Officer where the success or failure of the case is interlinked with his evidence.³⁵ Where in a trial with the aid of a jury, in a case of murder, medical evidence was not given, the High Court refused to examine or order the examination of the doctor under this section.³⁶ Where in a case of acquittal on a charge of selling Kerosene oil at the black-market rate, the Chemical Examiner who took sample and issued a certificate that the tins contained Kerosene oil and not diesel oil as claimed by the accused, after the close of the case, the Magistrate examined the Chemical Examiner as a Court witness but in view of the ‘wobbling’ nature of his evidence the prosecution prayed for his examination before the Appellate Court under S. 428, the prayer was refused.³⁷ Additional evidence can be admitted subject to the caution (1) that the prosecution should not be enabled to take out a different course from the one already put on record, (2) the new evidence should be put separately to the accused and he should be given an opportunity to explain it and if necessary to cross-examine the new witness and examine defence witness.^{37a}

9. Power limited to appeals under this Chapter.—“The power to

24. *Muthu Karuppan Sarvai v. Vellayya Kudumban*, (1914) MWN 778 : 16 Cr LJ 79 : 26 IC 671.

25. *Fateh*, (1882) 5 A 217.

26. *Jeremiah v. Vas*, (1911) 36 M 457 : 22 MLJ 73 : 12 Cr LJ 585 ; *Khalpa Ranchod*, (1916) 18 Bom LR 789.

27. *Karnan Benu Patnaik*, (1911) 9 MLT 406 : 12 Cr LJ 240 : 10 IC 290.

28. *Jeevarathnam*, A 1948 M 503 : 49 Cr LJ 745 ; *Varatarajulu*, 42 M 885.

29. *Subramaniya Aiyar*, A 1928 M 1174. In *re Cholanchari Ayamna*, A 1923 M 600 ; *Abdul Matleb*, 48 Cr LJ 682 (Cal)—case under S. 193 IPC.

30. *Mohammed Ali*, A 1955 A 700.

31. *Girijanandan*, A 1944 P 373 ; 46 Cr LJ 546.

32. *Munshi v. Musaffar*, 43 CWN 85 ; 40 Cr LJ 47.

33. *P. C Bholanath v. Jitendranath*, A 1942 P 143.

34. *Harilal*, A 1935 Oudh 402 ; 36 Cr LJ 814.

35. *Miteswar*, ILR (1953) Cut 751.

36. *Debendra Narayan*, 56 C 566 : 33 CWN 632 : 30 Cr LJ 1031.

37. *Sampangiramalah*, A 1952 Mys 53 : 1952 Cr LJ 885.

37a. *Majiya Ratna*, A 1961 MP 10.

take, or call for further evidence given by S. 428 is expressly limited to appeals under that Chapter, *i.e.*, under Chapter 31 of the Code."³⁸

10. 'Shall record its Reasons.'—The words 'shall record its reasons' are new in the Code of 1898. The law requires the Appellate Court to record its reasons before taking what the legislature evidently considered as the exceptional course of allowing additional evidence to be adduced in appeal,³⁹ although in an earlier decision the same High Court has held that the omission to record reasons is an irregularity cured by S. 537.⁴⁰ The word 'shall' being mandatory it seems this decision is not good law.

11. 'May either take it himself or direct it to be taken by a Magistrate, etc.'—An Appellate Court may itself take additional evidence or itself record such evidence.⁴¹ The High Court may direct the Sessions Judge to take proceedings for the purpose, after giving notice to the accused persons that it was proposed to use those statements against them,⁴² and the Sessions Judge ought not to refuse to adjourn the case in order to obtain the evidence of two absent witnesses whose evidence was material and must be recorded and certified to the High Court under this section.⁴³ When a subordinate Court which has been directed to take further evidence has reason to believe that any witness has intentionally given false evidence, it is competent to proceed under S. 195 or S. 476.⁴⁴

12. Sub-section (2)—'he shall certify such evidence to the Appellate Court.'—It does not justify such Court in passing a fresh sentence.⁴⁵

'Proceed to dispose of the appeal'.—Judgments and orders passed by such Court shall be final (S. 430). It has been held that no appeal lies in such cases.⁴⁶

13. Section 342 whether applicable.—Section 342 does not apply to additional evidence taken under this section.⁴⁷

Admission of Pleader.—Pleader's admission is no evidence. It is an irregularity curable under S. 537.⁴⁸

Accused cannot be examined as a witness.—Sections 428 and 540 do not seem to authorise the examination of the accused as a witness⁴⁹ but under S. 342-A accused may offer himself for examination as a witness.

14. Sub-section (3)—'but such evidence shall not be taken in the presence of jurors or assessors'.—The accused or his pleader has a right to be present but not the jurors or assessors. Although the opening words of this sub-section are "Unless the Appellate Court otherwise directs" which gives the accused a restricted right, it is seldom that the Appellate Court "otherwise directs" as to the presence of the accused or his pleader.

38. *Krishna Reddy*, (1909) 33 M 90 (91) : 20 MLJ 102.

39. *Varadarajalu Naidu*, (1919) 42 M 885 (890) ; *Dulla*, 7 L 148.

40. *Karnan Benu Patnaik*, 9 MLT 406 : 12 Cr LJ 240 : 10 IC 290 ; *Seentah*, 53 M 688.

41. *Moni Mohun Mondal*, (1907) 6 CLJ 251 ; *Luchman Singh*, (1904) 31 C 710.

42. *Nagina*, (1921) 19 ALJ 947.

43. *Virasami*, (1896) 19 M 375 : 6 MLJ 195 : 2 Weir 680.

44. *Bakhtear Maigarar*, (1871) 15 WR (Cr) 64 FB : 6 Beng LR 698.

45. *Anon*, 3 Beng LR 62.

46. *Shikh Ishahak*, (1900) 27 C 372 : 4 CWN 497 overruling *Mohesh*, 2 WR (Cr) 12.

47. *Narayan Keshan Devasthali*, (1928) 52 B 699 : 30 Bom LR 651, following *Saiyad Mohiuddin*, (1925) 4 P 488.

48. *Bansilal Gangaramvain*, (1928) 52 B 686 : 30 Bom LR 646.

49. *Subbayya*, (1889) 12 M 451 (453).

Where in a trial for murder held with assessors the Court relied on a statement made by the deceased and the evidence necessary to prove such statement was not recorded until after the close of the trial and the discharge of the assessors, *held* that this was a material irregularity not covered by the *proviso* of S. 537.⁵⁰

15. Sub-section (4) : Additional evidence must be taken in accordance with the provisions of Chapter XXV of the Code.—This is the reason for the insertion of the words in sub-cl. (3) *viz.*, “unless the Appellate Court otherwise directs, the accused or his pleader shall be present”—compare this with the language of S. 353.

429. Procedure where Judges of Court of appeal are equally divided.—When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. “Are equally divided in opinion.” |
| 2. Scope. | 4. “Such hearing if any.” |

1. Corresponding sections in former Codes.—This section corresponds to S. 271-B of the Code of 1872, S. 22 of Act XI of 1874 and is the same as S. 429 of the Code of 1882.

2. Scope.—Where the Judges differ as regards the case of some of the appellants it is only the case of those particular appellants which need be referred to a third Judge.⁵¹ Strong reasons for differing must be present.⁵² The section applies to applications in revision under S. 439.⁵³ In view of the amendment of S. 435 the view taken in⁵⁴ that S. 429 does not apply to S. 145 which used to be revised under S. 107 of the Government of India Act, and Cl. 36 of the Letters Patent and the opinion of the Sessions Judge prevailed is no longer good law.

3. Are equally divided in opinion.—*i. e.*, whether on points of law or on the facts. Even in a Jury reference under S. 307 the Bombay High Court directed on a difference of opinion between the Judges that the case should be laid before a third Judge being of opinion that the Criminal Procedure Code over-rules S. 36 of the Letters Patent, 1865.⁵⁵

Section 36 of the Letters Patent of the Calcutta High Court amended.—See G.I., dated 9th December, 1927. The material portion is quoted in 32 CWN xlvii.

In case of a divided opinion the matter will be referred to a third Judge and the judgment or order will be that of the third Judge.⁵⁶ What is

50. *Ram Lal*, (1893) 15 A 136 : (1893) AWN 50.

51. *Subedar Singh*, A 1943 A 272 : 41 Cr LJ 705 ; *Ahmed Sher*, A 1931 L 513 : 32 Cr LJ 868 ; *Sarat Chandra Misra*, 38 C 202 : 11 Cr LJ 515.

52. *Md. Yusuf*, A 193, S. 225 ; 31 Cr LJ 1026.

53. *Ibra Akanda*, 48 CWN 366 : A 1944 C

389 ; *Ashutosh Ganguly*, 53 C 929 ; *Dedikula*, 49 M 976.

54. *Moiram Bewa*, 47 C 438.

55. *Dada Ana*, (1889) 15 B 452 (474, 475) ; *Kunhanbu*, 1932 MWN 873.

56. *Sukdeo Narain Singh*, (1900) 27 C 892 (918) : 4 CWN 613 ; *Pandita alias Rahimulla Akanda*, (1900) 27 C 501 (505).

referred to the third Judge is not the point or points upon which the Judges are equally divided in opinion but the whole case is before him.⁵⁷ Where a difference of opinion arises in the Division Bench of the High Court hearing an application under S. 561-A, the same procedure as in S. 429 should be followed.⁵⁸ The opinion of the third Judge is binding on the Division Bench. Where the appellant was charged with two offences, under Ss. 304/34 and 323/34 I. P. C. and there was a difference of opinion between the Judges hearing the appeal as to the guilt of the accused under S. 304/34 I. P. C. it is open to the third Judge to take a view different from that taken by the referring Judges and to acquit the accused of all the charges.⁵⁹ It is only where there is any difference as to the disposal of the case that it can be said that the Judges are divided in opinion.⁶⁰

In case of a difference of opinion between two Judges regarding awarding death sentence, Mack J., observed that the third Judge cannot pass death sentence, Sonasundaran, J., observed, if he chooses, he can pass a death sentence.⁶¹

Woodroffe, J. observed :—"Without deciding that the word 'case' does not include the whole case it is plain that a third Judge would not differ upon a point on which both the referring Judges were agreed unless there were strong grounds for doing so".⁶² The third Judge *cannot refer the case* to a Full Bench.⁶³

He is not bound to follow previous Division Bench Decisions.⁶⁴

4. Such hearing if any.—The use of the words 'if any' shows that the third Judge is not bound to have a full hearing and then to arrive at an independent opinion. The third Judge can, unless or scrutinising the materials on record the judgment of the Judge pronouncing in favour of the accused is considered far from reasonable or perverse give the benefit of reasonable doubt to the accused and acquit him.⁶⁵

430. Finality of orders on appeal.—Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Section 417 and Chapter XXXII.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Powers of the High Court to cure inadvertent failure of justice. |
| 2. Finality of orders on appeal. | 4. Jail Appeal. |

1. Corresponding sections in former Codes.—This section corresponds to S. 428 of the Code of 1861 and S. 285 of the Code of 1872. It is the same as that of the Code of 1882.

2. Finality of orders on appeal.—It was held under the Codes of 1872 and 1882 that the order summarily dismissing an appeal was a final

57. *Sarat Chandra Mitra*, (1910) 38 C 202 : 12 CLJ 294 : 15 GWN 18 : 11 Cr LJ 515; *Ashutosh Ganguly v. Watson*, (1926) 53 C 929; *Daulat Ram*, A 1947 L 244 : 48 Cr LJ 126; *Ravipati Sitarammaya*, A 1953 M 61; 1953 Cr LJ 245; *Md. Ilias*, ILR 1948 IC 43.
58. *Stale v. K. C. Bandi Gourda*, A 1957 M 28 : 1958 Cr LJ 455 (2).
59. *Subedar*, A 1956 A 529 : 1956 Cr LJ 1039.
60. *State v. Minaketan Patnaik*, A 1953 Or

160 : 1953 Cr LJ 1084 (SB).
61. *Rayipati Sitaramaya*, A 1953 M 61 : 1953 Cr LJ 245.
62. *Grande Venkata v. Corporation of Calcutta*, (1918) 22 CWN 745 : 28 CLJ 32 : 19 Cr LJ 753; 46 IC 593.
63. *Ishan Chandra Samanta v. Hriday Krishna Bose*, (1924) 29 CWN 475 (483).
64. *Yusuf*, 58 CWN 279 : A 1954 L 258.
65. *Khetri Bewa*, A 1952 Or 17 where *Md. Ilias*, ILR 1948 IC was doubted.

order not subject to revision.⁶⁶ But that is no longer the law. Under the present Code such orders are subject to revision.⁶⁷

The expression 'Judgments... shall be final' in this section means that the judgment shall not be open to any further appeal. But these words do not take away the power of the High Court to interfere otherwise than in appeal. S. 439 (6) is exempted from the operation of S. 430.⁶⁸ The expression 'judgment should be final' means that the judgment shall not be open to further appeal. Where an appeal disposed of by the High Court before the date fixed for hearing and the counsel had no opportunity of being heard, the High Court has an inherent power to set aside the proceedings and starting with the hearing of the appeal.⁶⁹ Section 430 has no application to decisions or orders made by the High Court in revision. The scope of Ch. 32 having been enlarged by the addition of sub-section (6) to S. 439, the scope of the exception to S. 430 must also stand enlarged.⁷⁰

3. Powers of the High Court to cure inadvertent failure of justice.—The Bombay High Court held that although such an order was final within the meaning of S. 430 the High Court has ample jurisdiction under Chapter 32 to rectify an inadvertent failure of justice.⁷¹ The order is final whether the first order under S. 421 was made on the merits or on a technical point, *e.g.*, limitation.⁷²

4. Jail Appeal.—If dismissed summarily under S. 421, the order is final under S. 430 and the High Court has no power to entertain a regular appeal from a conviction.⁷³

431. Abatement of appeals.—Every appeal under Section 411-A, sub-section (2), or Section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Scope. |
| 2. Legislative Changes. | 5. Shall finally abate. |
| 3. Report of the Select Committee (1898). | 6. Principle of the section is applicable to revision. |

1. Corresponding sections in former Codes.—This section was inserted for the first time in the Code of 1882.

2. Legislative Changes.—The words within brackets were inserted by the Code of 1898.

3. Reason for the change.—"A sentence of fine must not abate on the death of the person against whom such sentence was passed, as it is not a thing which affects his person only, but which affects his property"—*Report of the Select Committee (1898)*.

This amendment has over-ruled the decision of the Bombay High Court in *Nabi Shah's case*.^{73a}

66. *Mahamed Yasin*, (1879) 4 B 101.

67. *Dular*, 12 C 536; *Bhimappa v. Ramanna*, (1894) 19 B 732.

68. *Bhawani Shankar*, A 1953 Raj 17 : 1953 Gr LJ 301.

69. *Chandrika*, A 1949 A 176 : 50 Cr LJ 228.

70. *Per Das J. in U. J. S. Chopra v. State of Bombay*, (1955) 2 SCR 94 : A 1955

SC 633 : 1955 Cr LJ 1410.

71. *Bhimappa v. Ramanna*, (1894) 19 B 732; *Inderchand*, A 1934 B 471.

72. *Ibid.*

73. *Madho Singh*, A 1957 Raj 204 : 1957 Cr LJ 797. *Rabari Rama Raja*, A 1955 Sau 9.

73a. (1894) 19 B 714; *Ishan*, 29 CWN 475 FB : 26 Cr LJ 915.

4. Scope.—In the absence of statutory provisions in terms applying to an application in revision, as there are these in S. 431 in respect of Criminal appeals the High Court has ample powers to pass orders under S. 439 and while dealing with any pending matter on the death of the petitioner has the power to examine the whole question of the correctness, propriety or legality of the sentence of fine which necessarily involves examining the order of conviction itself.⁷⁴ Ordinarily criminal appeal abates on the death of the appellant. Section 431 has however been amended so as to provide that this rule will not apply when the appeal is from a sentence of fine.⁷⁵ Where the appellant was sentenced to composite sentence of imprisonment and fine and the appellant died during the pendency of the appeal, the Court could not refuse to hear the legal representative of the convict appellant on the day the appeal was decided. In this view of the matter it is incumbent on the Court to send a notice to the legal representative and hear him so far as the sentence of fine is concerned.⁷⁶

5. Shall finally abate.—It is manifest that when the appellant is dead the appeal abates.⁷⁷ This decision so far as it stated that the Code has not provided for the continuance of an appeal in cases of fine is no longer good law on the point after the amendment.

6. Principle of the section is applicable to revision.—On the death of an applicant for revision, it was held the revision would abate except in so far as it related to a sentence of fine.⁷⁸

CHAPTER XXXII

OF REFERENCE AND REVISION

432. Reference to High Court.—(1) Where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

Explanation.—In this section “Regulation” means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897, or in the General Clauses Act of a State.

74. *Ramdhani Gope v. Jageshwar Mahto*, A 1941 P. 526 : 42 Cr LJ 653 ; *Pedrey*, 1957 ALJ 718 ; *Pranab K. Mitter v. State of W. B.*, (1959) MLJ (SC) 110 : 1 MLJ : A 1959 SC 146.

75. *Ramdhani Gope v. Jageshwar Mahto*, A 29 rul P. 526 : 42 Cr LJ 653.

76. *Vidya Devi*, A 1957 A 20 : 1957 Cr LJ 16 ; *Sailendra Sunder Mitra*, 60 GWN

239 : A 1957 C 24.

77. *Dangaji Andaji*, (1878) 2 B 564.

78. *Daulat Ram*, (1918) 8 PR Cr 1919 : 95 PLR 1918 : 10 PWR Cr 1919 : 20 Cr LJ 214 : 49 IC 744 ; *Prem Singh*, 24 PR 1908 ; *Pranab K. Mitter v. State of West Bengal*, (1959) 1 MLJ (SC) 110 : A 1959 SC 144 ; *Sailendra Sunder Mitra*, 60 CWN 239 : A 1957 C 24.

(2) A Presidency Magistrate may, if he thinks fit in any case pending before him to which the provisions of sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any Court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the Court thereon, either commit the accused to jail or release him on bail to appear when called upon.

SYNOPSIS

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|-------------------------|---------------------|
| 1. Legislative changes. | 4. Sub-section (2). |
| 2. Scope. | 5. Sub-section (3). |
| 3. Sub-section (1). | |

1. Legislative changes.—This section was substituted by Act 24 of 1951 (Civil and Criminal Powers Amendment Act, 1951).

2. Scope.—A reference under S. 432 (1) can be made only if all the following conditions are satisfied, otherwise it will be invalid :—

(1) A question as to the validity of any Act, Ordinance or Regulation or any provision thereof must arise in the case before the Court ; (2) the determination of such question should be necessary for the disposal of the case ; (3) there should be no decision of the High Court to which the Court is subordinate or the Supreme Court declaring the legislation in question to be invalid or inoperative ; and (4) the Court making a reference should be of the opinion for the reasons set forth by it that it is so invalid or inoperative. It is not in cases where doubt arises in the mind of a Court as to validity of any Act, Ordinance or Regulation or any provision thereof that a reference can be made. It is only when the Court is definitely of opinion that the same are or is so invalid that a reference be made. In this respect there is a material difference from the circumstances in which a Presidency Magistrate can make a reference as the section itself will make clear. In the instant case it was held that the Magistrate not having definitely expressed his opinion as to invalidity of Cl. 13 of Madhya Bharat Retaining Order the reference was incompetent.⁷⁹ Strictly speaking a reference under this section will not lie in a case where there is a conflict between a High Court decision and an instruction given by the Board of Revenue, because this section in terms applies only where there is a question regarding the validity of an Act, Ordinance or Regulation.⁸⁰

A Judge should not express any opinion while deciding a case on matters of Constitution unless it is absolutely necessary for the decision of the case.⁸¹ Under Art. 228 of the Constitution the High Court is the sole interpreter of the Constitution in a State and can transfer constitutional cases from the subordinate Courts to the High Court. Under Art. 228, the High Court may be moved either by the parties,⁸² or by the Subordinate Court.⁸³

The State cannot be allowed to plead before the Court the unconstitutionality of its own statutes. But where a conflict arises between Central

79. *Tataram*, (1952) Madhya BLJ (HCR) 391.

80. *Harihar Ojha v. Lavmi Jena*, A 1959 Or 116 : 1959 Cr LJ 884 ; *Aher Arian Govind*, 5 Sau LR 59.

81. *Maqdom Mohiuddin v. State of Hydra-*

bad, A 1952 Hyd 112 : 1952 Cr LJ 1076.

82. *Bhoirabendra*, A 1955 Ass 154 : A 1953 Punj 77 : 1953 Cr LJ 549.

83. *Rulia Ram v. Smith Ram*, A 1952 Pepsu 1 ; *Hamid*, A 1954 P 387.

Law and State Laws, it is open for the State in a Court to contest that the Central Act invades the State's Legislative powers and is therefore violative of the Constitution.⁸⁴

3. Sub-section (1).—Reference can be made only when Court is satisfied that in a case pending before it there is a substantial question as to the validity of any Act, Ordinance or Regulation.⁸⁵ The rules framed under an Act may have the force of law and there contravention may also be liable to penalty under the Act but that by itself does not make the rules part of the Act. Hence no reference can be made under S. 432 as regards their inability unless there is an express provision in the Act itself making the rules a part of the Act.⁸⁶

4. Sub-section (2)—Reference by a Presidency Magistrate.—In the old section it was enacted that the Presidency Magistrate only could refer under this section to the High Court and a District Magistrate could not make the reference.⁸⁷ S. 432 does not give the Presidency Magistrate power to refer points of law settled by decision of the High Court.⁸⁸ In dealing with a reference under sub-section (2) the High Court deals only with the particular points of law stated for its opinion but not with the facts.⁸⁹ It is undesirable to make a reference under this section for the opinion of the High Court in form which involves giving a decision of law, divorced to some extent from the facts.⁹⁰

5. Sub-section (3).—The language of this sub-section is the same as in the concluding portion of the unamended section. This gives the power to the Court that after reference has been made and pending the decision of the High Court the Magistrate may either commit the accused to jail or release him on bail, so that the accused if subsequently convicted can not evade justice.

Right to begin.—In a reference by a Presidency Magistrate to the High Court under this section as to whether, on the facts stated any offence has been committed by an accused person, it lies on the prosecution to make out that an offence has been committed, and under the circumstances the prosecution must begin.^{90a} This case has been overruled on the point under Ss. 471 and 415 I. P. C.

433. Disposal of case according to decision of High Court.—(1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Direction as to costs. (2) The High Court may direct by whom the costs of such reference shall be paid.

Corresponding sections in former Codes.—This section corresponds to S. 241 of Act IV of 1877 and is the same as S. 433 of the Code of 1882.

84. *State v. Keshab Chandra*, A 1962 C 335.

85. *In re Rajarama*, A 1952 M 578.

86. *Jagat Singh v. Mota Singh*, A 1956 Pepsu 73 : 1956 Cr LJ 1014.

87. *Rahimuddin*, A 1928 S. 69 (2).

88. *Ratan Singh*, 52 CWN 369 ; *Ismail Haji*, 54 B 146 : 31 Cr LJ 633.

89. *Molla Fazle Karim*, 33 C 198 : 3 Cr LJ 365 ; *Grish Chandra*, 34 CWN 13 (FB) 1 A 1929 C 756.

90. *Hemendra Prasad*, 43 CWN 950 ; 40 Cr LJ 752 (SB).

90a. *Haradhan*, (1892) 19 C 380 (385).

434. *Power to reserve questions arising in original jurisdiction of High Court. Procedure when question reserved. Rep. by the Criminal Procedure Amendment Act, 1943 (26 of 1943), Section 6.*

435. Power to call for records of inferior Courts.—(1) The High Court or any Sessions Judge or District Magistrate, or any Sub-divisional Magistrate empowered by the State Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence or order be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 437.

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

SYNOPSIS

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|---|---|
| 1. Legislative changes.
—1923 and 1956. | 12. 'Inferior Criminal Court.' |
| 2. State Amendments.
—Madras.
—Bombay.
—Saurashtra.
—Uttar Pradesh. | 13. Situate within the local limits of its or his jurisdiction. |
| 3. Effect of 1923 Amendment. | 14. For the purpose of satisfying itself or himself as to correctness, legality or propriety of any finding, sentence or order. |
| 4. Scope. | 15. Power of High Court to interfere on facts. |
| 5. Sections 435, 436, 437 and 438. | 16. May direct suspension of sentence and release on bail pending examination of the record. |
| 6. Executive order cannot be revised. | 17. Record of any proceedings.
—meaning of. |
| 7. Application of the section.
—to Security Proceedings.
—Order of Discharge.
—Order under S. 476. | 18. Explanation. |
| 8. Power of High Court to interfere in pending proceedings. | 19. Sub-section (2). |
| 9. Interference by High Court—if Lower Courts to be first moved. | 20. Sub-section (3). |
| 10. Sub-section (1).
—High Court, Sessions Judge, District Magistrate have concurrent Jurisdiction. | 21. Sub-section (4).
—Co-ordinate Jurisdiction of Sessions Judge and District Magistrate. |
| 11. 'The District Magistrate.' | 22. 'No further application.' |
| | 23. Revision on the ground of sentence. |

1. Legislative changes.—The words ‘and may . . . record’ at the end of sub-section (1) after the words ‘inferior Court’ and the Explanation were added and sub-section (3) repealed by S. 116 of Act 18 of 1923. The words ‘or order’ after the word ‘sentence’ in sub-section (1) were inserted by Act 39 of 1956.

2. State Amendments.

Madras.—In sub-section (1) after the words ‘any Sessions Judge’ the words ‘other than the Sessions Judge in the city of Madras’ have been inserted by Madras Act 34 of 1955.

Bombay.—In sub-section (1) after the words ‘any Sessions Judge’ the words ‘other than the Sessions Judge of the Court of Sessions for Greater Bombay’ have been added by Bombay Act 32 of 1948.

In sub-section (1) the words ‘or District Magistrate or any sub-divisional Magistrate, empowered by the State Government in this behalf’ and the Explanation were deleted by Bombay Act 23 of 1951.

For sub-sections (2) and (4) the following sub-sections were substituted by Bombay Act 23 of 1951, namely—

“(2) The District Magistrate or any Sub-Divisional Magistrate empowered by the State Government in this behalf, may call for and examine the record of any proceedings before any Subordinate Executive Magistrate for the purpose of satisfying himself as to the correctness, legality or propriety of any order recorded or passed and as to the regularity of any proceedings of such subordinate Magistrate and may, when calling for such record, direct that the execution of any order be suspended and if the person is in confinement that he be released on bail or on his own bond pending the examination of the record.

(3) If any Sub-Divisional Magistrate acting under sub-section (2) considers that any such proceeding or order is illegal or improper he shall forward the record with such remark thereon as he thinks fit to the District Magistrate.

(4) The High Court may call for and examine the record of any proceeding in respect of any order made under Ss. 118, 122, 143, 144 or 145, notwithstanding the fact that such proceeding was before an Executive Magistrate or the Commissioner of Police, as the case may be (The present sub-section (4) was substituted by Bombay Act 39 of 1955).

It may be observed that the words ‘an Executive Magistrate’ the words ‘or the Commissioner of Police as the case may be’ were inserted by Bombay Act 71 of 1954.

Saurashtra.—Sub-section (1) is the same as the Bombay Amendment made by Bombay Act 23 of 1951. For sub-sections (2) and (4), new sub-sections (2), (3) and (4) are same as in Bombay Amendment Act 23 of 1951 and subsequently amended by Bombay Act 39 of 1955 but in the Saurashtra Act, Bombay Amendment by Act 71 of 1954 has been omitted, *vide* Saurashtra Act 4 of 1952.

Uttar Pradesh.—In the Explanation to sub-section (1) the words ‘whether exercising original or appellate jurisdiction’ were deleted by U. P. Act 36 of 1948.

3. Effect of the 1923 Amendment.—(1) The effect of the introduction of bail being granted or staying execution of the sentence in sub-section (1) is a change for the better and now empowers the Court sitting in revision or making a reference to grant bail. (2) The addition of the *Explanation* has in effect over-ruled the following decision under the old Code.⁹¹ In S. 295 of the Code of 1872 (X of 1872) corresponding to the present S. 435 the word ‘subordinate’ was used and there was a paragraph at the end of the section subordinating Magistrates to the Sessions Judges. The word ‘inferior’ was substituted for the word ‘subordinate’ in the Codes of 1882 and 1898 and retained in the Code as amended in 1923. This substitution may have been the reason for omitting the second paragraph of S. 295. See the following cases.^{91a} The amendment has restored these decisions with this modification that the second paragraph of S. 295 of the Code of 1872 has also been restored. (3) The omission of sub-section (3) from the Code of 1898 has given statutory power to the Courts contemplated in sub-section (3) to enter-

91 *Balwant Singh*, (March 1923) 24 Cr LJ 616: 73 IC 504.

19a. *Upendra Nath v. Dukhin i Bewa*, (1886)

12 C 473 FB; *Padmanabha*, (1884) 8 M 18 FB, followed in *Shamsuddin v. Pir*, 38 PR 1885; *Jallo*, 15 PR 1904.

tain applications in revision against orders under Ss. 143 and 144, proceedings under Chapter XII and S. 176 and report for orders under S. 438.

This amendment has in effect modified the decisions which held that orders under S. 144, 145 or 146 could not be revised under this section. Under the old Code the High Courts interfered with those orders excluded by S. 435 (3) under S. 15 of the Charter Act now represented by S. 107 of the Government of India Act,⁹² and the power of revision thereunder was restricted to the ground of jurisdiction, *e. g.*, where the order of the lower Court was without jurisdiction or in excess or abuse of jurisdiction. The Amending Act XVIII of 1923 having deleted S. 435 (3) the revision will be under S. 439, which, read with S. 435, empowers the High Court to revise on a question of law as also upon facts for the purpose of satisfying itself about the correctness, legality or propriety of the orders passed under Ss. 143, 144, Chapter XII and S. 176.

4. Scope.—The provisions of Ss. 435 and 439 are not exhaustive.⁹³ Under Ss. 435 and 439 of the Code of Criminal Procedure, *the High Court* can in the exercise of its revisional jurisdiction examine the records of the cases for the purpose of satisfying itself as to the correctness or propriety as well as the legality of any finding, sentence or order, and where there are very exceptional grounds for its interference it will exercise the powers of a Court of appeal in dealing with them.⁹⁴ Where a District Magistrate calls for the record of a case under S. 435 from a Subordinate Magistrate, the latter is ousted from his jurisdiction to deal with the case after the receipt of the order.⁹⁵ Under S. 435 a District Magistrate is not entitled to question the propriety of an order passed by a Court of Session. His proper course, where he considers that action is necessary, is to move the Government to file an application in revision.⁹⁶

Section 435 empowers the District Magistrate only to suspend the execution of a sentence and release the accused on bail pending the examination of the record and does not empower him to quash the finding, sentence or order.

The only course open to him in such a case is to make a report to the High Court under S. 438.⁹⁷ A criminal revision Court has to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order and as to the legality of any proceedings, under Ss. 435 and 438 the High Court has no absolute discretion to interfere in revision in any case.⁹⁸ The power to interfere is discretionary and unfettered by limitations.⁹⁹ Once the case has come before the High Court by way of revision, it can deal with the matter under Ss. 435 and 439 and it is not necessary for the High Court to *see* whether the petition of revision is in order and the affidavit was properly sworn.¹

It may be pointed out that at the time of moving the application, surely the High Court can reject the application if the petition is not in

92. *Rahamatulla*, (1898) 17 A 485 FB ;
Mahadeo, v. Bisu, (1903) 25 A 537 ;
Martin, (1904) 27 A 296 ; *Pandurang*,
(1900) 24 B 527 ; *Asizuddin*, (1905) 2
ALJ 149 ; *Ali Mahomed Mandal v.*
Piggot, (1920) 48 C 522 : 22 Cr LJ
213.

93. *Annie Beasant v. Advocate General,*
Madras, (1919) 21 Bom LR 867 (879)
PC : 23 CWN 986 (994).

94. *Chagan Davaram*, (1890) 14 B 331

(336).

95. *In re Maruti Vithee*, (1924) 49 B 533.

96. *Daulat Singh*, (1926) 24 ALJ 224.

97. *Thomas Joseph v. Ponlose Verkey*, A 1957
TC 234 : 1957 Cr LJ 911.

98. *Bhan Singh Jubar Singh*, 1957 Cr LJ 67
(Madhya Bharat).

99. *Ram Prasad*, 17 CWN 379 : 13 Cr LJ
807

1. *Lalu Mahto*, A 1942 P 150 : 42 Cr LJ
537.

order *e. g.* the certified copy of the trial Court is not filed or if it is moved after a long delay and the delay is not properly explained. Besides the revisional powers under Ss. 435 and 439, the High Court possesses powers of superintendence over all Courts and tribunals under Art. 227 of the Constitution. The powers of the High Court under Art. 227 are not circumscribed by the conditions laid down in Ss. 435 and 439.^{1a} The power has to be exercised most sparingly.²

[Sections 439 and 435 must be read together].³

Application by a third party.—The High Court can call for and examine the record of proceedings in the Magistrate's Court if the necessity for doing so has been brought to its notice in any manner.⁴

5. Sections 435 and 437 (present Section 436).—The provisions of Ss. 437 and 439 must be read with the provisions of S. 435. Thus the summoning of the record must be a necessary preliminary to any action which a High Court may take under Ss. 437 and 439.⁵

Sections 435 and 436 (present Section 437).—Acquittal of an offence under S. 465, I. P. C. does not imply that the accused was discharged in respect of any other charge which might have been framed. In such a case the Magistrate not having made an order of discharge in respect of a charge under S. 467, I. P. C. the High Court held that the Sessions Judge had no power under Ss. 435 and 436 to direct the committal of the accused to the Sessions Court for trial of an offence under S. 467, I. P. C.⁶ An order of a District Magistrate refusing to call for the records and commit to the Sessions an accused person while the charge against him is still under enquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order the committal of the accused to the Sessions Court after his discharge by the inferior Magistrate.⁷ The High Court directed the commitment of the accused to the Court of Session where in a case proceeded with under S. 19F the evidence recorded by the Magistrate disclosed an offence under S. 20.⁸

Sections 435 and 438.—A District Magistrate is not empowered to make a reference to the High Court questioning the propriety of a judgment by a Sessions Judge.⁹

See the *Explanation* newly added to sub-section (1) which makes it clear that even the District Magistrate shall be deemed to be 'inferior' to the Sessions Judge.

6. Executive order cannot be revised.—An order under S. 17 of Act V of 1861 appointing certain persons as *special constables* is of an executive nature and cannot be made the subject of revision under this section.¹⁰ An order passed by a District Magistrate under the rules framed by Government

1a. *Baldeo Singh v. State of Bihar*, A 1957 SC 612 (614).

2. *Waryam*, 1954 SCR 565 : A 1954 SC 215.

3. *Haraprasad Das*, (1913) 40 C 477 (FB) ; *Moiram Bewa v. Meajan Sardar*, (1919) 47 C 438 : 24 CWN 97 : 31 CLJ 183 : 54 IC 169, following *Haridas Sanyal*, 15 C 608, (617) FB ; see *Thakur Das*, 15 Cr LJ 217 : 22 IC 1001.

4. *Narain Prosad Nigam*, (1922) 20 ALJ 909.

5. *Thakur Das*, (1913) 15 Cr LJ 217 : 22

IC 1001 (Oudh) 17 OC 25.

6. *Hakim Khan v. Bujruk Ali*, (1927) 26 CLJ 210.

7. *Gandi Appa Razu*, (1919) 43 M 330, where *Kalimathu*, (1903) 26 M 477 was distinguished.

8. *Nisikantu Lahiri*, (1916) 20 CWN 732.

9. *John Lobo*, (1916) 41 B 47 following *Karamdi*, (1895) 23 C 250 ; *Daulat Singh*, (1926) 24 ALJ 224.

10. *Parmeshwar Dat*, (1916) 18 LJ 900 : 42 IC 132 (Oudh).

under S. 45 (3) of the Code is an executive order and not subject to the revisional powers of the High Court.¹¹

Interference.—A Magistrate though vested with the powers under the Criminal Procedure Code may also be vested with certain powers under the special Acts as '*persona designata*' and is not amenable to the revisional jurisdiction of the High Court under S. 435 on the ground that the proceedings were not those of an inferior Criminal Court. The High Court has power under S. 439 read with Arts. 227 and 228 of the Constitution to call for records and interfere with such proceedings.¹² High Court under Ss. 435 and 439 cannot revise executive orders.¹³

7. Application of the section to Security Proceedings.—A Sessions Judge has power under S. 435, Cr. P. C., to call for the record of the proceedings under S. 110 of that Code before an inferior Cr. Court within his jurisdiction and to refer the matter to the High Court.¹⁴ The High Court seldom interferes in the preliminary stage with the discretion of the District Magistrate taking action under the preventive sections of the Cr. P. Code but it will exercise its powers of interference in a case when the order of the Magistrate is based on materials which are clearly insufficient to support the order.¹⁵ Section 125 does not affect the revisional jurisdiction of the Sessions Court or District Magistrate under Ss. 435 and 438.¹⁶

Order of Discharge.—The proper section is the next section (S. 436) applicable to such orders.

An Additional Sessions Judge has jurisdiction to examine the records of a case transferred to him by the Sessions Judge in which the accused has been discharged and to set aside the order of discharge and direct further enquiry.¹⁷ See Commentary on S. 436. If a Sessions Judge assumes jurisdiction under S. 435 over dismissal of a complaint under S. 203 or 204 or discharge of an accused, he may exercise the power conferred under S. 520 and modify an order regarding disposal of property passed by the trial Court, but he cannot modify such an order in any other case.¹⁸ Where in a revision against conviction under two offences, the Sessions Judge maintains the conviction under one of the offences and under S. 438 recommends acquittal under the other offence, no revision lies against that part of the order of the Sessions Judge which maintained the conviction.¹⁹ It is submitted that decision¹⁹ is not good law as the party may move the High Court against the order of conviction and the Rule and the Reference under S. 438 may be heard together.

Order under S. 476.—A full bench of the Calcutta High Court held that a Revenue Court taking action under S. 476 is not an inferior Criminal Court within the meaning of S. 435 and the order made in such proceeding is not open to revision under S. 439 read with S. 435.²⁰ The Allahabad High

11. *Damma*, (1907) 29 A 563 (565) : (1907) AWN 168 : 5 Cr LJ 476 : *Diamut Hosen*, (1881) 10 CLR 14 ; *Chottay Lal v. Chedilal*, (1922) 45 A 135 : 24 Cr LJ 597 : AIR (1923) A 149.

12. *Nizam Rajpramukh of Hyderabad*, A 1955 Hyd 241.

13. *Md. Ahmed Khan*, A 1940 Oudh 416 ; *Hari Kishan Das*, A 1957.

14. *Ashiq Ali*, (1923) 21 ALJ 513 : 24 Cr LJ 593 : 73 IC 337 : AIR (1923) A 596.

15. *Nafar Chandra Pal Chowdhury*, (1923) 38 GLJ 198 : 28 CWN 23 : 25 Cr LJ 198 : 76 IC 429 : AIR (1924) C 114.

16. *Bipin Behari*, 3 PLJ 302 : 19 Cr LJ 589 : 45 IC 397.

17. *Nazar Hussain*, (1920) 21 Cr LJ 293 : 55 IC 341.

18. *Jaleshwar Jha v. Maolchand*, A 1959 A 96 : 1959 Cr LJ 123.

19. *Hardeo*, A 1959 A 611 : 1959 Cr LJ 1133.

20. *Har Prosad Das*, (1913) 40 C 477 : 17 CLJ 245 : 17 CWN 674 : 14 Cr LJ 197 : 19 IC 197 followed in *Rukta Singh*, (1921) 6 PLJ 178 : (1921) Pat Supp CWN 240 : 22 Cr LJ 403 : 2 PLT 609 ; see *Hamid Ali v. Madhusudan*, 31 CWN 281.

Court has held that the Sessions Judge has powers to revise an order of discharge passed in a case under S. 476 at the instance of a private party.²¹ This view does not seem to be correct as under S. 476, the Court is the complainant and a private party has no *locus standi*. The new Code has by inserting S. 476-B provided for only one appeal but no second appeal to the High Court.²² The right view seems to be that the High Court exercises revisional powers under S. 439 if the complaint has been refused by a criminal Court under S. 476-B and has civil revisional jurisdiction under S. 115, C. P. C., if the Civil Court has refused to make a complaint. See Commentary on S. 476-B.

8. Power of High Court to interfere in pending proceedings.—

The High Court has power under S. 435 to call for the records of a case when it wishes to satisfy itself as to the regularity of any proceedings in subordinate Courts and hence it can interfere even in pending cases.²³ The Allahabad High Court while discharging the order of a Magistrate calling upon a witness to show cause why he should not be prosecuted for perjury observed that it was very unusual for the High Court to interfere at so early a stage.²⁴ District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for proceedings and taking action upon them within the period allowed for appeal.²⁵ The High Court quashed proceedings under Ss. 107 and 110 Cr. P. Code in *Nafar Chandra Pal Chaudhury's* case.²⁶ It was held in *Choa's* case :²⁷ "We have power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution we think it is our bounden duty to interfere." On 'Quashing' see Commentary on S. 439 and S. 561-A *infra*.

A composite application under Ss. 439, 561-A and Art. 227 of the Constitution for quashing the proceedings, against dismissal of preliminary objection as to the place of trial and its confirmation by Sessions Judge is certainly maintainable before the High Court and the proceedings can be quashed in an appropriate case.²⁸

9. Interference by High Court if Lower Courts to be first moved.—It is not the practice of the Calcutta High Court to entertain applications in revision against an order made by a Magistrate (in a proceeding under S. 133) unless the party has first moved the Sessions Judge under S. 435 and asked him to exercise his powers under S. 438.²⁹ The Nagpur Court follows the same practice.³⁰ The Allahabad Court also endorses the same view.³¹ The jurisdiction of the High Court and Sessions Judge under S. 435 is concurrent and in such cases, the aggrieved party has first to seek his

21. *Peary Lal v. Sagar Mal*, (1926) 25 ALJ 42.

22. *Ahmadur Rahman v. Dwipchand Chowdhury*, (1927) 55 C 765 : 32 CWN 164 : AIR (1928) C 281.

23. *In re S. Kuppuswami Aiyer*, (1915) 39 M 561 : (1915) MWN 365 : 28 MLJ 505 : 16 Cr LJ 477.

24. *Chadha*, (1916) 14 ALJ 851 : 18 Cr LJ 46 : 36 IC 878.

25. *Lakanaw*, (1916) UBR 124 : 10 Bur LT 166 : 18 Cr LJ 355.

26. (1923) 38 CLJ 198 : 28 CWN 23 ; *Chandi Pershad v. Abdur Rahman*, (1894) 22 C 131 (138) leading case.

27. *Choa Lal Dass v. Anant Pershad Missir*, (1897) 25 C 233 (235) ; see also *Jagat*

Chandra Mazumder, (1899) 26 C 786 (791) : 3 CWN 491 (494) ; *Vilayet Khanum v. Meher Ali*, (1874) 24 WR (Cr) 4.

28. *Hiralal Chaudhury*, A 1956 A 619 : 1956 Cr LJ 1165.

29. *Rashbehari v. Phani Bhusan*, (1920) 48 C 534 : 22 Cr LJ 650 : 63 IC 410 ; *Abdus Sobhan*, (1909) 36 C 643 (644) : 13 CWN 753 (754) ; see contra—*Peary Lal Mullick v. Surendra Krishna Mitter*, (1919) 23 CWN 774.

30. *Chinai*, AIR (1919) N 13 (2).

31. *Sharif Ahmad*, (1921) 43 A 497 following *Mansur Husain*, (1919) 41 A 587 ; *Md. Hashim*, 55 A 261 ; *Shailabala Devi*, 56 A 158 : 34 Cr LJ 1115 (FB).

remedy in the Subordinate Court.³² The Bombay High Court in *Chagan Dayaram*³³ held the same view.

Ordinarily the Andhra High Court will not entertain a revision unless the aggrieved party approached an inferior Court in the first instance and will not deviate from that practice except on special, exceptional or extraordinary grounds. Where there are no such grounds, the mere fact that a revision has been admitted by the High Court cannot make any difference in the enforcement of the rule of practice.^{33a}

Although it is the *practice* of the High Court not to entertain any application under S. 439 Cr. P. Code direct, the High Court has got powers to act under S. 435 as would appear from the opening words of sub-sec. (1). The Calcutta High Court does not insist on following the practice of moving the lower Court in the first instance.

10. Sub-section (1). The High Court, Sessions Judge, District Magistrate and any Sub-Divisional Magistrate empowered by the State Government—are the Courts authorised to act under this section.

High Court, Sessions Judge and District Magistrate have concurrent jurisdiction.—High Court, Sessions Judge and District Magistrate have concurrent jurisdiction vide S. 436. The Sessions Judge or the District Magistrate may examine the record of any case under S. 437 and order commitment of an accused person improperly discharged and under S. 438 report to High Court for orders with a recommendation that the order be set aside or the sentence be reversed.

Sub-Divisional Magistrates—in Madras and the Punjab have all been empowered to act under this section.³⁴

11. 'The District Magistrate'.—All Magistrates in the district are inferior to the District Magistrates. But the explanation newly added makes all Magistrates including District Magistrates 'inferior Court' to the Sessions Court.

12. 'Inferior Criminal Court'.—Revisional Jurisdiction under S. 435 applies only to "an inferior Criminal Court."³⁵ The use of the word 'Criminal' shews that the section cannot apply to an order under S. 476 relating to Civil or Revenue Courts. When the District Magistrate convicts or acquits an accused in a case tried by him or passes an order in appeal from a subordinate Court's judgment or order, his order can be revised by the Sessions Judge; but when he passes an order under Ss. 436 and 437 or makes a report to the High Court under S. 438, the Sessions Judge has no jurisdiction to revise his order; the High Court alone can do this.³⁶ It may be pointed out that in view of the deletion of S. 407 and the provision for appeal from the order of a second or third class Magistrate before an Assistant Sessions Judge by the amendment of S. 408 by Act 26 of 1955 the observation in³⁶ to the effect that when a District Magistrate passes an order on appeal is evidently a slip.

32. *Bipin Behari Mukherji*, (1918) 3 PLJ 302 : 19 Gr LJ 580 : 45 IC 397 ; *Chohat Ahir v. Suraj Singh*, A 1940 P 299 : 41 Cr LJ 257 (but after Rule issued, application should be disposed of on merits) see *R. N. Basu*, 53 A 857.

33. 14 B 331.

33a. *Sant Ramo*, A 1960 A 636 ; *Veera Ramayya v. Udayagiri Venkata Seshavatha-*

ram, A 1956 AP 97 : 1956 Cr LJ 571 (2) *Alapati Sriramamurty*, A 1959 AP 377 : 1959 Cr LJ 822 (FB).

34. Mad Gazette 1883, p. 13 ; Punj Gazette 1883, p. 52.

35. *In re Dalsukhram*, (1907) 9 Bom LR 1347.

36. *Faqueer Ahmed*, (1959) ALJ 351.

Additional District Magistrate in exercise of original jurisdiction, is a Court inferior to that of a District Magistrate within the meaning of this section, but if he has called for the record under this section and made report under S. 438, District Magistrate will not be able to exercise his power under S. 435 in respect of the order of the Additional District Magistrate.³⁷ One Court may be inferior to another Court without being subordinate to it.³⁸

District Registrar not subordinate to High Court.—A District Registrar is not an inferior Criminal Court subordinate to the High Court either on the Civil, Criminal or Revenue side and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for perjury.³⁹

Under the provisions of S. 435 the High Court has no power to call for and examine the Record of a Divisional Officer *hearing appeals under the Income-tax Act* which is a Revenue Court acting under S. 476.⁴⁰

Magistrate with special powers—whether inferior Court.—Under S. 17 (1) a Magistrate invested with special powers under S. 30 if not a District Magistrate is subordinate to the latter, in the same way and to the same extent as any other Magistrate of the first class.⁴¹

Court of Additional District Magistrate if 'inferior' to that of District Magistrate.—It was held under the old Code by the Lower Burma Chief Court that the Additional District Magistrate is not an 'inferior Court' to that of the District Magistrate.⁴² This decision is no longer good law in view of the amendment of S. 10 by the insertion of sub-sec. (3).

The High Court in Sessions exercising original Criminal jurisdiction is inferior to High Court in its appellate side as appeal lies from the former to the latter Court and consequently revision lies.⁴³ A District Magistrate while exercising revisional jurisdiction is inferior to the Sessions Judge within the meaning of the Explanation to sub-sec. (1) of this section.⁴⁴ A Special Magistrate is inferior to the Court of the Sessions Judge within the meaning of S. 435.⁴⁵ So also is a Municipal Magistrate, Calcutta⁴⁶ or a Court of Presidency Magistrate.⁴⁷ A Panchayat under the Bihar and Orissa Village Administration Act⁴⁸ is subordinate to High Court.

The following are not inferior Criminal Courts :—

A Magistrate passing an order under S. 247 (1) C. P. Municipality Act,⁴⁹ authority appointed under S. 15, Payment of Wages Act,⁵⁰ District

37. *Thakur Jaikirit Singh v. Sobhan Raj*, A 1959 Raj 63 : 1959 Cr LJ 379.

38. *Thakur Jai Kirit Singh v. Sobhan Raj*, A 1958 Raj 63 : 1958 Cr LJ 379 ; *Sunil Ch. Roy*, A 1954 A 305 ; *Parbati*, A 1952 C 835.

39. *Udit Narain Dube*, (1912) 35 A 109 : 11 A LJ 55 : 18 IC 896 ; *In re Ardeshir Kavasji Karanjavalle*, (1912) 14 Bom LR 970 : 13 Cr LJ 845 : 18 IC 717 ; *Thakurdas*, (1913) 15 Cr LJ 217 : 22 IC 1001 : 17 OC 25.

40. *In re Nataraja Aiyar*, 36 M 72 : 23 MLJ 393 : (1912) MWN 1012 : 13 Cr LJ 723 : see also *Ganga Sahai*, (1913) 15 Cr LJ 2 : 22 IC 146 (Oudh).

41. *Yado*, (1916) 12 NLR 94 : 17 Cr LJ 245 : 34 IC 965.

42. *Nawab Ali*, (1918) 12 Bur LT 56 : 20 Cr LJ 449 : 51 IC 478 ; see contra—

Abdul Karim, (1907) 25 PR 1908 : 9 Cr LJ 104.

43. *Krishnaji*, A 1949 B 29 : 49 Cr LJ 593.

44. *Sheoraj*, A 1948 A 46 ; *Priyagopal*, 9 B 100 ; *Darbarilal*, A 1925 A 591 ; *Har Karan Singh v. Harnam Singh*, A 1916 Oudh 136.

45. *Manmatha Nath*, 50 C 851 : 34 Cr LJ 579.

46. *Abdoola Haroon*, A 1950 C 36 : 51 Cr LJ 346 ; *Ramgopal Goenka*, 29 CWN 898 ; *Corporation of Calcutta v. Bhupal Chandra*, 54 CWN 438 : A 1950 C 421.

47. *Malik*, 36 C 994.

48. *Gani Mahton*, A 1941 P 169 : 42 Cr LJ 434.

49. *Mt. Mithan v. Municipal Board of Orai and State of U. P.*, A 1956 A 351.

50. *Beni Bahadur Singh*, 1957 Cr LJ 268 (All).

Magistrate exercising jurisdiction under Election rules,⁵¹ the Secretary to the State Government exercising powers under the Goonda Act,⁵² District Magistrate entertaining an appeal under S. 160 of U. P. Municipality Act.⁵³

13. 'Situate within the local limits of its or his jurisdiction.'—“The word ‘situate’ mean fixed or located ; when applied to a Court it must be taken to refer to the place where the Court ordinarily sits.”⁵⁴

The expression ‘inferior Criminal Court situate within the Local limits of its or his jurisdiction’ in S. 435 means an inferior Court exercising jurisdiction within the local limits of its or his jurisdiction.⁵⁵

14. 'For the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court.'—These words enlarge the scope of the District Magistrate's inquiry.⁵⁶ The words “finding, sentence or order” in S. 435 (1) are three separate matters and are separated by the disjunctive conjunction ‘or’.⁵⁷ The word ‘finding’ in S. 435 includes a conviction or an acquittal. The word ‘sentence’ means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. ‘Order’ covers command or directions that something shall be done, discontinued or suffered but it does not include ‘sentence’ and ‘finding’. The word ‘proceedings’ is wider than ‘judicial proceedings.’ The words ‘finding’ ‘sentence’ ‘order’ and ‘proceedings’ cover everything which may be remedied in revision.⁵⁸

15. Power of High Court to interfere on facts.—A finding of fact based on no evidence or inadmissible evidence is liable to be set aside on revision.⁵⁹ The Bombay High Court has held “But it has been the settled practice of this Court to refuse to interfere in the exercise of our revisional jurisdiction in regard to findings of fact, except on very exceptional grounds, such as a mis-statement of the evidence of the lower Court or the misconstruction of documents, or the placing by that Court of the *onus* of proof on the accused contrary to the law of evidence”.⁶⁰ “We have power in revision, if we think right to consider the whole evidence”.⁶¹ A High Court ought only to interfere in revision with findings of fact when it is demonstrated very clearly that they are wrong.⁶² In the following cases⁶³ it has been held that the High Court cannot question a finding of fact if there is evidence to support it or unless there is any error apparent on the face of the record or that the accused has been prejudiced by the action and procedure of the Courts below.

51. *Madusudhan Lal*, A 1929 A 931.

52. *Bhimraj Bania*, 51 G 460 : 26 Cr LJ 20.

53. *Municipal Board Banaras v. Ramdhan Gupta*, A1953 A 281 : 54 Cr LJ 1105.

54. *Valia Ambu Poduval*, (1906) 30 M 136 (137) : 16 MLJ 444 : 4 Cr LJ 443.

55. *Lalla Prosad Saxena*, A 1952 A 70 : 1952 Cr LJ 199.

56. *Dorabji Hormasji*, (1885) 10 B 131 (139)

57. *Satnarain Lal*, A 1940 A 426 : 41 Cr LJ 876.

58. *per* Khandkar J, in *Mahabir Singh*, A 1944 G 17 : 45 Cr LJ 309 (FB).

59. *Arura*, (1914) 94 PLR 1915 : 16 Cr LJ 202 ; *per* Walsh, J., in *Umed Singh*, (1923) 46 A 64 : 21 ALJ 765.

60. *per* Chandravarkar, J., in *Ganesh Bala-*

vant Modak, (1909) 34 B 378 (380) : 12 Bom LR 21 : 11 Cr LJ 180 ; see *Per Beaman, J.* in *Umakant Balwant*, (1907) 9 Bom LR 706 (709) : 6 Cr LJ 70.

61. *Reid v. Richardson*, (1887) 14 C 361 (363) and *Ambler v. Pushong*, (1885) 11 C 365 followed in *Katras Jherriah Coal Co. v. Shib Krishta Daw*, (1894) 22 C 297 (305).

62. *per* Beachcroft, J., in *Duli Chandra Lal*, (1917) 18 Cr LJ 437 : 38 IC 997 (C).

63. *Lal Singh*, (1914) 123 PLR 1914 : 15 Cr LJ 521 ; *Maru Thayal v. Apparupillai*, (1922) 24 Cr LJ 476 : AIR (1923) M 237 (2) ; *Surayabhan*, (1922) 24 Cr LJ 203 : AIR (1923) N 155.

See also Commentary on S. 439 *infra*.

16. 'And may, when calling for such record direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record'.—These words are new in the Code of 1923. The Legislature has now empowered the Courts calling for records from inferior Courts to suspend sentence or grant bail.

17. Record of any proceedings—meaning of.—The provisions in this section are to be read and interpreted in the light of the other provisions of the Code, when they refer to the 'record of any proceedings', they mean the record of any proceedings as contemplated by the Code.⁶⁴

18. Explanation.—Is new. See 'Effect of Amendment' noted *supra*.

All Magistrates whether exercising original or appellate Jurisdiction.—*i. e.* the District Magistrate or the Magistrate of the first class empowered to hear appeals under S. 407 (2) *supra* shall be deemed to be 'inferior' to the Sessions Judge for the purpose of this section and of S. 437.

19. Sub-section (2).—When a subordinate Magistrate of the 1st class invested with powers under S. 30 Cr. P. C. makes an order of discharge in a case which under S. 11 of the Code read with S. 28 or 29 thereof is triable exclusively by the Court of Session, such order is open to revision by the District Magistrate.⁶⁵

20. Sub-section (3)—having been omitted by S. 116 of Act (XVIII of 1923) the orders under Ss. 143, 144, Chapter XII and S. 176, do fall within the purview of this section.

See Commentary *supra* "Effect of Amendment". The High Court has now got the power to revise proceedings of a Magistrate under S. 176, either under S. 435 or S. 439, apart from its inherent powers under S. 561A of the Code.⁶⁶

Syed Reza Ali opposed the inclusion of proceedings under S. 144 within the revisional powers under S. 435. The Legislature although by omitting sub-sec. (3) has given the High Courts wider powers of revision in cases under S. 144 and the other sections mentioned in the unamended sub-sec. (3), the order under S. 144 which expires within a period of two months dies a natural death before it reaches the High Courts through the District Magistrates or the Sessions Judges. The High Courts do not ordinarily interfere with an order under S. 144 after the efflux of time which is normally taken up by the subordinate Courts of revision although the High Courts have powers to interfere with an order under S. 144 even after the lapse of two months⁶⁷, that power is exercised only when the petitioner has been ordered

64. *Mithan v. Municipal Board of Orai and State of U. P.*, A 1956 A 351 : 1956 Cr LJ 671.

65. *Yado*, (1916) 12 NLR 94 : 34 IC 965.

66. *In re Laxminarayan Timmanna Karkix*, (1928) 30 Bom LR 1050 : AIR (1928) B 390 ; *Rashid Allidina v. Jewandas Khemji*, 46 CWN 136 : 44 Cr LJ 288 ; *Editor Tribune*, A 1942 L 171 ; *Thakin*

Ba Mong, A 1934 R 124 ; *Kunja Mondal v. Sarju Ram Marwari*, A 1939 P 206 : 40 Cr LJ 538 ; *Chinnapara Adigari v. Desai Adigadu*, A 1929 M 847.

67. *Muthu Kumarswami Nadar v. Mahomed Rowther*, (1921) 42 MLJ 352 : (1922) MWN 177 : 23 Cr LJ 404 : AIR (1922) M 76.

to be prosecuted under S. 188 I. P. C. for the alleged disobedience to the order under S. 144 complained of.⁶⁸

The High Court may now consider not merely the legality but the propriety of the orders under Ss. 144 and 145,⁶⁹ but cannot pass any interim orders in proceedings under S. 145.⁷⁰ An order directing a party to be put in possession is not a sentence in any sense of the term. The Sessions Judge has no jurisdiction under S. 435 to suspend the order for possession.⁷¹ In view of the insertions of the words 'or orders' before the words 'be suspended' by Act 39 of 1956, the view in⁷¹ has been modified and cannot be treated as good law. It has been held in⁷² that in view of the amendment of Act 1956 the Additional Sessions Judge has power to direct that the execution of any sentence or order be suspended, if it arises out of proceedings under S. 145.

21. Sub-section (4).—This clause was enacted for the first time in the Code of 1898.

Co-ordinate Jurisdiction of the Sessions Judge and the District Magistrate.—This clause does not militate with the *Explanation* to sub-sec. (1) which makes the Court of the District Magistrate also 'inferior' to that of the Sessions Judge for the purpose of this section and of S. 437. The construction of sub-sec. (4) clearly is that where either the Sessions Judge or the District Magistrate had an application in revision in the same matter before them moved by either party, the other local District Court would have no jurisdiction to hear a further application in the same matter.⁷³ But the Sessions Judge can entertain a revision against the order of the District Magistrate and make a reference to the High Court under S. 438 for setting it aside.⁷⁴

22. 'No further application'.—Under this clause it is certainly not competent to the District Magistrate to entertain an application for the *commitment* being ordered when the Sessions Judge had refused such an order,⁷⁵ nor is it competent to the Sessions Judge to order *further enquiry* against the order of a Deputy Commissioner.⁷⁶ The words "further application" in sub-sec. (4) mean any other application in respect of the order in question of the inferior criminal Court.⁷⁷ *Darbari's case*⁷⁸ having been decided before sub-sec. (4) was enacted and the decision⁷⁹, not containing any discussion as to the course adopted by the Sessions Judge, need not be considered.

23. Revision on the ground of sentence.—Where a revision is admitted by the Application Judge only on the ground of sentence, the Judge hearing the revision is not bound by it and has unrestricted right to hear the same on the merits.⁸⁰

436. Power to order inquiry.—On examining any record under Section 435 or otherwise, the High Court or the Sessions

68. *Chandra Kantha Kanjilal*, (1916) 20 CWN 981 : 17 Cr LJ 464 : 36 IC 144; *Chandra Nath Mulherji v. East Indian Railway Co.*, (1918) 23 CWN 145 : 28 CLJ 483 : 19 Cr LJ 951 : 47 IC 803; *Firardin Mohammad*, (1921) 34 CLJ 578 : 23 Cr LJ 376 : 67 IC 200 (1); *In re Ardeshti Phiroj Shaw*, A 1940 B 42 : 4 Cr LJ 319.

69. *F. D. C. Sumner v. Jogendra Kumar*, A 1933 C 348 : 34 Cr LJ 334.

70. *Ram Aulor v. Udaibir Singh*, A 1953 A 498 : 1953 Cr LJ 1167.

71. *Mukutdhari Shao v. Ajodhya Sahao*, 53 GWN 322 : A 1949 C 241.

72. *Sitabai v. Motilal*, 1959 Nag LJ (Notes) 35.

73. *Md. Hussain v. Mt. Nanhi*, A 1930 A 257 : 31 Cr LJ 995; *Siddik v. Chaukuri Khansama*, 17 CWN 451 : 14 Cr LJ 123; *Karpura Sundaram Pillai*, 17 MLJ 153 : 5 Cr LJ 182.

74. *Sheoraj*, A 1948 A 46.

75. *Kalimothu*, (1902) 26 M 477 (478) : 2 Weir 542.

76. *Shaik Siddik v. Sheikh Chakauri Khansama*, (1913) 17 CWN 451 : 17 CLJ 608.

77. *Waryans*, (1912) 10 PR 1912 Cr : 117 PLR 1913 : 18 IC 886.

78. *Darbari Mander v. Jafer Lal*, 22 C 573.

79. *Bidhu Chandalin v. Mati Sheikh Mondal*, (1900) 28 G 102.

80. *Dulla*, A 1958 A 198 : 1958 Cr LJ 316.

Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (3) of Section 204, or into the case of any person accused of an offence who has been discharged :

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

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1. Earlier Law.—This section corresponds to S. 435 of the Code of 1861 and S. 298 of the Code of 1872. S. 437 of the Code of 1882 went beyond S. 298 of the Code of 1872 authorising the Court of Session or District Magistrate to direct further inquiry to be made “into the case of any accused person who has been discharged” which, as the case-law stood before the Code of 1872 was enacted, could be ordered by the High Court only. S. 437 of the Code of 1898 to which this section corresponds was similarly worded as that of the Code of 1882 with this modification that the word “*Sessions Judge*” was substituted for the word “*Court of Session*” and the words “*or sub-sec. (3) of Section 204*” were inserted in the Code of 1898. Hence the decisions on the Codes of 1861 and 1872 on the power of the Court to hold an inquiry will be read subject to the above modification.

2. Legislative Changes.—The words ‘*person accused of an offence*’ had been substituted by S. 117 of Act XVIII of 1923 for the words “*accused person*” occurring in the old S. 437. The *proviso* has been added by the said Act. This section was formerly S. 437.

3. State Amendments—

(1) **Bombay.**—After the words ‘*Sessions Judge*’, the words ‘*other than the Sessions Judge of the Court of Session for Greater Bombay*’ were added by Bombay Act 32 of 1948,

and the section was renumbered as sub-sec. (1) thereof and the words "the Judicial Magistrate to make" were substituted in sub-sec. (1) so renumbered for the words "the District Magistrate by himself... any subordinate Magistrate to make" by Bombay Act 23 of 1951. After sub-sec. (1) so renumbered, the following new sub-section was added by Bombay Act 23 of 1951 as further amended by Bombay Act 39 of 1955 namely, "(2) on examining any record under S. 435 or otherwise the District Magistrate may direct any Sub-Divisional Magistrate or any other executive Magistrate subordinate to him to make, and the Sub-Divisional Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any proceedings in which an order of release or discharge has been made under S. 119: Provided that no District Magistrate shall make any direction under this section for further inquiry into the case of any person unless such person has had an opportunity of showing cause why such direction should not be made."

(2) **Saurashtra.**—Section 436 was renumbered as sub-sec. (1) and the amendment is the same as the Bombay amendment by Bombay Act 23 of 1951 and sub-sec. (2) is the same as in Bombay as inserted by Bombay Act 23 of 1951 amended by Bombay Act 39 of 1955 subject to the modification that the words 'an order of release or discharge has been made under S. 119 shall be omitted' *vide* Saurashtra Act 4 of 1952.

4. Statement of Objects and Reasons.—"There have been different rulings as to whether the expression 'accused person' in S. 437 means any person accused of an offence and it is now made clear that it does"—Cl. 115 of Bill III of 1914.

5. Report of the Joint Committee (1922).—"We have added a proviso to the present S. 437 to give effect to the rule laid down by the Courts that a fresh inquiry should not be made into the case of a person who has been discharged unless he has had an opportunity of showing cause."

6. Effect of the 1923 Amendment.—The substitution of the words "person accused of an offence" for the words "any accused person" has superseded the following rulings⁸¹ under the old Code (S. 437) which held *the section applicable to proceedings under Chapter VIII* as "Persons proceeded against under Chapter VIII of the Code are persons against whom there is an accusation in the ordinary acceptation of the word." Hence it does not apply to a proceeding under S. 488 also.

The amendment, it seems, has restored the following rulings⁸² which held that S. 436 (S. 437) did not apply to proceedings under Chapter VIII and *Hurmoth* and other cases⁸³ which held that (old) S. 437 did not give authority to order a further inquiry into proceedings under S. 145.

The effect of the *proviso* added by the Amending Act XVIII of 1923 is that notice should statutorily now be given to a person who has been discharged before proceedings under S. 436 can be taken. See *Manika Padaycchi*.⁸⁴ This amendment has in effect modified the view in *Haridas's* case and other cases⁸⁵ which held that it is not absolutely necessary in point of law to give notice to an accused before an order for "further inquiry" is

81. *Baba Yeshwant*, (1911) 35 B 401 (403) : 13 Bom LR 505 : 12 Cr LJ 430 ; *Gokha Singji*, (1905) 149 PLR 1905 : 33 PR 1905 ; *Mona Puna*, (1892) 16 B 661 ; *Jhoja Singh*, (1896) 23 C 493 ; *Mutsuddi Lal*, (1898) 21 A 107 ; *Hopcroft*, (1908) 36 C 163 ; *Kharga*, (1913) 36 A 147 : 12 ALJ 167 : 15 Cr LJ 39 ; *Deoraj Singh*, (1919) 20 Cr LJ 704 (A) : 52 IC 672.

82. *Velu Jayi v. Chidambaravelu*, (1909) 33 M 85 (87) ; *Muhammad Khan*, (1905) PR 102 ; *Dayanath Talukdar*, (1905) 33 C 8.

83. *Huronath Chowdhury v. Rajendra Chander Roy*, (1871) 15 WR (Gr) 1 :

see *Chathu Rai v. Naranjan Pal*, (1893) 20 C 729—dissented from in *Baidya Nath Majumder v. Nibaran Chandra Ghose*, (1902) 29 C 242.

84. (1925) 48 M 874 (876).

85. *Haridas Sanyal v. Saritullah*, (1888) 15 C 608 (FB) ; *Wahed Ali*, (1905) 32 C 1038 ; *Kallu*, (1922) 4 LLJ 411 : 23 Cr LJ 693 ; *Dorabji Hurmasji*, (1885) 10 B 131 (143), followed in *Pandurang*, (1911) 3 Bom LR 703 ; *Chotu*, 9 A 52 (59) (FB) ; *Abdul Latif Khan*, (1918) 40 A 416 ; *Sagar Mall*, (1921) 20 ALJ 91 ; *Amber Ali v. Amjad Ali*, (1911) 39 C 238 ; *Abraham Adam Ishe*, (1917) 19 Bom LR 906.

made under S. 437, but on general principle of criminal jurisdiction no order prejudicially affecting an accused should be passed without giving him an opportunity of being heard. That principle has been recognised by the *statutory provision of notice*. The view taken in *Algirisamy Naidu v. Balkrishna Mudaliar* and other cases⁸⁶ that such order was improper though not illegal, has also been modified. But the Proviso having provided for notice to be statutorily given to an accused person discharged, *notice* is not necessary for directing a further inquiry into a complaint dismissed under S. 203 or 204 (3). It has to be kept in view that till the process is issued the person complained against is not an accused person⁸⁷ so there is no question of his being prejudiced in the absence of a notice. But it has been held in *Jogesh Chandra Sen v. Nikunja Behari Chowdhury*⁸⁸ that an accused shall be given an opportunity of being heard when he was allowed to be present from the commencement of the proceedings taken at the instance of the complainant.

The following decisions⁸⁹ which held that a *notice* was unnecessary in cases of complaints dismissed under S. 203 are still good law.

7. Nature of further inquiry that may be directed.—Following the *dictum* and authority of *Haridas Sanyal's* case⁹⁰ Greaves and Duval, JJ., have held in *Bachu Mia v. Anwar Nabi*⁹¹ that the Sessions Judge when he orders further enquiry can only order an inquiry of the same nature as the Magistrate has already held.

8. Application of the section.—*It does not apply to proceedings under Ch. VIII or Ch. XII.*

See Commentary *supra* under the heading "Effect of the Amendment."

Applies to discharge under Section 251A (2) and Section 253.—In view of the amendment of the Code in 1955 which has inserted S. 251A and provided in sub-sec. (2) of that section for a discharge of the accused in cases instituted on a police report, the present section applies to cases of discharge both under S. 251A (2) or under S. 253. For the difference in procedure between S. 251A (2) and S. 253 see notes under S. 251A *supra*.

Does the section apply to orders of discharge of Presidency Magistrates?—The High Court has no power under S. 437 (present S. 436) to order further enquiry in a case of discharge of a Presidency Magistrate, but it may do so under S. 15 of the Charter Act (S. 107 of the Government of India Act 1915).⁹² Now this view is not correct.

A full bench of the Calcutta High Court (Ghose, J. dissenting) has held that a Presidency Magistrate is competent to rehear a warrant-case, in which he has discharged the accused.⁹³

Section does not apply to a discharge in security proceedings or S. 145 or S. 133.—A Magistrate has no jurisdiction to revise the case of a person who has

86. (1902) 26 41 (42); *Desarivenkata v. Reddy Sanjeevi Reddy*, (1914) 16 MLT 288 : 15 Cr LJ 619.

87. 25 MLJ 1.

88. (1922) 27 CWN 552 where *Haridas Sanyal*, (1888) 15 C 608 (FB) was distinguished.

89. *Muhammad Mutagir*, (1907) 5 ALJ 74 : 7 Cr LJ 157; *Liaquat Hussain*, (1917) 40 A 138 : 16 ALJ 30 : 19 Cr LJ 206; *Fazerzey v. Moonsab Maub*, (1920) 32

CLJ 44; *Aingan v. Ram Pribhau*, 35 A 78; *Sheo Narain v. Ram Pertap Rai*, 4 PLJ 456 : 20 Cr LJ 843; *Girish Chandra Ghose*, 29 C 457 : 6 CWN 638.

90. (1888) 15 C 608 (FB).

91. (1924) 30 CWN 312.

92. *Debi Bux Shroff*, (1906) 33 C 1282 (1283); see contra *Malik Pratap Singh v. Khan Mahmed*, (1909) 11 GLJ 50.

93. *Dwarka Nath Mundal*, (1920) 28 C 652 (FB).

been called upon to give security and is discharged,⁹⁴ or where an application under S. 145 has been rejected.⁹⁵ Proceedings under S. 133 and Ch. X are not covered by S. 436.⁹⁶

9. Discharge no bar to trial on a fresh complaint.—It is competent to a Magistrate who has tried and discharged an accused person on particular charges to again inquire into the same charges on a second complaint.⁹⁷

10. Dismissal of complaint, no bar to Magistrate rehearing complaint.—The Madras High Court by a Full Bench decision in *Chinna Kaliappa Gounden*⁹⁸ approved and followed *Mir Ahmad Hossein v. Mahomed Askari*⁹⁹ and held that the dismissal of a complaint under S. 203 did not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal had not been set aside by a competent authority.

Dismissal of Complaint under Section 203 Cr. P. Code is no bar to Magistrate rehearing complaint.—There is no provision of the Code which declares that the dismissal of a complaint under S. 203 shall bar the Magistrate's jurisdiction to bring the offender to justice. The question was examined at great length by the Full Bench of the Calcutta High Court in the case of *Dwarkanath Mondal v. Beni Madhab Bannerjee*, 28 C 652 (seven Judges) as regards Presidency Magistrates and in the case of *Mir Ahmad Hossain v. Mahomed Askari*, 29 C 726 (five Judges) as regards Mofussil Magistrates, and in those it was decided (Ghose, J., in each case dissenting) that dismissal by a Magistrate under S. 203 was no bar to the rehearing by the same Magistrate. They did not decide whether it would bar a rehearing by a different Magistrate.¹

A Magistrate has jurisdiction to make enquiry in respect of the second complaint on the same charge.^{1a} The Supreme Court has held that the dismissal of the first complaint is no bar to the entertainment of the second complaint. If however the decision on the first complaint has been given on a full consideration of the case of the complainant, he cannot be given another opportunity.²

Complaint dismissed under S. 203 after enquiry under S. 202.—In directing a further inquiry at this stage the Sessions Judge cannot direct the accused to be summoned; he can only order a full and proper enquiry under S. 202 according to law.^{2a}

11. Order of discharge.—The power to order further inquiry into a case of any accused person who has been discharged was first conferred by the Code of 1882.

94. *Nem Ahir*, A 1928 A 735 : 30 Cr LJ 63; *Mg. Than*, 2 R 30 : 25 Cr LJ 1142; *Bashan Singh*, 46 A 235 : 25 Cr LJ 467; *Kippa Ram v. Durga Das*, A 1931 L 185 : 32 Cr LJ 21.

95. *Maung San E*, A 1925 R 202 : 30 Cr LJ 709.

96. *Prithipal*, A 1925 Oudh 736 : 26 Cr LJ 1251.

97. *W. C. Keymer*, (1913) 36 A 53.

98. (1905) 29 M 126 (FB).

99. 29 C 726 (FB).

1. *Chinna Kallappa Gounden*, (1905) 29 M 126 (145) : 16 MLJ 79 : 1 MLT 31 :

3 Cr LJ 274.

1a. *Keymer*, (1913) 36 A 53.

2. *Pramatha Nath Talukdar v. S. R. Sarkar*, A 1962 SC 876 where *Dwarkanath Mandal v. Beni Madhab Banerjee*, 28 C 652 (FB) and *Mir Ahmed Hussain v. Mohamed Askari*, 29 C 736 (FB) overruled and *Ramnarain v. Panachand Jain*, A 1949 P 256 and *Hansepan v. Anand*, A 1949 B 384, approved.

2a. *Bechu Mia v. Anwar Nabi*, (1924) 30 CWN 312 (313); *Brijnath Sahai v. Babulal*, 1957 Cr LJ 290 (Pat).

Meaning of discharge.—The word ‘discharged’ in S. 437 must be read as equivalent to ‘discharged within the meaning of Ss. 209, 253 and 259 of the Code’ and S. 437 (436) cannot be held to apply to orders of discharge under S. 119 of the Code where ‘discharge’ is merely a ‘permission to depart’.³ The proceeding preceding an order of discharge under subsec. (2) of S. 251A is not a trial in the strict sense but is only in the nature of an inquiry; on that view the District Magistrate has jurisdiction under this section to set aside a discharge under S. 251 (2).⁴ There is virtually no difference between a discharge under Ss. 251A and 253 (2). A Sessions Judge can direct a further enquiry.⁵

12. Of any person accused of an offence who has been discharged.—These words have been substituted for the words “an accused person who has been discharged”. The effect of the amendment is that it has superseded the view in *Kharga*⁶ and *Ebrahim*⁷ which held that this section applied to an order under S. 119, *vide Maung Than*.⁸

The expression “person who has been discharged” refers to a person who has been discharged under Ss. 209, 253 or 259.⁹

See Ss. 119, 209-213 (2), 253.

13. Wrongful dismissal of complaint.—The Calcutta High Court directed further inquiry into a complaint dismissed on the report of the President of Panchayat without giving the petitioner an opportunity to substantiate his case.¹⁰ It may be pointed out that the High Court interferes and directs further enquiry where the complainant has not been examined or the reasons for dismissal have not been briefly recorded.

See Commentary on S. 203 *supra*.

Section 437 (present S. 436) contemplates that where a complaint has in fact been dismissed under S. 203 the revisional jurisdiction of the District Magistrate can be invoked, irrespective of the consideration whether the dismissal is legal or illegal.¹¹ In a case where the complaint has been summarily dismissed under S. 203 without an enquiry, the direction of further enquiry may well mean that a judicial enquiry should be held before the complaint is dismissed.¹² Where a notice to show cause why the complainant should not be prosecuted for filing a false complaint was issued and the complainant filed a protest petition against the police report and also filed a show cause petition, the Magistrate found that the evidence in support of the complaint to police was of a very weak character. But the Magistrate dropped the proceedings against him. In an appeal filed under S. 476-A the Appellate Court directed further inquiry under S. 436 treating it as revision. *Held*, that the order *dropping the proceedings* was neither an order of discharge nor an order dismissing the complaint and therefore the order was without jurisdiction.¹³

3. *Velu Tayi Ammal*, (1909) 33 M 85; see also *Neus Ahir*, AIR (1928) A 755.

4. *In re Pakkisswami Pillai*, A 1962 M 142; 1962 (1) Cr LJ 439.

5. *Fakruddin*, A 1962 AP 236 overruling *Chandra Verriah*, A 1960 AP 391; (1960) Cr LJ 1064.

6. (1912) 36 A 147.

7. 2 LBR 80.

8. 2 R 30.

9. *per Devadoss, J.*, in *Appa Rao Mudaliar v. Janakiammal*, (1926) 51 MLJ 605

(FB) (609).

10. *Purno Chandra Dey v. Ambica Charan Adhikary*, (1919) 23 GWN 575; 20 Cr LJ 784; 53 IC 624.

11. *Sadhu Charan Roy v. Balai Swami*, (1917) 3 PLJ 346; 19 Cr LJ 874; 47 IC 70.

12. *Brijnath Sahai v. Babulal*, 1957 Cr LJ 290 (Patna).

13. *Rasik Lal Mondal v. Dukha Mondal*, A 1957 P 72; 1957 Cr LJ 226.

14. Further Inquiry. *Inquiry* :—See definition S. 4 (k). “Further inquiry” does not mean proceeding on the evidence already taken ; evidence or other evidence if there be any should be taken *de novo* by the Magistrate who holds the further inquiry.¹⁴ A full bench of the Allahabad High Court has held that when a Magistrate has discharged an accused person under S. 253, the High Court or Court of Session, under S. 437 has jurisdiction to direct further inquiry on the same materials and a District Magistrate may under the circumstances himself hold further inquiry by a subordinate Magistrate.¹⁵ “Further inquiry” in S. 437 (present S. 436) does not necessarily imply “additional evidence” and there may be a “further inquiry” upon the same evidence, as well as upon additional evidence, whether elicited from the same witnesses or new witnesses.¹⁶ Sessions Judges and Magistrates should, in a case where a man has been discharged, use the powers given to them by S. 437 sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of facts. Where the order of discharge is one which cannot be said to be either perverse or *prima facie* incorrect and there is no suggestion that any further evidence is forthcoming, no further inquiry should be directed under S. 437.¹⁷ While acting under S. 436 it is entirely wrong for the Magistrate to think that no further enquiry is necessary inasmuch as there is no evidence conclusively proving the guilt of the accused. The question before the Magistrate is whether there is a *prima facie* case for process to issue. S. 436 merely requires the Magistrate to see whether there is any scope for further enquiry into the matter. It does not certainly require him to pronounce finally upon the question of the credibility of the evidence.¹⁸ Under this section the Sessions Judge can only order a further inquiry but not straight-way direct a restoration of the case to the file.¹⁹ “Further inquiry” and ‘Fresh inquiry’ (S. 437) mean the same thing.²⁰ *Further inquiry* means that the Magistrate must proceed to hear the case as though process has been issued against the accused person, and try the case in accordance with the procedure laid down for the trial of a summons or warrant case.²¹ Further enquiry does not mean merely an examination of witnesses but a consideration of the evidence and the Magistrate is justified upon perusing the evidence already on record in framing a charge.²²

It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge on the ground of mis-appreciation of evidence.²³ Even mis-appreciation of the evidence made by the Trying Magistrate will not justify the setting aside of the order unless there is either irregularity or illegality in the proceedings.²⁴

15. When further enquiry should not be ordered—Further enquiry should not be ordered unless the order is manifestly perverse,²⁵ or because

14. *Ramdial*, (1912) 9 ALJ 310 : 13 Cr LJ 255 : 14 IC 607 (1).

15. *Chotu*, (1886) 9 A 52 (FB) : (1886) AWN 281.

16. *Dorabji Hormasji*, (1885) 10 B 131 (146, 147).

17. *Alam*, (1927) 49 A 879.

18. *Ananta Kr. Mondal v. Bepin Behari Naskar*, 61 CWN 524 : A 1957 C 383.

19. *Kanda Sesha Reddy v. Muthyala China Pullaiah*, A 1958 AP 595 : 1958 Cr LJ 1123.

20. *Haridas Sanyal*, 15 C 608 (619) (FB).

21. *Banshidhar*, A 1951 Ass 172 : 52 Cr LJ 1513.

22. *Harichandra Reddi*, A 1938 M 742 : 39

Cr LJ 828 ; *Haridas Sanyal*, 15 C 608 (FB) ; *Chotu*, 9 A 52 (FB) ; *Dayanand*, A 1925 A 295 ; *Sulav Chandra Das*, A 1929 C 755 : 31 Cr LJ 475 (palpable errors in the decision of lower court).

23. *P. C. Sheoprasad Renjoo*, A 1938 N 894.

24. *Bageshwar*, A 1930 N 108 : 31 Cr LJ 417.

25. *Daulat Ram*, A 1932 L 166 ; *Ghulam Nabi*, A 1927 L 815 ; *Sheocharan*, A 1926 N 117 ; *Sulav*, A 1929 C 755 ; *Parashram*, A 1933 B 158 ; *Sheoprasad Ramjas*, A 1938 N 394 : 39 Cr LJ 917 ; *Durgadas Radhakishan*, A 1934 B 48 : 35 Cr LJ 644.

the Sessions Judge holds a different view.²⁶ where accused was discharged because of complainant's persistent default in offering himself for examination and the State did not intervene in the proceedings ordering further inquiry would not be in the interests of justice.²⁷ The Sessions Judge should not override the Trying Magistrates' discretion when he has dismissed a complaint on a finding that the allegations of major offences have been falsely mixed with the complaint of minor offences.²⁸ Where an order of discharge has been made after hearing all the prosecution evidence, it should not be set aside unless it is perverse or manifestly unreasonable.²⁹ A bare possibility of disclosure of offence is not sufficient to direct further inquiry.³⁰ Further enquiry into an offence under S. 395 I. P. C. cannot be ordered when an accused is acquitted of an offence under S. 379 I. P. C.³¹ or in case of an acquittal.³²

16. Which Courts can direct further enquiry?—It is competent to the High Court, Court of Session, or District Magistrate to set aside an order of discharge passed against the weight of evidence, and to order a further enquiry.³³

It has been held by Wallis and Munro, JJ., (Sankaran Nair, J., dissenting) that the powers of interference of the High Court and the Sessions Judge or District Magistrate are co-extensive under S. 437.³⁴

Sessions Judge.—A Session Judge has the power while acting under S. 437 to direct further enquiry by a Magistrate other than the Magistrate who has discharged the accused.³⁵ Both the Sessions Judge and the District Magistrate are competent under S. 437 to order a further enquiry; but the Sessions Judge has no jurisdiction to review an order made by the District Magistrate under that section refusing a further enquiry. It is open to the Sessions Judge to refer the matter to the High Court under S. 438.³⁶

District Magistrate.—Section 437 does not limit the power of a District Magistrate to make, or order a subordinate Magistrate to make further enquiry into a case in which an order of dismissal or discharge may have been passed by a subordinate Magistrate. There is no bar to a District Magistrate making further inquiry himself into a case in which such order may have been passed by himself.³⁷

Holmwood and Sharfuddin, JJ., refused to entertain a reference in an undefended case *Emp. v. Krishnanath* on the ground that the Sessions Judge has no jurisdiction to refer the orders of a co-ordinate Court of appellate jurisdiction to the High Court for revision but see cases referred to in 11 CWN clxi where a contrary view has been held.

26. *Azizuddin R Faruqui*, A 1939 S 71 : 40 Cr LJ 494; *Jagannath*, A 1927 A 754 : 28 Cr LJ 582; *Alam*, 49 A 879 : 28 Cr LJ 601; *Kumaraswami Mudali v. Kathamal*, 1937 MWN 332.
27. *Hari Narayan*, A 1953 C 496 : 1953 Cr LJ 1163.
28. *Narayan Punjuran*, A 1944 N 318 : 46 Cr LJ 195.
29. *Durga Das Radha Kishan*, A 1934 B 48 : 35 Cr LJ 644.
30. *Ramchandra Naidu v. Manu Swamy Naidu*, A 1948 P 31 : 48 Cr LJ 152; *Valayudhan v. Raman Nair*, A 1947 M 307.
31. *Sudhir*, 59 CWN 397 : A 1955 C 406; where *Satish v. Harinath*, A 1954 C 393

- distinguished.
32. *Wahar Singh*, A 1952 A 231 (FB) *contra* *Nalla Baligadu*, A 1953 M 801 (FB); *Sheoraj*, A 1948 A 46.
33. *per* Prinsep, J., in *Haridas Sanyal*, (1885) 15 C 608 (622) (FB).
34. *Narayanswamy Naidu* (1908) 32 M 220 (FB) at p 238.
35. *Tun Win*, (1908) 4 LBR 233 (234) : 7 Cr LJ, where *Chundi Charan Bhattacharjee v. Hem Chander Banerjee*, (1883) 10 C 207 was not followed.
36. *Darbari Mander v. Jagoo Lal*, (1895) 32 C 573 (578).
37. *Bidhu Chandolini v. Mati Sheikh Mondal*, (1900) 28 C 102.

All that a District Magistrate can do under S. 437 is to direct further enquiry leaving it entirely to the inquiring Magistrate to determine whether or not the evidence justified the accused being charged and put on his trial.³⁸

Deputy Magistrate.—A Deputy Magistrate placed in charge of current duties of the District Magistrate's office is not thereby vested with jurisdiction under S. 437.³⁹

17. Who may be directed to make further enquiry.—A Full Bench of the Allahabad High Court has held that a Magistrate of the first class is within the meaning of S. 437 (present S. 436) "subordinate" to the Magistrate of the District, who is therefore competent to call for the record of the former, and to deal with it under S. 437.⁴⁰

District Magistrate.—A Full Bench of the Calcutta High Court has held that a Magistrate of a District is competent under S. 435 to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.⁴¹ "The Legislature appears to have contemplated that the Magistrate of the District should exercise a discretion as to the selection of any Magistrate subordinate to him and this discretion seems to have been vested in the District Magistrate, and not in the Sessions Judge."⁴²

18. Proviso—is new and was introduced by S. 117 of Act XVIII of 1923. See 'Effect of Amendment', sub-heading 'Notice'.

Notice to person discharged.—The direction in the proviso is mandatory and not directory.⁴³

Complaint dismissed under S. 203.—Proviso does not apply.⁴⁴ See "Effect of the Amendment".

19. Guiding Principles for Further Enquiry.—Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available, which has not been taken and which would support a charge for that offence.⁴⁵

In a case in which the Sessions Judge reverses the order of the Magistrate discharging an accused person the Sessions Judge should give reasons.⁴⁶

38. *Gajan Khan*, (1900) 2 Bom LR 586 (588).

39. *Ramanand Mahton v. Koylash Mahton*, (1885) 11 C 236.

40. *Laskari*, (1885) 7 A 853 (FB) : (1885) AWN 257.

41. *Opendra Nath Ghose v. Dukhini Bewa*, (1886) 12 C 473 (FB).

42. *per Field, J.*, in *Chundi Churan Bhattacharjee v. Hem Chunder Banerjee*, (1883) 10 C 207 (209).

43. *Brij Kishore Ghose v. Gopal Rai*, 11 CWN 316 : 5 Cr LJ 112 ; *Chhaganlal v. Mt. Birja Bai*, 1951 Raj LW 140 ; *Chhaju*, A 1933 L 1018 : 35 Cr LJ 404 (1) ; *Kripparam Jagan Nath v. Thakur Hans Raj*, A 1950 EP 18 : 51 Cr LJ 344 ; *Joynal Hussain*, A 1951 Ass 1 ; *Bhagwan Das*, 56 A 285 : 35 Cr LJ 418 ; *Mahendra Nath v. Mihi Ram*, A 1923 L

689 *Contra Nga Kyam Kayamg Bamg*, 7 R 166 : 35 Cr LJ 1408.

44. *Nawsher Ali Pramanik v. Hazratulla Pramanik*, A 1929 C 508 : 30 Cr LJ 103 ; *Gajraj Singh*, 47 A 722 : A 1925 A 537 ; *Daya Ram*, A 1927 Oudh 264 ; *Dhundu Bapu*, A 1927 B 464 : 28 Cr LJ 575 ; *Thami Kachala Mudali v. Ponnappa Mudli*, A 1947 M 389 ; following *Apparao v. Janakiammal*, 49 M 918 : A 1927 M 19.

45. *In re Armaga Mudalier*, (1922) 43 MLJ 564 : (1922) MWN 801 : AIR (1923) M 59.

46. *Bhagwan Das*, 58 A 285 : 35 Cr LJ 418 ; *Davaji*, A 1926 N 374 following *Haridas Sanyal*, 15 C 608 (FB) and *Abinash*, 13 CWN 76, *Nagendra Nath Sen*, 8 CWN 456. *Contra Venkatappa v. Laehanna*, A 1942 M 653 : 44 Cr LJ 70.

20. Procedure on Further Enquiry.—Wilson, J., held :—“The third question is that what orders these Courts can make when the necessity arises for setting aside an order of discharge. The High Court, under S. 423, embodied in S. 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under S. 437 and probably also under S. 439, order a further enquiry instead of a committal. The Court of Session and the District Magistrate, have, in cases triable exclusively by the Court of Session, the same alternative open to them under Ss. 436 and 437. In other cases they can set aside the discharge and order a further enquiry under S. 437, or refer the matter to this Court.”^{46a} Section 437 does undoubtedly contemplate that further enquiry may be made by another Magistrate and if it is necessary and incidental to the further enquiry being made by another Magistrate that the evidence taken before the first Magistrate should be retaken, the Legislature must be considered to have contemplated this also.⁴⁷

Where the accused is discharged under S. 209 it is open to the revisional Court to order straightway the committal of the accused or direct the Magistrate to frame a charge under a particular section.⁴⁸ It is not permissible under S. 436 to direct the Magistrate to frame a charge and dispose of the case.⁴⁹

The revising Court cannot direct that the accused be summoned.⁵⁰ What steps will be taken after further enquiry is ordered, will depend upon the circumstances of the case.⁵¹

21. Grounds for interference.—It has been held that the order for further inquiry without stating the grounds therefor is bad in law and cannot stand.⁵² It may be contended on behalf of the opposite party that a detailed examination of the evidence should not be given except so far as would indicate to the Court below in what manner its order was incorrect, whether on a point of law or on misappreciation of the evidence for want of a complete enquiry, but the Court should give enough in the shape of reasons to show that its order is a proper one.⁵³ Where after a charge had been framed in a warrant-case the accused pleaded not guilty but the Magistrate passed an order “Accused discharged”; held the order was bad.⁵⁴ The order directing further enquiry is bad where the Sessions Judge had not recorded reasons,⁵⁵ or when there is no illegality, impropriety or irregularity in the proceedings.⁵⁶ Where the Magistrate ordered a further enquiry merely because he came

46a. *Haridas Sanyal v. Saritulla*, (1888) 15 C 608 (619) (FB); *Chotu*, 9 A 52 (FB).

47. *Narayanswami Naidu*, (1908) 32 M 220 (239) (FB).

48. *Karuppiiah Ambulan v. Andiappan Servai*, A 1950 M 462 : 51 Cr LJ 1076 *Contra Narayanaswamy*, 32 M 220.

49. *Sidda Reddi v. Venkatagurianna*, A 1941 M 65 : 42 Cr LJ 102; *Ibrahim v. Guran Datta Mal*, A 1922 L 362 : *Maung Ba*, A 1931 R 225 : 32 Cr LJ 956 (FB) (directions how to conduct enquiry or frame charge are bad); *In re Thirupelu*, A 1945 M 424 : 47 Cr LJ 230.

50. *Bechu*, 30 CWN 812.

51. *Uditnarayan*, A 1938 P 369 : 39 Cr LJ 778.

52. *Thirukonam Kuppachari*, (1913) MWN 638 : 14 Cr LJ 572 : 21 IC 172; *Wahed Ali*, (1905) 3 CLJ 43; *Nagendra*

Nath Sen, (1904) 8 CWN 456; *Samuel Bheru*, (1908) 3 SLR 7 : 19 Cr LJ 446.

53. *Wahed Ali*, (1905) 32 C 1090 (1092) : 3 CLJ 43 : 3 Cr LJ 120; *Hari Dass Sanyal*, (1888) 15 C 608 (621) (FB); *Nga Than*, (1911) 13 Cr LJ 301; *Nga Min Din*, (1917) 3 UBR (1917) 16 : 19 Cr LJ 14 : 42 IC 926.

54. *Chotelal*, (1918) 16 ALJ 388 : 19 Cr LJ 596 : 54 IC 500; *Sunder Singh v. Mt. Bhagan*, 4 LLJ 331.

55. *Nga Min Din*, (1917) 4 UBR 16 : 19 Cr LJ 14 : 42 IC 926; *Abinash Chandra Mitra*, (1907) 13 CWN 76 : 9 Cr LJ 303; *Dost Mahomed v. Asa Ram*, (1922) 24 Cr LJ 474 : 72 IC 890 : AIR (1922) L 409.

56. *Prankhang*, (1911) 16 CWN 1078 : 13 Cr LJ 764 : 17 IC 76.

to a different conclusion on the evidence when the accused had a fair trial according to law and the trying Magistrate's discussion of the evidence has been quite reasonable; *held* the order is not tenable.⁵⁷ It has been held in *Bindeshwari Dube's* and other cases⁵⁸ that the Sessions Judge should not have directed further enquiry inasmuch as the order of discharge was not *perverse* or *manifestly incorrect* or that there were other *evidence forthcoming*. Further enquiry *cannot be sustained* on the bare possibility of an offence being disclosed *on further evidence*.⁵⁹ Mere lapse of time is no ground for refusal to direct a further enquiry.⁶⁰

In cases of dismissal of a complaint where reasons had not been recorded further enquiry was directed,⁶¹ but the order for further enquiry was set aside where the order was passed without giving the complainant a reasonable opportunity of proving his case.⁶²

22. Setting aside discharge—Third party may apply.—Where an order of discharge of an accused has the effect of operating to the detriment of a third person such third person has a right to apply to the High Court in revision against such an order.⁶³

23. Revision.—Even if successive applications for issue of process and made in a proceeding under S. 324/143 I. P. C. against the accused to answer a charge under S. 302 I. P. C. are all dismissed and the wife of the deceased files a complaint before another Magistrate implicating the accused in the murder of her husband and the complaint is dismissed under S. 203 but in revision the Sessions Judge directs further enquiry into the complaint and there are materials which can be taken into consideration by Court in directing further enquiry, the contention that the Sessions Judge should have treated the matter as closed as a result of successive orders of the Magistrate declining to issue process against the accused cannot be accepted.⁶⁴

Where concurrent revisional jurisdiction is conferred on Courts of different grades, the aggrieved party should approach the inferior among such Courts first and not approach the High Court directly. This rule should not be deviated from except on special, exceptional or extraordinary grounds. The mere fact that a revision has been admitted by the High Court cannot make any difference in the enforcement of the rule.⁶⁵ High Court will not interfere with the order of further enquiry unless it is *perverse*.⁶⁶

437. Power to order commitment.—When, on examining the record of any case under Section 435 or otherwise,

57. *In re Narainah Venkatesh*, (1917) 19 Bom LR 350 : 18 Cr LJ 646 : 40 IC 294 ; see *Umraokhan*, 21 ALJ 194 : 24 Cr LJ 184 ; *Chandu Khan v. Kallu*, (1911) 8 ALJ 45 ; *Bindeshwari Dube*, (1920) 13 ALJ 1135 : 22 Cr LJ 49 ; *Karam Chand v. Mathura Das*, (1922) 24 Cr LJ 369 : 72 IC 369 : AIR (1923) L 329 (2).
58. *Bindeshwari Dube*, (1920) 18 ALJ 1135 : 22 Cr LJ 49 : 59 IC 193 ; *Udai Raj Singh*, (1922) 44 A 891 : 24 Cr LJ 176 : 71 IC 528 : AIR (1922) A 429 (2) ; *Abdul Rashid Sheikh v. Momtaz Sheikh*, (1923) 38 CLJ 206 : 25 Cr LJ 191 : 76 IC 431 ; *Radha Prosad Bhagwat*, (1927) 28 Cr LJ 857 : 104 IC 633 (P).

59. *In re Armuga Mudaliar*, (1923) 43 MLJ 564.
60. *Birju Bhukan*, (1922) 23 Cr LJ 745 (N).
61. *Mahiruddin Sarker*, (1921) 40 C 41 ; *Ahmed Bee*, (1910) 21 MLJ 492.
62. *H. P. Sandyal*, (1916) 16 CWN 143 ; *Gokul Chand*, (1903) 11 ALJ 451 ; *Krishna Pillai*, (1922) 43 MLJ 555 ; see *Rashid Sheikh v. Momtaz Sheikh*, (1923) 38 CLJ 206.
63. *G. V. Raman*, (1929) 33 CWN 468 : AIR (1929) C 319.
64. *Bhujanga Bhuvan Das*, 61 CWN 752 : A 1957 C 376 : 1957 Cr LJ 710.
65. *Das Issac v. Narayana*, (1959) MLJ (Cr) 206.
66. *Kripa Ram Jagan Nath v. Thakar Hans Raj*, A 1950 EP 18 : 51 Cr LJ 344.

the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged :

Provided as follows :—

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;
- (b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

SYNOPSIS

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| 1. Earlier Law. | (c) 'that an accused person has been improperly discharged.' |
| 2. State Amendments. | —Improperly discharged. |
| —(1) Bombay. | 9. "By the Inferior Court". |
| —(2) Saurashtra. | 9a. Who can order commitment. |
| 3. Scope of old section. | —District Magistrate. |
| 4. Scope of present section. | —High Court. |
| 5. Object. | 10. Procedure. |
| 6. Application. | —'Instead of directing a fresh enquiry'. |
| 7. When can an order be passed under this section. | —'Order him to be committed.' |
| 8. Other ways in which record may come before Court. | —'For trial upon the matter of which he has been improperly discharged.' |
| (a) when the record is already before the Court on appeal. | 11. Proviso (a). |
| (b) "Considers that such case is triable exclusively by the Court of Session. | —Notice absolutely essential. |
| —"Discharged". | 12. Proviso (b). |
| | 13. Revision by High Court. |

This section was formerly S. 436.

1. Earlier Law.—This section corresponds to S. 435 of the Code of 1861 and S. 296 of Act X of 1872. S. 436 of the Code of 1882 was similarly worded as that of S. 436 of the Code of 1898 excepting that the expressions "Sessions Judge" in the section and "Judge" in provisos (a) and (b) were new in the latter Code. The language in S. 296 of Act X of 1872 which was interpreted by the full bench decision of the Allahabad High Court in *Kanchan Singh*⁶⁷ where it was held that "Sessions case" is a case exclusively triable by a Court of Session has been adopted.

2. State Amendments.

(1) **Bombay.**—The words 'or District Magistrate' and the words 'or Magistrate' wherever they occur were deleted by Bombay Act 23 of 1951. After the words 'Sessions Judge' the words 'other than the Sessions Judge Court of Session for greater Bombay' were added by Bombay Act 32 of 1948.

67. 1 A 413 FB ; see *Sukha*, (1885) 8 A 14; *Hary Dayal Kermoker*, (1878) 4 C 16.

(2) **Saurashtra.**—Same as Bombay Amendment by Bombay Act 23 of 1951 *vide* Saurashtra Act 4 of 1952.

3. Scope of old Section.—“So by S. 296 if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the Subordinate Magistrate to enquire into that offence ; but this he can only do in a case which, when before that Magistrate, was a Sessions case”.⁶⁸

4. Scope of present section.—Wallis, J., observed :—“If a Sessions Judge or District Magistrate can be trusted to commit for trial in more serious cases under S. 436, he can equally be trusted to make an order for further inquiry under S. 437 in less serious cases”.⁶⁹

Where the committing Magistrate in a case which was originally sent up by the Police under S. 304 I. P. C. without deciding judicially that the charge was groundless and evidence did not establish the case, altered this charge to one under S. 304A and discharged the accused and the Sessions Judge under this section set aside the order and directed the accused to be committed to Sessions Court for trial under the original charge ; the District Magistrate thereupon submitted a reference against the order of the Sessions Judge ; *held*, that the reference was wholly incompetent.⁷⁰

5. Object.—“One of the objects of Ss. 403 and 436 is to prevent Magistrates with limited powers from clutching jurisdiction in important cases, but this object would, it seems to me, with all respect, be, to a great extent, frustrated if the view of the Calcutta High Court on which the decision reported in I. L. R. 20 C. 233 is based, be accepted as correct”.⁷¹

6. Application.—Because of the use of the expression ‘District Magistrate’ the section does not apply to the case of a Presidency Magistrate.⁷² S. 436 (S. 437) contemplates a case of discharge and the petitioner not having been discharged but acquitted on the charge as framed, the Sessions Judge had no power to direct his commitment, or to order a further inquiry under proviso (b) in respect of that offence.⁷³ S. 436 gives the Sessions Judge power to order commitment only when the offence is exclusively triable by the Sessions Court.⁷⁴

7. When can an order be passed under this section.—“When on examining the record of any case under S. 435 or otherwise.”—“We think that these words ‘or otherwise’ being words of general import following the particular words ‘under S. 435’ must be construed according to the usual rule and that they mean not ‘in any way whatsoever’ but in any other way provided by the Code.”⁷⁵

The expression ‘on examining the record under S. 345 or otherwise’ used in Ss. 436, 437 and 438 bear the same meaning. The language of S. 439 on this point is different and is governed by different considerations although we have noticed in Commentary to S. 435 *supra* that S. 439 must be read subject to and along with S. 435.

68. *Donelly*, (1877) 2 C 405 (411).

69. *Narayanswami Naidu*, (1908) 32 M 220 (236) FB.

70. *Allah Mahar*, (1927) 25 ALJ 191.

71. *Kota Krishna Reddy v. Subbanna*, (1900) 24 M 136 (139) FB : 2 Weir 544.

72. *Opporba Kumer Sett v. Probod Kumary Dassi*, (1893) 1 CWN 49.

73. *per* Richardson, J., in *Abdul Hakim*

Khan v. Buzruk Ali Khan, (1917) 22 CWN 117 : 26 CLJ 210 : 18 Cr LJ 834 : 41 IC 658.

74. *In re Nalluri Chenciah*, (1919) 42 M 561 : 36 MLI 296 : (1919) MWN 183 : 20 Cr LJ 379.

75. *Nobinkristo Mukherjee v. Rassick Lal Laha*, (1884) 10 C 268 (272).

8. Other ways in which the record may come before the Court are as follows.—(a) (1) When the record is already before the Court on appeal.

(2) When the record is before the Court in connexion with a connected case or as part of evidence in another case. (3) When the record has been called for under S. 15 of the High Courts Act by the High Court under S. 439.⁷⁶

(b) '*considers that such case is triable exclusively by the Court of Session*'. See Second Schedule, eighth column.

A District Magistrate has no power under S. 436 (present S. 437) to direct a Sub-Divisional Magistrate to commit the accused for trial to the Sessions in a case where the offence with which the accused is charged is not one triable exclusively by the Court of Session.⁷⁷

When an accused is discharged of an offence exclusively triable by a Court of Session, such as mischief under S. 436 of the Penal Code, a Sessions Judge is competent to order a commitment for an offence not exclusively triable by such Court, *e.g.*, one under S. 427 of the same, if it is intimately connected with the former and forms part of the same transaction but not for an offence of an entirely different character, *e.g.*, under S. 380 committed in the course of the same transaction.⁷⁸

The language of S. 437 requires that the case should be triable exclusively by the Court of Session, but it does not go on to state that an accused person has been improperly discharged on such a charge. On the contrary the section merely says that it requires that an accused person has been improperly discharged. These words are general and cover a discharge of any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Sessions.⁷⁹

"Discharged".—See notes under S. 436 *ante*. The term 'discharged' in S. 437 does not mean 'absolutely discharged' and set at 'liberty' but also 'partially discharged' or in other words, not charged with an offence exclusively triable by the Court of Session,⁸⁰ and also cases of implied discharge namely, when the Magistrate framed a charge under S. 388 and convicted the accused only under S. 392 I. P. C.⁸¹ or where the accused was placed on trial for offences under Ss. 307 and 323 I. P. C., the Magistrate omitted to frame a charge under S. 307 and ordered that the accused be committed to Sessions on a charge under S. 308;⁸² or where on a complaint of an offence under S. 302 the Magistrate framed a charge under Ss. 147, 323 and 325 I. P. C.⁸³; or where the complaint was under S. 307 and the Magistrate framed a charge under S. 506 I. P. C., it was an implied discharge.⁸⁴

Where the accused is alleged to have committed a major offence and the Magistrate charged him with a minor offence, the Court in revision is not

76. *Ananda Chandra Bhattacharjee v. Carr Stephen*, (1891) 19 C 127.

77. *Thammanna*, (1905) 15 MLJ 373; *Bajinath Pandey v. Gourikanta Mandal*, (1893) 20 C 633.

78. *Bijoy Gopal Ghosh v. Ishwar Chandra Kumer*, (1926) 53 C 645, following *Gendal Chimanbhai*, (1913) 16 Bom L 60.

79. *Alopir Din*, A 1935 A 366; 36 Cr LJ 1103.

80. *Sultan Ali*, A 1934 L 164; 36 Cr LJ

466.

81. *Shambhoo Ram*, A 1935 S 221; 37 Cr LJ 80.

82. *Sukhlal*, A 1934 A 141; 35 Cr LJ 865; *In re Parameshwarayya*, A 1949 M 430; 50 Cr LJ 558.

83. *Gandhi Appa*, 43 M 330; *Narayana Reddi*, A 1955 AP 48; *Nalla Baligala*, A 1953 M 801 (FB); 1953 Cr LJ 1470; *Khurshid*, A 1943 Pesh 89.

84. *Pabudam Singh*, A 1951 Raj 84; 52 Cr LJ 669.

competent to direct commitment in respect of major offence.⁸⁵ When a Magistrate discharges an accused in respect of an offence exclusively triable by a Court of Session and proceeds to try him himself for an offence within his jurisdiction, it would be open to the District Magistrate to direct the commitment of the accused for trial "upon the matter of which he has been in the opinion of the District Magistrate improperly discharged."⁸⁶ Where the complaint disclosed offences under Ss. 143, 379 and 436 I. P. C. and the Magistrate tried the accused under Ss. 143 and 379 and refused to commit accused on the ground that there was no possibility of conviction under S. 436 I. P. C., held that the implied discharge under S. 436 I. P. C. was improper, case ought to have been committed to Sessions.⁸⁷

(c) '*that an accused person has been improperly discharged*'.—For the application of the section (a) and (b) are conditions precedent and after they are complied with, condition (c) is another ingredient.

"..... among such sufficient grounds are the omission to take evidence which ought to have been taken, the discovery of fresh evidence, mistake of law, illegality or irregularity in the proceedings, and the incorrectness of the first finding".⁸⁸

'*Improperly discharged*'—"But the law has provided a safeguard in S. 436 of the Code, whereby a District Magistrate or a Court of Session can set aside an order of discharge passed by a Magistrate holding an inquiry under Chapter XVIII".⁸⁹ It is the duty of a Sessions Judge in considering whether an accused person has been "improperly discharged", so as to require him to be committed to the Sessions Court, to consider all the grounds upon which such order of discharge has been passed including a consideration of the evidence, which has not been believed or held to be sufficient to establish a *prima facie* case.⁹⁰

A full bench of the Madras High Court has held that refusal to frame a charge in respect of higher offence may amount to a discharge.⁹¹

The Sessions Judge or the District Magistrate acting under S. 437 may direct a commitment only in a case where the accused persons have been improperly discharged by an inferior Court. Where the inferior Court has omitted or declined to frame a charge in respect of an offence triable by the Court of Session and has proceeded with the trial under other sections, it is not a case of discharge, not to speak of improper discharge. In such a case the person aggrieved has a remedy by applying to the High Court for a revision of the order of the inferior Court under S. 439.⁹²

The word 'improperly' in S. 437 is a mild word, S. 437 is merely intended to cover the case where a Magistrate wrongly considers that he has juris-

85. *Nahar*, A 1952 A 231 : 1952 ; Cr LJ 440 (FB) overruling *Amir Hassan*, A 1948 A 405 : 49 Cr LJ 602.

86. *Nalla Balligulu*, A 1953 M 801 : 1953 Cr LJ 1470 dissenting from *Nahar*, A 1952 A 231 (FB).

87. *Rambalam Pal Singh*, A 1960 p. 307.

88. *Haridas Sanyal v. Saritulla*, (1888) 15 C 608 (621) FB ; *Ram Chandra*, A 1955 B 187 : 36 Cr LJ 643 ; *Akherali Tayabali v. Abdul Hussain*, A 1939 B 372 : 40 Cr LJ 951.

89. *Fattu v. Fattu*, (1904) 26 A 564 : (1904) AWN 125 : 1 ALJ 292 : 1 Or LJ 519,

followed in *Mangat Rai*, (1916) 13 ALJ 111 : 16 Cr LJ 139 : 27 IC 203.

90. *Harbans Singh Fakir Dass*, (1902) 7 CWN 77 (79).

91. *Krishna Reddi v. Subbamma*, (1900) 24 M 136 : 2 Weir 546 distinguished in *Murappa*, 41 M 982 (984) and in *Abdul Hakim*, 22 CWN 117 (121) but followed in *Sheo Narain*, 42 A-128 (129) *In re G. Maya*, A 1953 M 26 : 1953 Cr LJ 121.

92. *Sambhu Charan Mandal*, 60 CWN 708 following *Yunus Sheikh*, A 1953 C 567.

diction to try a certain case and proceeds to try the case and where the Sessions Judge or the District Magistrate concludes that the facts alleged show a case triable exclusively by a Court of Session and that the inferior Court has improperly discharged an accused person.⁹³

Where some of the accused are discharged in the inquiry preliminary to commitment and a revision petition against that order is dismissed, the Sessions Judge is not precluded from directing their committal when the case of the other accused comes to him for trial.⁹⁴

Commitment of a discharged person.—The discharge of a person accused of an offence triable by the Court of Session is no bar to his being again brought with a view to commitment, before a Magistrate who may proceed in such a case without an order from the Judge.⁹⁵ Order must specify the offence for which the commitment is made.⁹⁶

9. "By the Inferior Court".—"The term 'subordinate' is comprised in the term 'inferior' used in S. 435. The reason for the employment of the latter term in Ss. 435 and 436 was that in both these sections the Court of Session and the District Magistrate are combined and the Magistrates (other than the District Magistrate,) are not so generally to the Court of Session. It was necessary, therefore, in Ss. 435 and 436 (present S. 437) to employ a term applicable to the relations of the Magistracy both to the supervising authority and the appellate tribunal.

"When we come to S. 437 (present S. 436) in which the *District Magistrate* is dealt with separately from the *Court of Session*, the use of the term 'inferior' is no longer necessary and accordingly we find the term used is 'subordinate'.⁹⁷ The term 'inferior criminal Court' must be construed to mean 'judicially inferior' that is, a Court over which the Court of Magistrate proceeding under S. 435 of the Code has appellate jurisdiction.⁹⁸

9a. Who can order commitment.—In cases exclusively triable by the Court of Session, S. 436 of the Code (Act X of 1882) empowers the Court of Session or District Magistrate to order a discharged person to be committed for trial by such Court.⁹⁹

District Magistrate.—The expression does not apply to Presidency Magistrates.¹

High Court.—The High Court in revision may order commitment to the Sessions.^{1a}

10. Procedure.—The word 'may' imports discretionary powers; see *Narayanswamy Naidu*.² A High Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of this section.³

93. *Harish Chandra Reddi v. Syed Kasim Sahib*, 1937 MWN 1240.

94. *Debidas Karmokar*, 33 CWN 974 : 31 Cr LJ 260.

95. *Tilkoo Goala*, (1867) 8 WR (Cr) 61; *Sreenath Dey*, (1871) 15 WR (Cr) 61—decision under S. 435 Act VIII of 1869.

96. *Ankanna*, A 1953 M 247.

97. *In re Padmanabha*, (1884) 8 M 18 (FB).

98. *Nabinkristo Mukherjee v. Rushick Lall*

Laha, (1884) 10 C 268.

99. *Krishnabhat*, (1885), 10 B 319, referred to in *Surendra Nath Sarker*, 28 C 397 (399) : 5 CWN 732 (734); *Ram*, 6 A 40.

1. *Oppoorba v. Sreemuty*, 1 CWN 49; *Debi v. Jutmal*, 33 C 1282.

1a. *Nishikanta Lahiry*, (1916) 20 CWN 732 (734); *Ram*, 6 A 40.

2. (1908) 32 M 220 (236).

3. *Mangot Rai*, (1915) 13 ALJ 111 : 16 Cr LJ 139 : 27 IC 203.

'Instead of directing a fresh enquiry.'—The words here used 'instead of directing a fresh enquiry' must, I think, refer to the power given by the next (previous) section of ordering a 'further enquiry' for, except in the single case spoken of in proviso (b) there is no other section giving power to order any enquiry at all.⁴ 'S. 436 contemplates a fresh or a further inquiry being held, for it empowers a District Magistrate 'instead of directing a fresh inquiry' to order the commitment of the accused, and there is nothing in the terms of S. 437 which would prevent a District Magistrate from ordering a further inquiry merely because the case may be one triable exclusively by the Court of Session'.⁵

'order him to be committed.'—The words "order him to be committed for trial" in S. 436 of the present Criminal Procedure Code seem to us to mean "commit him for trial".⁶

'for trial upon the matter of which he has been improperly discharged.'—These words embody the decision in *Tarak Nath Mukherjee*⁷ with this modification that the word "wrongfully discharged" has been substituted for "improperly discharged". Under S. 436 in setting aside a Magistrate's order of discharge and that for this purpose the High Court may consider the facts as well as the questions of law involved.⁸

11. Proviso (a).—is an exception to the general rule contained in S. 440 that no party has a right to be heard in revision.

Notice absolutely essential for an order under this section.—A Court of Session had no power under the Code of 1872 to direct the commitment for trial of persons against whom no evidence has been legally recorded, or of persons upon whom no notice had been served⁹, or without at least giving them an opportunity of showing cause against it.¹⁰

12. Proviso (b).—It contemplates inquiry into some other offence established upon the evidence on the record.

13. Revision by High Court.—The High Court has full jurisdiction under S. 439 to revise a commitment order under S. 436 (present S. 437) on points of law as well as of facts.¹¹

An order under this section may be quashed both on points of law and fact as an order under this section may be quashed by the High Court in the exercise of its revisional powers.¹² The High Court has the jurisdiction to set aside the order of commitment on the merits.¹³ The Allahabad High Court

4. *Haridas Sanyal v. Saritulla*, (1888) 150 C 608 (618) FB dissented from in *Narayanswamy Naidu*, 32 M 220 (235) FB.

5. *Maniruddin Mondal*, (1890) 18 C 75 (78).

6. *Krishnabhat*, (1885) 10 B 319 (323); *Taraknath Mukherjee*, (1873) 10 Bom LR 285; 19 WR (Cr) 30.

7. *Tarak Nath Mookherjee*, (1873) 10 BLR 285; 19 WR (Cr) 30.

8. *Mutham Chetty*, (1906) 30 M 224.

9. *Nawab Singh v. Kokil Singh*, (1875) 24 WR (Cr) 70 and *Bandhoo*, 22 WR (Cr) 67 followed in *Dwarkanath Bhattacharjee*, (1877) 1 CLR 93.

10. *Khamir*, (1881) 7 C 662; 15 CLR 8; *Kanjamalai*, (1883) 6 M 372; see

Anokha Singh, (1913) 312 PLR 1913; 21 IC 477 following *Thamanna*, 15 MLJ 373; 2 Cr LJ 774.

11. *Rash Behari Lal Mandal*, (1907) 12 CWN 117 (119); 6 CLJ 760; 6 Cr LJ 406; see *Muthia Chetty*, (1906) 30 M 224 (225); 16 MLJ 529; 5 Cr LJ 100; *Nishi*, 20 CWN 732.

12. *Kalagav Bapiah*, (1903) 27 M 54; *Muthia Chetty*, (1906) 30 M 224 following *Pirithi Chand Lal v. Sampathia*, 7 CWN 327.

13. *Pirithichand Lal*, (1903) 7 CWN 327 (328); see *contra Annadakrishna Chowdhury*, (1900) 4 CWN 116; *Surendra Nath Sarker*, (1901) 5 CWN 574.

has held that it would not be proper to quash commitment except on a point of law.¹⁴

438. Report to High Court.—(1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under Section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence or an order be reversed or altered, may order that the execution of such sentence or order be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

SYNOPSIS

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1. State Amendments—

Bombay.—In Sub-sec. (1), after the words "Sessions Judge" insert the words "other than the Sessions Judge of the Court of Session for Greater Bombay", *vide* Bombay Act 32 of 1946 and delete the words "or District Magistrate" *vide* Bombay Act 23 of 1951.

After S. 438 the following section was inserted by Bombay Act 39 of 1955 :—

"S. 438-A.—*Power of District Magistrate to report to High Court or decide finally proceedings called for.*—On examining under S. 435 or otherwise the record of any proceeding,—

(1) if such proceeding is in respect of an order under S. 118, 122, 143, 144 or 145 and the District Magistrate thinks that the order made in such proceeding should be reversed or altered, he shall report for the orders of the High Court the result of such examination ;

(2) if such proceeding is in respect of an order made under any other section, then in the case of such proceeding the District Magistrate may, subject to the provisions of sub-sec. (2) of S. 438 exercise any of the powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428."

Saurashtra.—Delete the words "or District Magistrate" *vide* Saurashtra Act 4 of 1952.

1a. Corresponding sections in former Codes.—This section corresponds to Ss. 434 and 435 of the Code of 1861 and S. 296, paragraph 1 of the Code of 1872.

2. Legislative Changes.—The words “Sessions Judge” and the words “or altered” in sub-sec.(1) were added for the first time in the Code of 1898. Cl. (2) was inserted in the Code of 1898 for the first time and was further amended by Act XVIII of 1923.

The words in sub-sec. (2) viz., “by or under any general or special order of the Sessions Judge” were substituted by S. 118 of Act XVIII of 1923 for the words “by the Sessions Judge.”

3. Report of the Select Committee (1916).—“In order to provide for the absence of a Sessions Judge, we think it necessary to empower to make him a general order authorising the Additional Sessions Judge to exercise all his powers. We have provided for it specifically by this amendment.”

4. Scope.—S. 438 contains nothing to limit or qualify the power which is conferred on the Court of Session or a District Magistrate, or to suggest that the High Court should not consider a case so reported for its orders and pass orders accordingly¹⁵. S. 438 distinctly provides in what way he may take action in favour of the accused, pending his recommendation to the High Court that a sentence be reversed or altered.¹⁶

Where a Sessions Judge once declines to make a reference to the High Court under S. 438, he is not thereby debarred from making another reference in the same case in view of the facts that came subsequently to his knowledge.¹⁷

Reference to High Court for the opinion of that Court can only be made under S. 432, that too by a Presidency Magistrate (*see* S. 432 as amended which in sub-sec. (1) mentions ‘any Court’ and in sub-sec. (2) ‘Presidency Magistrate’). S. 438 is not intended to enable the District Magistrate to get the opinion of the High Court on a point of law.¹⁸

It is undesirable to have reference in matters of admissibility of evidence or incompetency of witnesses in pending proceedings, the matter is entirely in the discretion of the trial Court; objection should be noted and decision can be challenged in revision or appeal.¹⁹ Although it is unusual for a judge to make a reference regarding his own order yet there is nothing in this section to preclude him from doing so. The words “or otherwise” are wide enough to cover such a reference.²⁰ An order under S. 523 may be reported.²¹

5. Sessions Judge making reference on the merits.—A Sessions Judge sitting in revision should not make a reference to the High Court if his only objection to the finding of the Court below is based on the merits, unless it is very clear that the conviction is wrong and there can be no reasonable doubt of the matter.²²

14. *Mangat Rai*, (1915) 13 ALJ 111 : 16 Cr LJ 139 : 27 IC 203.

15. *Babu*, (1898) AWN 12.

16. *Shanmugan Chetty v. Pennappa Mudaly*, (1902) 26 M 137 (138) : 2 Weir 196 ; *Satyanarayana*, A 1946 M 412 ; *Kasim Ali*, A 1929 C 204.

17. *Sitaram Narayan Ghogle*, (1927) 20 Bom LR 480 : AIR (1927) B 360.

18. *Birju Singh Dhidma Singh*, A 1953 Pepsu 49 : 1953 Cr LJ 592 ; *Mir Ahmed*, A 1937 Pesh 73 (High Court may consider point of law under S. 439).

19. *Jawla Prasad*, A 1953 VP 18 : 1953 Cr

LJ 85 ; *In re Kotrappa*, A 1949 M 11 : 50 Cr LJ 83 ; *In re Palani Goundas*, A 1914 M 100 ; contra *Abdul Razakar v. Haji Hussain*, A 1945 N 286 (Reference made though order was interlocutory).

20. *Radha Raman Mitra*, A 1930 A 817 : 32 Cr LJ 364 ; *Rama Siv Thakur*, A 1933 p. 697 : 35 Cr LJ 22 (2).

21. *Haribandhu*, A 1948 p. 180.

22. *Sudaman*, (1927) 49 A 551 ; *see* comment in 32 CWN xix, but *see* to the same effect *Harishikesh Mandal v. Abhedanand Mandal*, 44 C 703 : 21 CWN 250 : 18 Cr LJ 309 : 38 IC 421.

6. Courts empowered to report under this section.—The Code of 1861 empowered the Sessions Court to send questions for the opinion of the High Court but the present Code contains no such provisions except in the cases of Presidency Magistrates (*see* S. 432).

7. Sessions Judge.—The Code of 1898 substituted 'Sessions Judge' for 'Sessions Court' occurring in the earlier Codes. A District Magistrate sitting as a Court of Appeal is an inferior Criminal Court to the Sessions Court for the purposes of S. 435.²³

8. District Magistrate.—The power given to a District Magistrate to make a reference to the High Court is conferred by S. 438 read with S. 435. But this clearly refers to a "proceeding before any inferior Criminal Court"; and notwithstanding the words "or otherwise" in S. 438, the Legislature never intended to give a Magistrate the power to question the propriety of a judgment or sentence by a superior Criminal authority, as the Sessions Judge is, and to refer the proceedings to the High Court for revision.²⁴

'or otherwise.'—These words mean not in any other way whatsoever but in any other way provided by the Code.²⁵

9. Additional Sessions Judge.—Under sub-sec. (2) an Additional Sessions Judge shall have all the powers of a Sessions Judge under this Chapter in respect of any case that may have been transferred to him by the Sessions Judge. The Amending Act XVIII of 1923 by the addition of the words 'by or under any general or special order of the Sessions Judge' has specially provided for a general or special order by the Sessions Judge authorising the Additional Sessions Judge to act under this Chapter.

'may, if he thinks fit.'—There is no obligation to refer every case in which there is some error. The section gives the Court a discretion to refer.²⁶

10. 'On examining the record.'—The Court cannot act under this section without having the record before it either called under S. 435 or otherwise.

10a. 'Of any proceedings.'—The District Magistrate has jurisdiction to report under this section proceedings under Chapter XII.²⁷ S. 435 (3) having been repealed one has now got to move the Sessions Judge or the District Magistrate in proceedings under S. 144 or Chapter XII before moving the High Court.

11. Reference for enhancement of Sentence.—The Sessions Judge is not competent to refer a case for enhancement of sentence unless he has tried the appeal filed against the conviction. He can only refer the case under the provisions of S. 438 when he is satisfied as to the propriety of the conviction.²⁸ Such applications are not entertained on behalf of private parties.²⁹ It is very much doubtful whether a District Magistrate is entitled, as a matter of law to make a reference to the High Court for enhancement of

23. *Kallu*, (1921) 3 L 23 : 23 Cr LJ 577 : 68 IC 609 : AIR (1922) L 85.

24. *Karamdi*, (1895) 23 C 250; *Allah Mahr* (1927) 25 ALJ 191; *Isher Singh*, (1925) 26 PLR 801 : AIR (1927) L 85; *Jamna Bai*, (1905) 28 A 91; *Wali*, A 1953 L 433 (2) : 34 Cr LJ 371; *Faqir Mohammad*, A 1937 Pesh 6 : 38 Cr LJ 335, *Maung Myat*, 9 R 352.

25. *Nabin*, 10 C 268 (272) referred to in *Kamal Kutty*, (1912) 36 M 275 (281).

26. *Nibaran*, 20 WR (Cr) 40.

27. *Kefatulla v. Ferozuddin Miah*, (1900) 5 CWN 71.

28. *Intizer Ali Khan*, (1909) 6 ALJ 421.

29. *Mahammad Hossain v. A. W. Forby*, (1916) 25 CLJ 610.

sentence in a case tried by a Sessions Judge, even if he was so entitled, the procedure is extremely inconvenient.³⁰

To permit the prosecution to plead their own negligence and to harass the accused with further proceedings directed towards the enhancement of the sentence would simply be to put a premium on the negligence of the prosecution.³¹

On a reference under this section for enhancement of sentence the accused is entitled to show cause against his conviction.³²

The Calcutta High Court on a reference under S. 438 set aside an order of acquittal passed under S. 247 when the High Court agreed with the Sessions Judge that S. 247 had not been rightly applied.³³

12. Reference in cases of acquittal.—The High Court will not as a rule entertain a reference by a Sessions Judge having for its object the reversal of an acquittal, when the Government has a right of appeal, more particularly when the matter is one, such as a question of correct weights and measures, in which the Government may be considered to be peculiarly interested.³⁴ Mukherji, J., has condemned the practice of reference under S. 438 by the District Magistrate or the Sessions Judge recommending that the order of acquittal should be set aside.³⁵

Rule 268 of the Criminal Rules of Practice and orders of Madras High Court, has been framed for the guidance of District Magistrates in suitable cases. The Rule cannot be read as saying that District Magistrate shall never refer cases of acquittal to the High Court.³⁶ The principle of interference with an order of acquittal either on a reference under this section or in revision under S. 439 has been embodied in Rule 8 of Chapter 2, Vol. II of the Patiala High Court Rules.^{36a}

13. Reference limited to proceedings of inferior Courts.—See in this connection *Allah Mahr* and other cases³⁷ which has held that a reference questioning the order of the Sessions Judge is incompetent.

14. Reference if may be made on facts.—Reference should ordinarily be made on a question of law but reference may also be made on facts in extraordinary cases.³⁸ In a later decision the same High Court has held that an admission of fact before the Sessions Judge ought to be accepted by the High Court.³⁹

30. *Ganga*, (1914) 36 A 378 : 12 ALJ 519 : 15 Cr LJ 407 : 23 IC 1007.

31. *Bashir*, A 1929 A 267 : 30 Cr LJ 505.

32. *Joyram Rakshit v. Annada Prasad*, A 1941 C 90 : 42 Cr LJ 383.

33. *Etim Hazi v. Hamid*, (1916) 24 CLJ 444.

34. *Harak Chand Marwari*, (1917) 40 A 84; *Rasul Khan v. Zarin Khan*, A 1931 L 533 : 32 Cr LJ 1128; *K. Subbarami Reddi*, 1934 MWN 927; *Qualandar Singh v. Md. Reza*, A 1924 A 624 Contra, *Laxmi Prasad Tulsiram*, A 1940 N 357.

35. *Dabiruddi Nasker v. Sheikh Mollah*, (1928) 33 CWN 258; see cases referred to therein; *Acchar Singh*, A 1924 L 451 Contra *Ramdeo*, A 1942 Oudh

443.

36. *Kulesakara Chetty v. Tholasingam*, A 1938 M 349 (FB).

36a. *Amar Das v. Thakur Das*, 3 Pepsu LR 652.

37. 25 ALJ 191; *Isher Singh*, 26 PLR 801 : 27 Cr LJ 430 : 99 IC 948 : AIR (1927) L 85; *Keramdi*, (1895) 23 C 250; *Jamna Bai*, (1905) 28 A 91; *In re Angam Venthiram*, (1912) 23 MLJ 732 : (1912) MWN 812 : 16 IC 522; *John Francis Lobo*, (1916) 41 B 47 : 18 Bom LR 796; *In the matter of the petition of Ram Lall*, (1882) 8 C 875.

38. *Nasiram Mistry*, (1920) 24 CWN 549.

39. *Garib Haji v. Muchiram Saha*, (1915) 30 CWN 359.

15. "Such report containing a recommendation that a sentence be reversed or altered".—The word 'altered' was introduced in the Code of 1898 and has superseded *Ishan's* case⁴⁰ which held that no report could be made under this section where the recommendation was merely to alter conviction from one section to another cognate offence.

16. When Reference should not be made.—It has been discussed *ante* that reference by a District Magistrate should not be made against the order of a Sessions Judge, and that reference should ordinarily be made on a point of law.

17. Further Evidence.—Neither S. 435 nor S. 438 nor any other section empowers a District Magistrate to take further evidence with a view to reporting a case the record of which he has examined.⁴¹

18. 'May order that the execution of such sentence be suspended, or if the accused is in confinement, that he be released on bail or on his own bond'.—Under S. 438 the Magistrate may order that proceedings (if any) should be stayed pending disposal of the petition of revision.⁴² This power of stay is now given under S. 435.

Bail.—The Sessions Judge or the District Magistrate referring the case under S. 438 can admit the accused to bail as S. 435 (1) amended gives him such jurisdiction.

19. Sub-section (2).—See Commentary *supra* under the heading 'Additional Sessions Judge'.

A Sessions Judge can make a report to the High Court touching an illegal order passed by an Additional Sessions Judge, although he cannot call for a report.⁴³

20. Practice—Application to the High Court without previous recourse to the Sessions Judge.—Ordinarily a person who has been convicted should in the first instance move the Sessions Judge to report the case under S. 438, but when the High Court has once issued a Rule it will not be discharged on such ground only, but must be heard on the merits.⁴⁴

21. Report should contain.—It should contain a recommendation that the sentence be reversed or altered. There is no section in the present Code corresponding to the old section in Act No. XXV of 1861, which empowers a Court of Session to send up a question for the opinion of this Court.⁴⁵ See however S. 432 applicable to Presidency Magistrate. Under R. 6 of Chapter 2 (10) of the General Rules (Criminal) a report to the High Court should indicate the portion of the finding recommended for revision, state the grounds upon which that finding is to be reserved and should contain an analysis of the proceedings.⁴⁶

The following order had been issued by the Calcutta High Court (Circ. 18, July 15, 1863) regarding the manner in which such reference should be made.

40. 9 C 847.

41. *Muda*, 3 Bom LR 677.

42. *Shanmugan Chetty v. Pennappa Mudaly*, 26 M 137.

43. *Kamra*, A 1955 A 694.

44. *Abdul Mattab v. Nandu Lal Khatel*,

(1922) 50 C 423 : AIR (1923) C 674.

45. *Mohan Lal*, (1904) 27 A 25 (26).

46. *Brahmadin*, (1927) 26 ALJ 76 : AIR (1927) A 727 (2).

"References under S. 438 shall always be accompanied by the records of the case to which they relate and by an English letter commencing under S. 438 of the Code of Criminal Procedure, and Circular order of the High Court, dated 15th July 1863, No. 19, I herewith transmit the record of the case noted in the margin, to be laid before the High Court with the following report. There will then be stated—

1st.—A brief analysis of the case.

2nd.—The order of the Lower Court.

3rd.—In what particular portion of that order the Court making the reference considers an error on a point of law to exist.

4th.—The grounds upon which the order of the Lower Court should be reversed.

"Unless there be any particular reason why delay should be avoided, the explanation of the Lower Court should be called for and accompany the reference.

"The Court do not think it necessary to enter into any details of the particular occasions on which such references should be made to them, or to define what descriptions of grave irregularity of procedure, undue severity of punishment, etc., may give rise to a reference to them.

"It is deemed sufficient to enjoin the exercise of a sound discretion in making these references to the Court, so that neither important errors and omissions may escape correction, nor the time of the Court be needlessly engrossed by matters not demanding their interference."

439. High Court's powers of revision.—(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence; and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by Section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under Section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under

Section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

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1. Corresponding sections in former Codes.—This section corresponds to Ss. 404 and 405 of the Code of 1861 and S. 297 of the Code of 1872. Excepting sub-sec. (5) which was inserted in the Code of 1898 for the first time the section was similarly worded in the Code of 1882.

2. Legislative changes.—Sub-section (6) is new and was inserted in the Code by S. 119 of Act XVIII of 1923. In sub-sec. (1) the figures “195” have been omitted.

Referring to the amendment in sub-sec. (1) the *Select Committee* observed :—

“We have in the interests of brevity redrafted the amendment proposed by this clause. We have introduced here an amendment of S. 439 consequential upon the alteration made by the Bill in S. 195.”

3. Effect of the Amendment.—S. 195 having been considerably amended we need not consider the following rulings⁴⁷ under the old Code which discussed whether or not the High Court had powers under S. 439 to interfere with an order of the Sessions Judge granting *sanction* under S. 195.

The effect of the introduction of sub-sec. (6) is to convert the High Court into a Court of appeal against the order of conviction and the accused is entitled to show that his conviction is unjustified.⁴⁸ Sub-section (6) is primarily intended to operate as an exception to what is otherwise laid down or implied in S. 439 itself. The sub-section no doubt allows a convicted person to whom a notice has been given to show cause why his sentence should not be enhanced a right of showing cause also against his conviction.⁴⁹ The Lahore High Court has recently followed *Jorabhai's* case⁴⁹ and held that owing to the inherent incapacity of one Judge of the High Court to reconsider the decision of another (whether arrived at on an appeal or on revision) the accused was no longer entitled under S. 439 (6) to re-open the question of his guilt.⁵⁰

47. *Kanhai Lal v. Chamdami Lal*, (1908) 6 ALJ 1 referred to in *Nazir Hassan v. Mahomed Yamin*, 9 OLJ 282 : 23 Cr LJ 574 : *Nallapperaju Venkataramaraju v. Midisetti Achayya*, (1916) 17 Cr LJ 184 (M) : 33 IC 824 ; *contra*, *Mussammatt Chotti v. Khecheru*, (1920) 42 A 649 : 18 ALJ 758 : 58 IC 250.

48. *per* Shadilal, C.J., in *Tej Ram*, (1925)

27 PLR 112 : 27 Cr LJ 380 : 92 IC 892 : AIR (1927) L 34.

49. *Jorabhai*, (1926) 50 B 783 overruling *Chinto Bhairav*; (1908) 32 F 162 and regarding *Mangal*, (1924) 49 B 450 (452) as *obiter*.

50. *Sher Singh*, (1927) 8 L 521 : 28 Cr LJ 266 : 100 IC 234 : AIR (1927) L 217.

I. GENERAL

4. S. 439 must be read along with and subject to S. 435.⁵¹

5. **Revisional powers are for the correction of injustice⁵²—High Court not to entertain application unless lower Court moved.**—It is not the practice of the High Court to entertain an application in revision against an order made by a Magistrate (in proceeding under S. 133 of the Code) unless the party aggrieved has first moved the Sessions Judge under Ss. 435 and 438.⁵³ See Commentary on S. 435 *supra*.

6. **Power to direct further inquiry.**—High Courts can direct further inquiry in revisions under this section read with S. 436.⁵⁴

Clauses (c) and (d) of S. 423 include a power to remit to lower Court cases after setting aside the order passed either under S. 107 or S. 110 or S. 145 and also include power to order further enquiry.⁵⁵

7. **Power to direct retrial.**—A full bench of the Madras High Court has held that Ss. 423 and 439 confer on High Courts power to direct accused to be committed for retrial.⁵⁶

Where the conviction of a lorry driver under S. 279 I P C was set aside on the ground that the trial which was initiated on a summons under S. 130 (1) of the Motor Vehicles Act, retrial was ordered.⁵⁷ Where the prosecution protracted the trial because of the laches and defaults on its own part, retrial was not ordered.⁵⁸ Where there has been a complete confusion in the case in regard to the prosecution case and the idea of the Magistrate, the ends of justice required that the matter should be retried.⁵⁹ Where a trial was held on a Sunday and the application for adjournment by the accused for getting legal advice was refused and in those circumstances, the accused pleaded guilty, retrial was ordered.⁶⁰ Where cross-examination of prosecution witnesses were perfunctory owing to counsel's inaptitude⁶¹; or where in case of a joint trial of two accused, it is held that the proceedings against one was totally invalid,⁶² retrial should be ordered. Mere defect in framing the charge,⁶³ or where there is no reasonable probability of the accused being convicted on the evidence,⁶⁴ or for a technical defect when no injustice has been done⁶⁵ will not be sufficient for ordering a retrial.

8. **Order to submit a charge-sheet.**—The Patna High Court has held that the order to submit a charge-sheet is a judicial act and hence revis-

51. *Hara Prasad Das*, (1912) 40 C 477 (FB) 17 CLJ 245; 17 CWN 647; 14 Cr LJ 197; 19 IC 197, following *per* Wilson J., in *Haridas Sanyal*, 15 C 608 (617) FB.

52. *Govinda Kumbi*, (1927) AIR (1928) N 172.

53. *Rashbehary v. Phani Bhushan Halder*, (1920) 48 C 534; 22 Cr LJ 650; 63 IC 410.

54. *M. Viswanadha Row*, (1928) MWN 615.

55. *Prokasa Reddi v. Pichi Reddi*, A 1955 AP 55; 1955 Cr LJ 565.

56. *Public Prosecutor v. Ponnusami Nayak*, (1927) 55 MLJ 674; (1928) MWN 312; AIR (1928) M 1267 FB.

57. *Govindan*, A 1958 M 286; 1958 Cr LJ

775.

58. *Hukumchand*, A 1957 A 705; 1957 Cr LJ 1191.

59. *Sailendra Kumar Roy v. Corporation of Calcutta*, A 1956 C 156; 1956 Cr LJ 531.

60. *Md. Kasim*, A 1947 B 388; 48 Cr LJ 631.

61. *Barendra Kumar Ghose*, 28 CWN 170; A 1924 C 257 (FB).

62. *S. B. Hussain*, A 1947 C 29; 47 Cr LJ 623.

63. *Bhagwandas Jagannath*, A 1942 S 102; 43 Cr LJ 759.

64. *Soglanuthu Padyachi*, 50 M 274; A 1926 M 638.

65. *Gurdas Singh*, A 1938 L 882; 40 Cr LJ 186.

able.⁶⁶ The Lahore High Court has held that a charge drawn up can be set aside.⁶⁷

9. Ss. 437 (present S. 436) and 439 compared.—The powers of interference of the High Court and the District Magistrate or Sessions Judge are co-extensive under S. 437 and they can set aside an order of discharge for reasons other than those which will justify the High Court in interfering in revision.⁶⁸

10. High Court cannot revise its own judgments under S. 439.—Petheram, C. J., observed :—“Speaking for myself and indeed in this matter I think for the whole of the Judges constituting this Bench, I have no doubt whatever that in cases of this kind (*i. e.*, review of a judgment of a Division Bench by itself) no power of review resides in the Court or in any Bench of the Court.⁶⁹ The High Court has no power to revise or review the judgment of one or more of its Judges in a Criminal Appeal or Revision.⁷⁰ But the High Court has the inherent power under S. 561-A to pass any order which would not conflict with any of the provisions of the Code.⁷¹ The Calcutta High Court exercised the powers under S. 561-A in vacating an order of enhancement of sentence passed without notice to the accused.⁷²

11. When to interfere in Revision under this section.—The High Court has, as a Court of Revision, jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial,⁷³ but in interfering with an order of discharge or acquittal the High Court should see that such order is clearly wrong.⁷⁴ Although generally interference is based on errors of law or principle prejudicially affecting the case,⁷⁵ Walsh, J., in an earlier decision⁷⁶ held that revisional powers would be a farce if the High Court could not interfere on facts and reports would show that there are thousands of cases where the High Court in the past had interfered on facts.

The Madras High Court held that no revision lies where *appeal though tenable has not been filed*.⁷⁷ A High Court, as a Court of Revision, has power under S. 439 to *revoke an order* made by a Subordinate Court under S. 476 of the Code.⁷⁸ Where explanation of defence is not accepted by lower Courts, the High Court will not accept the explanation in revision.⁷⁹

12. There is no species of injustice which the High Court is powerless to correct.—“For my part, I am of opinion that there is no form of judicial injustice which this Court if need be cannot reach. It would be unfortunate if it were otherwise,⁸⁰ but it may be pointed out that these

66. *Sukhdeo Sahay*, (1928) 7 p. 561 : AIR (1928) P. 585a.

67. *Balbit Singh*, AIR (1929) L. 67.

68. *Narayanaswami Naidu*, (1908) 32 M 220 (FB).

69. *In the matter of Gibbons*, (1886) 14 C 42 (FB) 45 following *Durga Charan*, (1885) 7 A 672 and *Fox*, 10 B 176.

70. *Kunnahamad Haji*, 46 M 382 : 44 MLJ 450 ; (1923) MWN 94 : 24 Cr LJ 489 : AIR (1923) M 426.

71. *In re Gurunath Narayan Batgeri*, (1924) 26 Bom LR 719.

72. *Ramesh Pada Mandal v. Kadambini Dassi*, (1927) 55 C 417 : 47 CLJ 358 : 31 GWN 960.

73. *Kalidas Bhaidas*, (1902) 4 Bom LR

779.

74. *Bishen Singh v. Abdul Gafur*, AIR (1928) L 178 (1).

75. *Baburam*, (1927) AIR (1928) A 1.

76. *Umed Singh*, (1923) 46 A 77 : 21 ALJ 785.

77. *Subbramanya Ayyar*, (1928) MWN 777 : AIR (1928) M 1174.

78. *Srinivasalu Naidu*, (1897) 21 M 124 (127) FB : 2 Weir 593 ; *Jogiah*, (1908) 31 M 510.

79. *Bachu Lakman*, A 1960 Guj 376.

80. *per Woodroffe, J.*, in *Lekhraj Ram v. Debi Pershad*, (1908) 12 GWN 678 : 7 Cr LJ 499 ; *Jagiah*, (1908) 31 M 510 ; *Balkrishna Narayan v. Col. N. S. Jatar*, A 1945 N 33.

decisions⁸⁰ are based upon the powers of interference under the Charter or the Government of India Act.

II. PRACTICE

13. Limitation.—The law of limitation has no application to petitions for revision under this section. But the practice prevailing in the Calcutta High Court is to move the High Court within 60 days from the order complained of, *viz.*, from the Appellate order or if the Sessions Judge or the District Magistrate is asked to refer the matter under Ss. 435 and 438 of the Code, then 60 days from the order of the trying Magistrate excluding of course the time requisite for obtaining copies and the time taken by the Revisional Court in disposing of the application under S. 438. Although it is not an inflexible rule and in exceptional circumstances the rule may be departed from,⁸¹ practitioners know how difficult it is to persuade the Judges to accept a petition even if it is late by a day, *e. g.*, when the 60th day happens to fall on a Sunday, Mondays being the dates on which motions are usually taken, applications are not entertained and one meets with an observation from the Bench: "Why did you not move on the last motion day?" The fact that one Division Bench of the High Court has issued a Rule *ex parte* does not *per se* disentitle the Bench hearing that Rule to question the propriety of the order on the ground that the application was made too late, and that Bench can decide the point in the presence of the opposite party.⁸² With great respect to the learned Judges who started this limitation in *Khetra v. Darpa*, 20 C W N 1170 and issued a circular to the Subordinate Courts in *Rajchandra's* case,⁸³ it seems, that by putting a limitation of 60 days' rule based upon practice the learned Judges deny justice inasmuch as the law of Limitation does not provide for the period of limitation in such cases. We know that it is a purely discretionary jurisdiction that is exercised under this section and the time taken in rejecting an application as being late by a few days may be better utilised in disposing of the application on its merits.

Sind Judicial Commissioner's Court used to follow the sixty days rule in practice exclusive of the time taken for obtaining copies of judgment.⁸⁴ The Allahabad High Court does not follow the 60 days' rule but held that unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court in the exercise of its discretion declining to interfere.⁸⁵

The Patna High Court also follows the same rule of 60 days' practice although it holds that it is not an inflexible rule.⁸⁶ The Lahore High Court refused to interfere where the accused, convicted under S. 408 I. P. C. was ordered to execute a bond under S. 562, moved the High Court after considerable time.⁸⁷

There is no limitations for taking action under Ss. 438 and 439.⁸⁸ The

81. *Khetra Mohan Giri v. Darpa Narain Giri*, (1916) 20 CWN 1170; 43 C 1029; *Raj Chandra*, 25 CLJ 564; *Kishen Dayal Chaukidar v. Darjeeling Municipality*, 54 C 394.

82. *Kishen Dayal Chaukidar v. Darjeeling Municipality*, (1920) 54 C 394, distinguishing *Abdul Mutlub v. Kanda Lal Khatel*, (1922) 50 C 423.

83. (1916) 25 CLJ 564.

84. *Mahrom Dhanibux*, (1911) 5 SLR 265; 13 Cr LJ 531.

85. *Jagannath*, (1905) 27 A 468; *Ramnarain*,

(1886) 8 A 514—delay of 9 months *Puttan Lal*, (1907) AWN 204; 6 Cr LJ 153.

86. *Kelu Patra v. Iswar Parida*, (1929) 8 p. 468; *Baldeo Singh v. Dhenoo Goulin*, A 1936 P 109; *Zainab Bibi v. Anwar Khan*, A 1946 P 104; 47 Cr LJ 821; *Lalo Mahto*, A 1942 p. 150; *Zafar Ahsan v. Gajashwar Bux*, A 1943 p. 135.

87. *Khairthi Lal*, AIR (1928) L 926.

88. *Kanra v. Murarilal*, A 1955 A 694; 1955 Cr LJ 1551; *Sher Ali*, A 1959 C 457.

Nagpur High Court held that under Rule 14 of the Nagpur High Court Rule a limitation of 60 days has been prescribed for moving the High Court in revision.⁸⁹ There is no limitation prescribed for the filing of Criminal Revision. It is the practice of the Himachal Pradesh Judicial Commissioner's Court not to entertain Criminal Revisions generally if filed beyond 90 days from the order complained of.⁹⁰ It will be entertained if on a consideration of the case on merits, it appears that there has been a failure of justice.⁹¹ Long delay in filing the revisional application for insufficient reasons cannot be condoned.⁹² So far as the Lahore High Court is concerned, there is no rule of practice that Criminal revisions which are filed after 60 or 90 days must be rejected.⁹³ The fact that the pleaders in the *mofussil* are not aware of the practice of the High Court and the petitioners include a *parda-nashin* lady cannot be regarded as among the most exceptional circumstances for condoning the delay.⁹⁴

14. Can the High Court act suo motu?—Yes, the words of the section “otherwise comes to its knowledge” confer on the High Court such powers.

The Calcutta High Court acted *suo motu* in quashing an order under S. 110.⁹⁵

15. If a rule is issued is the High Court confined to the grounds on which the rule is issued or is the whole case open?—The applicant or the petitioner will not ordinarily be heard on a point not covered by the grounds on which the Rule has been issued.⁹⁶ Another view is that the Court is not restricted or confined to the four corners of the rule as to the points it will consider or the form of the final order.⁹⁷ Where there is a difference of opinion between two learned Judges and the matter is referred to a third Judge under S. 429 the hands of the third Judge are tied to the rule as the whole case is before him.⁹⁸ Where in the application a point was raised which had not been included in the rule, but the learned Judges disposing of the rule were informed that the Judge issuing a rule directed a note to be made on the application that the matter would be considered when the rule would come up for hearing, the High Court allowed the point to be argued.⁹⁹ The correct view seems to be that the High Court can travel beyond the rule as in *Milan Khan's* case,⁹⁷ but if the ground or grounds on which the rule was issued is based upon allegations of fact which have been controverted by the Magistrate in his explanation or by the opposite party in a counter-affidavit, it is only fair that the other side should be given an opportunity of controverting the allegations of fact not covered by the rule. If it is a pure point of law raised at the hearing, although it is not covered by the rule the point should be allowed to be argued as in *Chhakoo Mandal*⁹⁹ but even then the Crown or the opposite party should be given a notice by the petitioner of the point of law so that they might come prepared to meet the same.

89. *Niamat Khan*, A 1951 N 216.

90. *Lajja Ram*, A 1952 HP & B 32 : 1952 Cr LJ 821.

91. *Hari Singh v. Mt. Parbati*, A 1951 HP 59 : 52 Cr LJ 1078 ; *Natho Ranjee v. Jagannath*, A 1940 N 259.

92. *Municipal Commissioners Raniganj v. Kalwar*, 57 CWN 704 : 1953 Cr LJ 1874.

93. *Des Raj*, A 1934 L 264.

94. *Bachan Kuer v. Maharaja of Chotnagpur*, A 1939 p. 320 : 40 Cr LJ 196.

95. *Satindra Nath Sen*: (1928) 48 CLJ 143.

96. *Luchman Singh*, (1906) 31 C 710 ; *Kanto Ram Das v. Gobardhan Das*, (1907) 35 C 133 (136) . *Molla Fuzla Kerim*, (1906) 33 C 193.

97. *Milan Khan v. Sagai Bepari*, (1895) 23 C 347 (349) ; *Mohar Khan v. Gayzuddin Sheikh*, (1913) 18 CWN 399.

98. *Rakhal Nikari*, (1897) 2 CWN 81.

99. *Chhakoo Mandal*, (1900) 11 CWN 467 : 5 Cr LJ 278.

A point which was not raised in the revision petition will not be allowed to be raised at the time of the hearing.¹ Even if an application was admitted on the question of sentence, the High Court can consider the case as a whole and hold that there is an illegality in the trial.^{1a}

Where a Rule issued by the High Court was to show cause why the appeal should not be reheard, at the final hearing it is open to the High Court to make any order as it may think fit.²

15a. New plea.—A plea which was not raised in the lower Court cannot be entertained by the High Court for the first time in revision³.

Want of sanctions which goes to the root of the proceedings could be allowed to be raised at the subsequent retrial.⁴

16. Has the High Court power to revise even after the sentence has expired or the order has died a natural death by the efflux of time? Yes, see *Sinha's case*.⁵ An order under S. 144 Cr. P. Code lasts only for 60 days after which it dies a natural death and in the following cases⁶ the High Court revised the order when a proceeding under S. 188 I. P. C. had been started for a disobedience of the order under S. 144 of the Code.

17. In cases of imprisonment motions will not be entertained unless the accused surrenders himself.—A full bench of the Allahabad High Court held: "The Division Bench in our judgment rightly refused to entertain this petition until the petitioner had surrendered to the warrant".⁷

But in applications in revision against an order of fine in default of which there is an order for imprisonment the accused need not surrender but in that event he will either pay the fine or pray in the petition for suspension of the sentence of fine pending the hearing of the Rule.

18. After an application is rejected no fresh petition on the same facts will be entertained.—Once a criminal revision petition is dismissed on the merits by the High Court, the rules of equity, justice and good conscience require that the other petition on the same matter should not lie.⁸

19. Does the rule abate on the death of the applicant?—It certainly abates with the death of the applicant when he is ordered to be imprisoned. But it does not abate when the sentence is one of fine.⁹ A petition for the revision of an order directing the petitioner to pay compensation under S. 250 does not abate on the death of the petitioner.¹⁰

1. *Prem Narain*, A 1957 MB 172 : 1957 Cr LJ 508.

1a. *Valukutty*, A 1956 PC 191 : 1956 Cr LJ 102.

2. *Mangi Lal*, A 1945 A 98 : 46 Cr LJ 529.

3. *Bejoy Singh Hazari v. Mathuriya Debya*, A 1925 C 1182.

4. *Major J. Philips*, A 1957 C 25 : 1957 Cr LJ 54.

5. (1884) 7 A 135.

6. *Chandra Nath Mukherji v. East India Railway Co.*, (1918) 23 CWN 145 : 28 GLJ 483 : 19 Cr LJ 951 ; *Chandra*

Kanta Kanjilal, (1916) 20 CWN 981 : 17 Cr LJ 404 : 36 IC 144 *contra Swaminath Mudaliar v. Gopalkrishna Naidu*, 16 Cr LJ 272 : 28 IC 160 (M).

7. *Bisheshur Pershad*, (1870) 2 NWPHCR 441 FB.

8. *Kamakashabhai*, (1915) MWN 786 : 16 Cr LJ 697.

9. *Dongaji Andaji*, (1878) 2 B 564 (570).

10. *Prem Singh v. Bhola*, (1908) 24 PR 1908 : 9 Cr LJ 103.

20. Can an order passed on default be restored?—Where the Court discharged a rule because no one appeared in support of it, *held*, that it had power to reopen it.¹¹ Once a criminal case has been dismissed for default of payment of printing charges, it is not competent to the High Court to rehear the case or entertain a fresh application for revision.¹²

In view of the provisions of S. 561-A the High Court has powers to restore such revision cases.¹³

21. Is affidavit necessary in all applications?—When the petitioner does not rely on any facts but wants a revision of the order on a pure point of law, he may not support the application by an affidavit but whenever any allegation is made in the petition based on a statement of fact, those statements must be supported by an affidavit, otherwise the High Courts will not listen to such applications. But all applications for transfer except when the *applicant* is the Advocate-General must be supported by affidavit or affirmation *vide* S. 526(4).

Affidavit by an accused is not worth the paper on which it is written.—Courts will not hear an affidavit by an accused person for the simple reason that he cannot be prosecuted in regard to such an offence.¹⁴

22. Hearing a Party or Pleader.—True, under S. 440 *infra*, no party has any right to be heard either personally or by pleader before any Court exercising its powers of revision. Since in such applications the members of the Bar enjoy a privilege of being heard, it would be too late in the day for a learned Judge to say “I refuse to hear you” because the longstanding practice has so to say conferred on the profession a prescriptive right of being heard.

23. Right to begin.—In *practice* the petitioner who has obtained the Rule has the right to begin and he has also got the right to reply. But, when the Bench who had issued the Rule hear the Rule, the practice is to call upon the Crown or the opposite Party to show cause and then to hear the petitioner's counsel if necessary.

24. Has the complainant any locus standi to move for a rule or right of audience in revision cases?—Ordinarily in criminal cases the two parties contending are the State and the accused and the complainant cannot come in. A complainant may move the High Court against an order of acquittal but the practice is that he must move the Local Government either through the District Magistrate or through the Legal Remembrancer as early as possible and after such application is rejected he must move within 60 days. It may be that the Legal Remembrancer with whom the application had been lodged may take time to dispose of the application and meanwhile the application may be barred, in such cases the complainant will mention the matter to the learned Judges presiding over the criminal Bench who may either hear the application or order the same to be noted. Complainants should remember that the High Court seldom interfere with an order of acquittal at the instance of a private party unless grounds are

11. *Bibhuti Mohan Roy v. Dasmoni Dassi*, (1902) 10 GLJ 80 : 10 Cr LJ 287 : 3 IC 393.

12. *Nara Appaya v. Darsi Venkatappaya*, (1922) 44 MLJ 27 following *Re Ranga Rao*, (1912) 23 MLJ 391 : 13 Cr LJ 710.

13. *Ramesh Pada Mandal v. Kadambini Dasi*, (1927) 31 GWN 960.

14. *Barkat*, (1897) 19 A 200, followed in *Bindeshri Singh*, (1906) 3 ALJ 98 : (1906) AWN 42 ; *Subappa*, (1889) 12 M 451 ; *Bhashyam Chetti*, (1896) 19 M 209.

made out that the interference is "urgently demanded in the interests of public Justice" as Jenkins, C. J., observed in *Faujdar Thakur v. Kashi Choudhuri*.¹⁵

See in fuller detail discussion *infra* headed 'motions against acquittal' under sub-sec. (4).

A complainant may move the High Court for a transfer of his case and under S. 526. He is not obliged to serve the Crown with a notice of such application as under S. 526 (6) the accused before making such application is required to give the Public Prosecutor notice.

Unless a rule is issued upon the complainant he has no right of audience except in cases where he has been awarded compensation or fine or he has been awarded costs.¹⁶

25. Can you move the High Court direct, i. e., without moving the Sessions Judge or the District magistrate under Ss. 435 and 438 ?

—In law there is no bar to moving the High Court direct as S. 435 opens with the words "The High Court". It has been held in *Hara Prasad Das*¹⁷ that S. 439 must be read subject to S. 435.

See Commentary to S. 435.

26. Quashing.—In applications for quashing of an order directing the prosecution or trial of the accused, the applicants will have to move the High Court direct as the High Court may interfere in revision under Ss. 435, 438 and 439 at any stage with the proceedings of a Magistrate in a pending trial.¹⁸ The High Court seldom interferes in the preliminary stage with the discretion of a Magistrate taking action under the *preventive sections* of the Code except where the order is passed on materials clearly insufficient to support the order.¹⁹

The High Court has power to quash a criminal proceeding in its early stages *before any evidence* has been recorded but this power should be exercised in exceptional circumstances²⁰ and the same High Court interfered upon the issue of summons to the accused.^{20a}

In an application under Ss. 439 and 561-A the Supreme Court has quashed proceedings where the allegations in the petition of complaint or in the F. I. R., even if true, do not disclose an offence,²¹ or when there is some legal bar to the continuance of the proceedings such as lack of jurisdiction or the bar under S. 403.²² What the High Court has to consider when a prayer is

15. (1914) 42 C 612 : 19 CWN 184 : 21 CLJ 53 : 16 Cr LJ 122 : 27 IC 186, followed in *Fareedoon Cowasji Prabhu*, (1917) 41 B 560 : 19 Bom LR 354 : 18 Cr LJ 668 : 40 IC 316, *per* Crump J, (Macleod CJ, dissenting) in *Joita Bachar v. Parshotom*, 25 Bom LR 488 : 24 Cr LJ 734 : AIR (1923) B 455 : *Pramatha Nath Barat v. P. C. Lahiri*, (1920) 47 C 818 : 22 Cr LJ 5 : 59 IC 37.

16. *Jhulan Jha v. Bucher Gope*, (1904) 31 C 811 ; *Mohar Khan v. Gayzuddin Shaikh*, (1913) 18 CWN 399.

17. 40 C 477 : 17 CWN 674 : 17 CLJ 245 : 14 Cr LJ 197 : 19 IC 197 (FB).

18. *Ramnath Cheltiyar v. Sivaram Subramahanya Ayyer*, (1924) 47 M 723.

19. *Nafar Chandra Pal Chaudhury*, (1923, July) 28 GWN 23 : 38 CLJ 198 : 25 Cr LJ 189 : AIR (1924) C 114 ; *Rajendra Narayan*, (1912) 17 CWN 238 : 16 CLJ 467 (498).

20. *Nripendra Bhusan Roy v. Gobinda Bandhu Majumdar*, (1923 Augt.) 39 CLJ 236 ; *Chaitan Lal*, (1918) 16 ALJ 734 : 19 Cr LJ 740.

20a. *Hari Charan Gorait v. Girish Chandra Sadhukhan*, (1911) 38 C 68 ; see also *Thakaria v. Puran Singh*, (1922) 67 IC 589.

21. *K. N. Kapur v. State of Punjab*, A 1960 SC 866 ; *T. V. Palaniswamy Naidu v. Sirkar*, A 1957 TC 319 : 1957 Cr LJ 1455 (2).

22. *Harol Narmoda Prasad*, A 1956 VP 30 ; 1956 Cr LJ 1246.

made to that Court for quashing is the allegation made in the charge itself.²³ Where on the facts and circumstances of the case, the prosecution has not been launched *bona fide* and appeared to have been taken for the ulterior purpose of coercing the accused to come to settlement in the civil claim and the Court had no jurisdiction to entertain the complaint in respect of the offence of criminal breach of Trust and as it would not be in the interest of public justice to allow a prolonged trial in respect of the cheating for a purely civil claim, the proceedings should be quashed.²⁴

The High Court very seldom interferes at a preliminary stage and one often meets with an observation from the Bench "we are not to do the work of the Magistrate, if no offence has been made out, you will be acquitted". It is also a *dangerous step* to advise a party to move the High Court for quashing because after the application is rejected no Magistrate will venture to acquit if the facts are proved. But one has to advise a party to move for quashing in order to save harassment and expenses of a prolonged criminal trial if the facts do not constitute an offence or if there is or are in law a bar or bars to the trial being held, e.g., '*autrefois acquit*' or other technical errors.

"There can be no doubt whatever that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected to harassment of an illegal prosecution, it is our bounden duty to interfere".²⁵ "One *practical test* would be this, that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince this Court, that it is a fit one for interference at any intermediate stage".²⁶

In a recent case, the Madras High Court has held that the High Court in revision would not except on the allegation of gravest departure from procedure take the conduct of a case out of the hands of the trial court.²⁷

Long delay in disposal if a ground for quashing.—The mere fact that the proceedings in a criminal case have been pending for a very long time is *no ground for quashing* them where the delay is not due to the complainant.²⁸

"The power under S. 439 ought, no doubt, to be exercised by this Court with great care, and certainly with regard to pending trials it is only in most exceptional cases that the power should be exercised".²⁹

High Court may quash commitment made under S. 437 (old S. 436).—S. 215 bars the reviewing of a commitment made under Ss. 213, 214, 477 and 478 except on a point of law, but it does not bar the revision under S. 439 of a commitment order made under S. 436 (present 437).³⁰

Is S. 215 a bar?—No, the High Court has authority to set aside the order of commitment on the merits of the case.³¹

23. *Parbhubhai Paragi*, A 1956 B 232 : 1956 Cr LJ 497.

24. *Hiralal Chowdhury*, A 1956 A 619: 1956 Cr LJ 1165.

25. *Chandi Pershad v. Abdur Rahman*, (1894) 22 C 131, quashing after charge has been framed—followed in *Sripad Chandhuvakar*, 30 Bom LR 70 : 52 B 151 : AIR (1928) B 184.

26. *Choa Lal Dass v. Anant Pershad Missir*, (1897) 25 C 233 (235); *Sone Setti Subbarayalu Seti v. Ramgiat Chetty*, A 1958 AP 574 : 1958 Cr LJ 1003.

27. *Nachiappa Udayan alias Venga Udayan*, (1927) 51 M 84.

28. *Mohan v. Khan Muhammad*, (1926) 8 LLJ 518 : 27 PLR 705: 28 Cr LJ 164 : 99 IC 596 : AIR (1927) L 66 (1).

29. *Inamullah*, 2 ALJ 673 : (1905) AWN 238 : 2 Cr LJ 790.

30. *Rashbehari Lal Mandal*, (1907) 12 GWN 117 : 6 CLJ 760.

31. *Pirthi Chand Lal v. Sampati*, (1903) 7 GWN 327 followed in *Muthu Chetty*, (1906) 30 M 224.

The Allahabad High Court has held however that commitment can be set aside only on a point of law.³²

Can it quash a charge?—Yes, the High Court may quash at any stage. The High Courts have quashed a charge in the following cases.³³

27. Can the High Court in revision under this section enter into questions of fact?—The High Court will not usually revise a finding of fact but it has the power to revise such finding or may look into the evidence on the record and after examining the record set aside the order although such power is exercised in exceptional cases and very sparingly.

See notes to S. 435 *supra* under this heading.

See also the following cases which have held that the High Court would not ordinarily interfere with findings of fact.³⁴

It is not open to the High Court exercising revisional jurisdiction to determine disputed question of fact.³⁵ High Court in revision will not dislodge findings of fact when they are based on evidence³⁶ specially so in the case of concurrent findings of lower Courts^{36a} or unless they were perverse.^{36b} Misappreciation of evidence³⁷ or inadequate evidence³⁸ would not be sufficient to disturb a finding of fact.

In a criminal revision, it is not permissible to canvass the findings of facts arrived at by the Courts below.³⁹ A finding of fact supported by one set of witnesses need not be disturbed in revision merely because the evidence of other set of witnesses with conflicting versions has not been considered.⁴⁰

28. Practice of High Court as to entering into facts.—“The uniform practice of the Court”, says Mr. Justice Melvill, “is not to exercise its powers of upsetting a finding of fact except for some very extraordinary reason and the circumstance that the Court itself might have come to a different conclusion is not such a reason”.⁴¹ The High Court will do so if there are very exceptional grounds for its interference in the interests of the justice.⁴² Aston J., (dissenting) held: “It is a well-established rule

32. *Sailani*, (1913) 36 A 4 : 11 ALJ 959 ; *Mahabir*, (1921) 23 Cr LJ 79 : AIR (1922) Oudh 109 (1).

33. *Chandi Pershad v. Abdur Rahman*, (1895) 22 C 131 ; *Jagat Chandra Majumdar*, (1899) 26 C 786; and *In re Kuppuswami Ayer*, (1916) 39 M 561 : 28 MLJ 505: 16 Cr LJ 477 ; *Seth Jivandas*, (1917) 20 Cr LJ 764 : 53 IC 492 ; *Balbit Singh*, (1929) AIR (1929) L 67.

34. *Dullichandalal*, (1917) 18 Cr LJ 437 (441) : 38 IC 997 : *Ram Rao*, (1917) 13 NLR 169 : 18 Cr LJ 993 : 42 IC 721 : *Maruthayee v. Appavu Pillai*, (1922) 31 MLT 388 (HC) : 24 Cr LJ 476 ; *Gajadhar Lal*, (1920) 22 Cr LJ 230 (P) ; *Bansilal v. Ali Mahammad*, (1913) 319 PLR 1913 : 21 IC 467.

35. *Gangapathi Muthuriyar v. Narayanaswami*; A 1957 M 405 : 1957 Cr LJ 76.

36. *Issa Yaenb*, A 1961 Mys 7 ; *Shivkeli*, A 1944 A 257 FB.

36a. *Narayan*, A 1954 SC 726 ; 1954 Cr LJ 1808.

36b. *Chimanlal*, A 1958 Raj 335 : 1958 Cr

LJ 1537 ; *Naurang v. Janata*, 1952 Cr LJ 542 (HP) ; *Trikamji*, A 1952 N 33 ; *Beoparia v. State of Ajmer*, A 1955 Ajmer 10, *Vagha Lakha*, A 1955 Kutch 1 ; *Umed Singh*, A 1955 Raj 195: 1955 Cr LJ 1518 ; *Mohan Waghdi*, A 1955 Sau 39.

37. *Prayag Dasab v. Ramjatan Pandey*, A 1950 p. 508 : *Damodar v. Jujhir Singh*, A 1926 N 115.

38. *Hafizur Rahman*, 44 CWN 1114 : 42 Cr LJ 490 ; *Prohit Anadi Prashad*, A 1949 A 322 : 50 Cr LJ 516.

39. *Khalandar Saheb*, A 1955 AP 59 ; 1955 Cr LJ 58.

40. *Kalipada Dalal*, A 1955 C 470 : 1955 Cr LJ 1243.

41. *Maganlal*, (1889) 14 B 115 (118) ; *Umakant Balwant*, (1907) 9 Bom LR 706 (709) : 6 Cr LJ 70 (71).

42. *Chagan Dayaram*, (1890) 14 B 331 ; *Girdhari Lal*, (1911) 11 PR (Cr) 1911 : 146 PLR 1911 : 12 Cr LJ 217 ; *In re Daya Bhika Kumbi*, (1928) 30 Bom LR 631 : AIR (1928) B 221.

of this Court that in exercising the powers of revision this Court interferes, on questions of fact only in very exceptional circumstances".⁴³ If the finding of a Sessions Judge on appeal is inconsistent with his conclusion, that is only a ground for rehearing of the appeal.⁴⁴ It is unusual in revision to interfere with a finding of fact, there can be no question as to the competency of the High Court so to interfere with a finding of fact when the occasion requires it, and the Court will not hesitate to do so when satisfied that the finding is manifestly erroneous and miscarriage of justice would result from it if left uncorrected.⁴⁵ The practice of the Allahabad High Court not to interfere in criminal revision on questions of fact is not an absolute one and the Court will interfere where it is not satisfied as to the propriety of the finding.⁴⁶ Walsh J., held that revisional powers would be a *farce* if the High Court could not interfere on facts.⁴⁷ Even concurrent findings of fact will be set aside when the case seems *ab initio* improbable and the element of doubt is very strong.⁴⁸

To justify an interference of the High Court in revision it must be shown that there exists an error in law and that the accused has been prejudiced by that error. An error in appreciation of evidence is not an error in law.⁴⁹

28a. Power to order stay of criminal proceedings pending civil proceedings.—See Commentary on S. 344 *ante*.

29. Power to order that remarks be expunged.—See Commentary on S. 561-A *infra*.

30. Power to order Composition of Offence.—See Commentary on Section 345 *ante*.

31. Order of discharge.—Where concurrent revisional jurisdiction is conferred on courts of different grades, the aggrieved party should approach the inferior among such courts first and not to approach the High Court directly.⁵⁰ The practice of the Calcutta High Court is to move the High Court direct but there is no bar to moving the Sessions Judge in the first instance.

32. Motions or appeals against Acquittal.—Under the heading 'acquittal' notice the distinction between motion at the instance of a private party (complainant) and *appeals* by the Local Government.

33. Motions for enhancement of sentence.—Will be considered under commentary to sub-sec. (6).

34. Court-fees.—If the petitioner is in jail no *Court-fee* is required to be affixed on the petition but a Court-fee stamp of Rs. 2/- is required on the vakalatnama and a Court-fee stamp of Rs. 2/- is required to be affixed on the affidavit.

43. *Nandeyappa Gawda Shiddangowda*, (1906) 8 Bom LR 851 (852) : 4 Cr LJ 446 ; *Bankataram Lachiram*, (1904) 28 B 533 : 6 Bom LR 379 (385).

44. *Babu Ram Raut*, (1912) 17 CLJ 394 : 14 Cr LJ 295 : 19 IC 951.

45. *Ram Prasad*, 17 CWN 379 : 16 CLJ 453 : 13 Cr LJ 897, see cases referred to.

46. *Shiama Sunder*, (1922) 20 ALJ 276 : 23 Cr LJ 241 : AIR (1922) A 122 ; see *Raghubir Dayal*, (1916) 18 Cr LJ 435 :

38 IC 995 ; *Mahbob*, (1920) 21 Cr LJ 552 (M).

47. *Umed Singh*, (1923 July) 46 A 64 : 21 ALJ 785 ; *Pannalal*, 52 CWN 922.

48. *Boori*, (1912) 10 PLR 1912 : 13 Cr LJ 712 : 16 IC 520 ; *Prafulla*, A 1948 p. 409.

49. *Sakharam Nago*, (1912) 4 Bom LR 686.

50. *Das Isaac v. Narayana*, (1959) MLJ (Cr) 206.

If the petitioner has been sentenced to pay a fine or if it is directed against any order other than a sentence of imprisonment a Court-fee stamp of Rs. 2/- is required to be affixed on the top of the petition.

35. Form and Contents of a Petition.—No 'form' is given in the Schedules to the Criminal Procedure Code and the practitioner is to draw up the petition as he thinks best. There is no prescribed form and instead of drawing up *grounds*, one might simply state in the petition after making the allegations, the following passage: "In view of the illegalities and the irregularities complained of in the foregoing paragraphs of this petition your petitioner begs leave to move your Lordships for setting aside the order of conviction and sentence etc."

Now it is not usual nor is it the practice to draw up a petition in which grounds are not specifically taken because the *practice* of the learned Judges while issuing a *Rule* is to confine it to some grounds taken in the petition, although the Judges cannot reject a petition simply on the ground that no specific grounds have been drawn up.

36. Affidavit annexed to the petition should be worded as follows.—I am a *relation* (or *Kanrpardaz*) of the petitioner and I looked after the case in the Courts below on his behalf and as such I am fully acquainted with the facts and circumstances of the case.

2. That the facts and circumstances set forth in the foregoing paragraphs of the petition excepting those that are matters of Record are true to my knowledge.

In case any statement or allegations made in the petition is not true to knowledge, draw up a third paragraph in which state as follows:—

3. That the facts set forth in paragraph.....are true to my information from.....which information I verily believe to be true.

37. Powers not exercisable by High Court in revision.—Section 435 (3) of the Code of 1898 having been omitted by S. 116 of Act XVIII of 1923 orders under Ss. 143 and 144, proceedings under Chapter XII and S. 176 of the Code which were excepted from the purview of S. 435 and consequently from S. 439 *are now revisable* under S. 439. Hence we need not consider the old decisions which held that such orders could not be revised under this section as the said decisions have been impliedly overruled by the amendment.

(a) *Order of discharge made by a Presidency Magistrate.*—Where a complaint has been dismissed by a Presidency Magistrate under S. 203 of the Code the High Court has no power to direct a further enquiry under Ss. 437 and 439 of the Code but it may interfere only under S. 15 of the Charter Act.⁵¹

(b) *Orders under the Extradition Act.*—The High Court cannot interfere in revision with the proceedings of a Magistrate taken upon a warrant issued

51. *Debi Bux Shroff v. Jutmal Dungarwal*, (1906) 33 C 1282 (1284); see *contra Varjivandas*, (1902) 27 B 84; *Mallik Pratap Singh v. Khan Mahamed*, 36 C 994; *King Emperor v. Nanda Gopal Roy*,

(1916) 20 CWN 1128; *Charoobala Dabee v. Barendra Nath Majumdar*, (1899) 27 C 126 (129); 3 CWN 601; see *Dwarkanath Mandal v. Beni Madhab Banerjee*, (1900) 28 C 652 FB.

by the Political Agent under S. 7 of the Indian Extradition Act,⁵² but the proper remedy is to move the High Court under S. 491.⁵³

(c) *Orders under the Goonda Act.*—The High Court has no power to interfere under S. 439 of the Code, with the warrant issued by a Secretary to the Local Government under S. 4 of the Goondas Act (Beng. I of 1923) or with the orders of the Deputy Commissioner of Police refusing to release a person, arrested under the Act, on bail. The proper procedure in such a case is to move the High Court under S. 491 of the Code.⁵⁴

(d) *Orders for Security or Legality of forfeiture under the Press Act.*—An order under S. 8 of the Indian Press Act for the deposit of security by the publisher of a newspaper is not revisable by the High Court.⁵⁵

(e) *Orders under the Reformatory Schools Act (VIII of 1897)*—It has been held by a full bench decision of the Allahabad High Court that it has powers to interfere with such orders.⁵⁶ If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not debarred by S. 16 of the Reformatory Schools Act (VIII of 1897) from altering or revising such orders.⁵⁷ The Bombay High Court has recently held that it has under S. 439 (1) powers to pass orders in revision for detaining youthful offenders in a Reformatory under S. 8 of the Reformatory Schools Act.⁵⁸

(f) *Orders under S. 476B.*—See Commentary on S. 435 ante.

The Allahabad High Court in⁵⁹ has upon a comparison of the old and new Codes, held that S. 439 is inapplicable to an order under S. 476-B. The Calcutta High Court in *Ahmader Rahman v. Dwip Chand*⁶⁰ while holding that there was no second appeal did not decide the point whether a revision lay under this section. As has been discussed in Commentary to S. 435 ante, it follows from the plain words of S. 439 (1) that revision lies under this section against orders under S. 476B when the order under S. 476 is by a criminal Court. In view of the Amending Act XVIII of 1923 having inserted Ss. 476A and 476B and especially the provision for appeals under S. 476B it is submitted that the view that a proceeding under S. 476 is a complaint and nothing more and as such not a judicial proceeding or order which is revisable under S. 439 taken in the full bench decision in *Ottupara*⁶¹ over-ruling *Eranhoti Attian*,⁶² is no longer tenable. The same High Court in *Srinivasulu Naidu*⁶³ held as follows:—"The High Court as a Court of Revision has power under S. 439 Cr. P. C. to interfere on grounds other than want of jurisdiction, when a Criminal Court has taken action under S. 476".

Order under S. 476 by Civil or Revenue Court—Revision.—It was held by a full bench of the Calcutta High Court that an order passed by a Civil

52. *Gulli Sahu*, (1914) 42 C 783 ; see also *Subodh Chandra Ray Chowdhury*, (1924) 29 CWN 98 ; *Giyan Chand v. Mehram*, (1908) 9 Cr LJ 3.

53. *Rameswar Khiroriwalla*, (1928) 32 CWN 889.

54. *Bisheswar Raj Gorla*, (1926) 53 C 962.

55. *Aga Syed Jalaluddin Husain*, (1913) 17 CWN 1245.

56. *Hori*, (1899) 21 A 391 (FB) overruling *Billar*, (1897) 20 A 158 ; *Rajabali*, 5 SLR 173 : 13 Cr LJ 44 : 13 IC

284.

57. *Mokimuddin*, (1899) 27 C 133, see *Radhakrishto Barat v. Gokul Nat*, 5 CWN 210 ; *Amir Bhikan*, 6 Bom LR 550.

58. *Lakshan Naran*, (1928) 30 Bom LR 952.

59. *Banwari Lal v. Jhumka*, (1925) 24 ALJ 217, following *Bhup Kunwar*, 26 A 249

60. 32 CWN 164.

61. 33 M 48 FB.

62. (1902) 26 M 98 FB.

63. 21 M 24 FB.

or Revenue Court under S. 476 Cr. P. C. could be revised by the High Court under S. 439 Cr. P. C. but under S. 115 Cr. P. C. or S. 15 of the High Courts Act.⁶⁴

So far as the Allahabad High Court is concerned it is firmly established that a Court exercising jurisdiction under S. 476 does not cease to be a Civil Court and in such cases revision lies under S. 115 of the Code of Civil Procedure and S. 439 has no application.⁶⁵

38. Sub-section (1)—‘any proceeding’.—Formerly under the Code of 1898 proceedings under Chapter XII and S. 176 were held not to be proceedings within the meaning of S. 435 (3). But S. 435 (3) having been omitted by S. 116 of Act XVIII of 1923 revision now lies under this section against the aforesaid proceedings. Under the old Codes the High Court used to revise proceedings under Chapter XII not under this section but under S. 15 of the Charter Act subsequently repealed by S. 107 of the Government of India Act 1915.

Proceedings under S. 476.—See Commentary *supra*.

Proceedings under Chapter VIII are revised under this section.

Proceedings under Chapter X are revised under this section.

39. ‘The record of which has been called for by itself’—The High Court calls for record under the powers vested in it by S. 435.

See Commentary *supra* under the heading “S. 439 read with S. 435”.

40. ‘Or which has been reported for its orders’.—Under S. 438 the Sessions Judge or the District Magistrate reports to High Court for orders and thereafter under this section the High Court revises such orders.

“S. 439 read with S. 435 gives to the High Court the authority to examine the record of any proceeding (whether it be of a Sessions or Magistrate’s Court, and howsoever it might have been brought up) and interfere with or alter the conviction or sentence or other order, but notwithstanding the use of the words ‘or which has been reported for orders’ as in S. 439 it could never have been intended that such report might be made by an inferior criminal authority with respect to a proceeding by a superior authority”.⁶⁶

41. ‘Or which otherwise comes to its knowledge’.—Under S. 435 the High Court can call for and examine the proceedings of inferior Courts, if the necessity for doing so is brought to its notice *in any manner*. But before it does so it would have to be satisfied that there are ‘*apriori*’ grounds for apprehending a miscarriage of justice.⁶⁷ Aston, J., held “It is not necessary that there should be a right of appeal in order that the High Court may exercise the revisional power conferred by S. 439”.⁶⁸ The language in S. 439 “the record of which has been called for by itself” is not used in contradistinction to the words “*which otherwise comes to its knowledge*”, but as contrasted with the words “*which has been reported for orders*” and that it has reference to the recognized channels by which the High Court becomes seized of the case. There is, therefore, the room for the reading

64. *Hara Prasad Das*, (1913) 40 G 477 FB.

65. *Karimullah v. Rameshwar Prasad*, (1928) 27 ALJ 55.

66. *Karamdi*, (1895) 23 G 250, (251, 252).

67. *Narain Prasad Nigam*, (1922) 45 A 128: 20 ALJ 909 : 24 Cr LJ 115 : AIR (1923) A 85.

68. *Varjivan Das*, (1902) 27 B 84 (90).

of these words "otherwise comes to its knowledge" as having reference to petitions.⁶⁹ The words "or otherwise comes to its knowledge" have no reference to any power outside the Criminal Procedure Code.⁷⁰ It was held in *Kamal Kutty*⁷⁰ following a long line of cases that under S. 439 proceedings under S. 145 could not be revised as that section was excepted from S. 435. After the amendment of 1923 the decision cannot be treated as good law on that point.

Revision—On reference under S. 145 to Civil Court.—Although the finding of the Civil Court on a reference to the Magistrate under S. 146 cannot be challenged by way of appeal, revision or review, the finding is still open to challenge if the finding has been acted upon by the Magistrate.^{70a}

42. 'May in its discretion'.—It has been observed *ante* that the powers exercised under this section are purely discretionary.

43. 'Any of the powers'.—The High Court may exercise such powers as are given under Cl. (1). Sub-sec. (6) controls sub-sec. (2). Sub-secs. (2), (3), (4) and (5) restrict the powers of the High Court.

44. Power to take additional evidence—"Or otherwise comes to its knowledge".—

Where the matter comes to the High Court on a reference which is decided to be incompetent, it is within the power of the High Court to deal with it.⁷¹ The High Court in an appeal under S. 411-A can exercise the powers under S. 439.⁷²

The High Court in its revisional jurisdiction exercises all the powers of an appellate Court and can send back the case on remand for retrial of a particular offence while upholding the decision of the lower Court with respect to other offences.⁷³

Under S. 439(1) a Court of revision has all the powers of an appellate Court including the power to take additional evidence under S. 428.⁷⁴

45. 'May enhance sentence'.—See Commentary on sub-sec. (6).

The High Court in revision not only exercises the powers conferred on a Court of Appeal but may enhance the sentence which it cannot do under S. 423(1)(b).

46. Sub-sec. (2).—Contemplates that the sentence of an accused person cannot be enhanced or an adverse order made against him without *notice* to him or giving him an opportunity of being heard in his defence.

Notice to an Accused.—Even under the old Code before sub-sec. (6) was introduced by S. 119 of Act XVIII of 1923 it was held that notice should have been given to an accused person before enhancing his sentence.⁷⁵ Under S. 439 no order can be made to the prejudice of the accused unless he has had an opportunity of being heard in his defence in the Court which

69. *Kamal Kutty v. Udayavarma Raja*, (1912) 23 MLJ 499 : 13 Cr LJ 753 : 17 IC 65, see cases referred to therein.

70. *Ibid* following *Nobin Kristo Mukerjee v. Russick Lall Saha*, 10 C 268.

70a. *Suchamawati Kuer v. Ram Chandra Singh*, AIR 1963 P 320 following *Raja Singh v. Mohendra Singh*, AIR 1963 Pat 243 (F B).

71. *Birju Singh*, A 1953 Pepsu 49 : 1953 Cr LJ 592 ; *Kaluram*, A 1951 MB 67 : 52 Cr LJ 214.

72. *Parbati Devi*, A 1952 C 835 : 1952 Cr LJ 1672.

73. *Paresh*, A 1950 C 346.

74. *Ramakanta Khaligar*, A 1957 Or 10 : 1957 Cr LJ 78.

75. Rat, 179.

passed the order.⁷⁶ Sub-sec. (6) has been enacted, it seems, as a result of the decision in *Somu Naidu*.⁷⁷

Sub-sec. (6) has by implication over-ruled *Chinto Bhairava*⁷⁸ which held that it was the invariable practice of the Bombay High Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis.

It is in accordance with justice that the accused should be entitled to show cause, not only against the sentence being enhanced but also against the conviction.⁷⁹

The view in *Bukshan*⁸⁰ which held that an accused person who had an opportunity of being heard when he moved against his conviction need not be served with a formal notice of enhancement does not appear to be correct.

Summary dismissal of appeal or revision by accused—Notice.—Under the rules of the Court the Chief Justice is to allot work to the Judges. Where a Bench issued a notice to show cause to an accused why the sentence should not be enhanced, in a case that had not been placed before that Bench by the Chief Justice, *held*, the Bench had no jurisdiction to issue the notice.⁸¹ A person convicted on the basis of jury's verdict may also show cause against his conviction but in showing cause he has no larger or better rights than he would have had if he had appealed against his conviction,⁸² but in charges under S. 302 I. P. C. he can show cause on facts as well.⁸³

Notice on him under sub-sec. (2).

Where the accused's petition of appeal or application has been summarily dismissed either hearing him or his pleader or without hearing him as the case may be, there is no judgment of the High Court replacing the judgment of the lower Court and the High Court would be in a position to issue the notice of enhancement of sentence. The right which is conferred on the accused of showing cause against his conviction under sub-sec. (6) is a right which accrues to him on a notice for enhancement of sentence being served on him and he is entitled to exercise the same irrespective of what has happened in the past unless and until there is a judgment of the High Court already pronounced against his conviction after a full hearing in the presence of both the parties on notice being issued by the High Court in that behalf. This right of his is not curtailed by anything contained in the earlier provisions of S. 439 nor by anything contained in either S. 369 or S. 430.⁸⁴

S. R. Das, J. in⁸⁴ held that the summary dismissal of the appeal filed by an accused person in the High Court is a judgment of conviction by the High Court and is final and he cannot initiate any further revisional applications either against his conviction or for reducing his sentence, but the State can apply for enhancement of the sentence. As soon as the State applies

76. *Ramesh Chandra Gupta*, (1917) 22 CWN 168 : 19 Cr LJ 701 : 46 IC 157.

77. (1923) 46 MLJ 456.

78. *Chinto Bhairava*, (1908) 32 B 162 : 10 Bom LR 93 : 7 Cr LJ 119—overruled in *Mangal Narain*, (1924) 49 B 450 : 27 Bom LR 355.

79. *Mangal Naran*, (1924) 49 B 540 : see *Ramesh Pada Mandal v. Kadombini Dasi*, (1927) 31 CWN 960 ; *U. J. S. Chopra v. State of Bombay*, A 1955 SC 633 : 1955 Cr LJ 1410.

80. (1926) 98 IC 113 : AIR (1927) p. 85.

81. *State v. Devi Dayal*, A 1959 A 421 : 1959 Cr LJ 803.

82. *Ganesh*, A 1955 Ass 51 ; 1955 Cr LJ 437.

83. *Mahabir*, 48 CWN 113 (FB) ; 45 Cr LJ 309.

84. *per Bhagwati and Imam JJ*, in *U. J. S. Chopra v. State of Bombay*, (1955) 2 SCR 94 : A 1955 SC 633 : 1955 Cr LJ 1410 ; *Aira Singh Rai Singh*, A 1956 B 231 : 1956 Cr LJ 436.

for enhancement under sub-sec. (6) and a notice is issued on the accused under sub-sec. (2) he becomes entitled to challenge the conviction. There is nothing in Ss. 369 and 430 to cut down that right.

47. Motion by private prosecution for enhancement.—It is not open to a private party to apply to the High Court for enhancing a sentence passed by a subordinate Court. A District Magistrate, a Sessions Judge or the Government Pleader, may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion send for the record and take action with a like object. If a private complainant considers a sentence unduly lenient he may draw the attention of the Government to the fact.⁸⁵ Though it is competent to the High Court to enhance the sentence in revision it will only do so for exceptional reasons especially when the revision petition is by a private person. When a sentence passed is substantial, even though inadequate, it will not be enhanced in revision.⁸⁶

It is very much doubtful whether a District Magistrate is entitled, as a matter of law, to make a *reference* to the High Court for enhancement of sentence in a case tried by a Sessions Judge, even if he is so entitled, the procedure is extremely inconvenient.⁸⁷

The High Court has jurisdiction to enhance the sentence, howsoever the case comes to its notice. It is not necessary that the Government should instruct the Government Pleader to move the High Court to enhance the sentence. The District Magistrate can bring to the notice of the High Court cases of inadequate sentences.⁸⁸

48. Power to change nature of sentence.—The High Court, in the exercise of its powers of revision, can enhance a sentence so as to alter its nature.⁸⁹ The lower Court cannot *enhance* the sentence under S. 423 (1) (b), but the High Court has the power under S. 439.⁹⁰

49. Principles guiding enhancement of sentence.—Ordinarily, the sentences to be passed after conviction must be left to the Judge or Magistrate who tries the case. The High Court will not interfere in revision unless the sentence is so severe or so lenient that it cannot be said that a proper discretion has not been used.⁹¹ When a sentence passed by a Magistrate is not illegal, the mere fact that the High Court might have passed a heavier sentence is not of itself a sufficient reason to enhance the punishment 'inflicted' in the exercise of its revisional powers.⁹² Enhancement of sentence is a very serious proceeding and when there is a proposal to that effect, it must be supported by the Government Pleader with cogent reasons.⁹³ But the Calcutta High Court has held in *Pramotha Nath Basu v. Sanga Charan*⁹⁴ that it has the power to interfere on an application by a private complainant for enhancement of sentence, but it has been adopted as a safe working rule not so to interfere.

*Sentence must be manifestly inadequate.*⁹⁵

85. *In re Nagji Dula*, (1924) 26 Bom LR 182.

86. *Dharam Singh*, (1927) 29 Cr LJ 343 : 108 IC 162 : AIR (1928) L 507.

87. *Ganga*, (1914) 36 A 378 : 12 ALJ 519 : 15 Cr LJ 407 : 23 IC 1007.

88. *Roger De Silva*, (1911) 13 Bom LR 1185 : 12 Cr LJ 604 : 12 IC 980.

89. *Ram Kuria*, (1884) 6 A 622 : (1884) AWN 252 (253) FB.

90. *Ramchandra Bhikaji*, (1928) 30 Bom LR 967.

91. *Santu*, (1920) 23 Bom LR 358 : 22 Cr LJ 324 : 61 IC 52.

92. *Budha*, (1918) 7 PR (Cr) 1919 : 48 PLR 1919 : 20 Cr LJ 212.

93. *Shamji Ram Chandra Gujar*, (1914) 16 Bom LR 202 : 15 Cr LJ 365 : 23 IC 733.

94. 33 CWN 395 ; *Ali Akbar v. Kasem Ali*, (1929) 33 CWN 605.

95. *Harnath Singh*, (1873) 20 WR (Cr) 22 ; *Pario*, (1916) 10 SLR 207 : 18 Cr LJ 708.

Although the sentence on an accused is inadequate, it ought not to be enhanced *after the lapse of nine months*.⁹⁶

There is no doubt that the question of sentence is a matter of discretion which has to be exercised in a judicial way that is to say, that the sentence should not be enhanced unless the appellate Court comes to the conclusion on a consideration of the entire circumstances in the evidence that the sentence imposed is inadequate⁹⁷ or perverse.⁹⁸

Clause in sub-sec. (6) does not refer only to sub-sec. (5).⁹⁹ This jurisdiction can be properly exercised if the High Court is satisfied that the sentence imposed by the trial Judge is unduly lenient or that in passing the order of sentence the trial Judge had manifestly failed to consider the relevant facts. It would not be right for the appellate Court to interfere with the order of sentence passed by the trial Court merely on the ground that if it had tried the case it would have imposed a heavier sentence.¹ Where the High Court during the pendency of the appeal before the Sessions Judge *suo motu* called for the record and issued notice on the accused to show cause why the sentence should not be enhanced and thereafter transferred the appeal to the High Court, *held* there was no illegality.^{1a}

50. Order under S. 562 if a sentence and if the High Court can enhance sentence by substituting another sentence.—S. 562 (3) is altogether new and has in effect overruled *Ghasita*² which held that the High Court in revision could not substitute a sentence for an order under S. 562.

S. 439 Cr. P. C. presupposes that a sentence had been imposed. Therefore when an accused has been released on good probation under S. 562 of the Code the High Court cannot substitute a sentence of imprisonment or of whipping in revision.³

Release under S. 562—notice under sub-section (2).—Where a person though convicted is released on probation, the Court does not pass a sentence and the accused is not entitled to be heard on the merits.⁴

Release under Probation of Offenders Act, (1958).—The only limitation imposed by S. 6 of that Act is that in the first instance an offender under 21 years of age will not be sentenced to imprisonment.⁵

51. No power of enhancement if the sentence is illegal.—The High Court can interfere, under S. 439 of the Code, to enhance a sentence in those cases in which a legal sentence has been passed. A sentence for a period already undergone in the lock-up is not legal sentence.⁶

Now it is open to the accused to show cause on the facts that the conviction is bad when a Rule had been issued calling upon him to show cause why the sentence should not be enhanced.

96. *Aiyachalamaya*, (1912) MWN 50 : 23 Cr LJ 121.

97. *Sarjng Rai v. State of Bihar*, A 1958 SC 127 ; *Alamgir v. State of Bihar*, 1959 SCJ 457 : A 1959 SC 436 : 1959 Cr LJ 527 ; *Balraj v. State of U. P.*, A 1955 SC 778 ; 1955 Cr LJ 1642 ; *State of Mysore v. Md. Jalal*, A 1959 Mys 54 : 1959 Cr LJ 346.

98. *Airsrih Rai Singh*, A 1956 B 231 : 1958 Cr LJ 496 (2).

99. *U. J. S. Chopra v. State of Bombay*, A 1955 SC 633 : 1955 Cr LJ 1410.

1. *Alamgir v. State of Bihar*, A 1959 SC 436 ; *State v. Bocha Singh*, A 1956

Ajmer 2 : 1956 Cr LJ 1 ; *State v. Pritamdas*, A 1956 B 559 : 1956 Cr LJ 984.

1a. *Ramesh Chandra Arora v. State*, (1960) 1 SCR 924 : A 1960 SC 154 : 1960 Cr LJ 177.

2. 37 A 31.

3. *Nurkhan*, (1918) 20 Cr LJ 99 : 48 IC 979 (N).

4. *Sita Ram Malkiat Singh*, A 1956 Pepsu 30 : 1956 Cr LJ 412.

5. *Rajeswar Prashad v. R. B. Gupta*, A 1961 p. 19.

6. *Ashgar Ali*, (1919) 27 PR (Cr) : 20 Cr LJ 684 : 52 IC 604.

52. Sub-section (3)—Limitation of powers of enhancement.—The power of enhancement of sentence conferred upon the High Court by S. 439 of the Code is limited only by Cl. (3) of that section, which clause does not regard the difference in the powers of trying Magistrate under S. 32 of the same Code, but lays down the general rule that in cases of sentences passed by Magistrates not empowered under S. 34, the limit of enhancement shall be the sentence that may be inflicted by a Presidency or District Magistrate.⁷ The *practice* of the Lahore High Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on the basis of facts found by the Lower Court could not be followed when it is proposed to enhance a sentence beyond the powers of a trying Magistrate. In such cases both conviction and sentence are open to revision.⁸

Sub-section (1) itself does not contain any words of limitation on the power to enhance the sentence. Hence the High Court can impose any sentence up to the maximum limit prescribed by the I. P. C. for a particular offence. The fact that the trial of the case was entrusted to a Court with a limited jurisdiction in the matter of sentence cannot be used to impose a limit on the power of a High Court to impose a proper and adequate sentence.⁹ Powers in revision should not be used except where the failure to enhance the sentence would lead to a serious miscarriage of justice.¹⁰

53. Sub-section (6).—Though logically Commentary on sub-sec. (6) should have followed that on sub-sec. (5) it would be convenient to deal with it here as it is connected with sub-sec. (2) or with “enhancement of sentence”.

Effect of amendment by insertion of sub-section (6).—The effect of the addition of sub-sec. (6) is that the High Court when adjudicating upon an application for enhancement of sentence, is converted into a Court of appeal against conviction the accused is entitled to show that his conviction is unjustified.¹¹

The Bombay High Court in *Mangal Narain's* case¹² has held that the addition of sub-sec. (6) has superseded the view in *Bhairana*.¹³

The Bombay High Court in a later decision¹⁴ dissented from the view in *Mangal's* case and held that when an appeal on the merits of the conviction which had been preferred by the petitioner had been dismissed, on application by the Crown for an enhancement of sentence it is not open to the accused to argue on the merits. The Lahore High Court has followed *Jorabhai's* case¹⁴ in *Sher's* case.¹⁵ It seems that these decisions are not good law. The *ratio decidendi* therein is that another Division Bench cannot allow the accused to re-open the question of guilt in the face of previous finding by the High Court, or in other words the High Court can neither review its previous order nor vacate the same.

The *fallacy* is that the High Court in rejecting the application for setting aside the conviction at the instance of the accused seldom interferes on facts and might have rejected the petition, as no error of law or question of error-

7. *Kamal*, (1915) 9 SLR 82 : 16 Cr LJ 712 : 30 IC 1000.

8. *Jagat Singh*, 1 L 453 : 2 LLJ 541 : 56 IC 861.

9. *Sarjug Rai v. State of Bihar*, A 1958 SC 127 : 1958 Cr LJ 268.

10. *State v. Bal Krishna*, A 1961 Ker 25.

11. *per Shadi Lal, CJ.*, in *Tej Ram*, (1925) 27 PLR 112 : 92 IC 892 : AIR (1927)

L 34 : AIR (1928) A 150.

12. (1924) 49 B 540 : 27 Bom LR 355 : AIR (1927) L 217.

13. (1908) 32 B 162 : 10 Bom LR 93 : 7 Cr LJ 119.

14. *Jorabhai, Kistobhai*, (1926) 50 B 783 : 29 Bom LR 1051 : AIR (1926) B 555.

15. (1927) 8 L 520 : 28 Cr LJ 266 : 100 IC 234 : AIR (1927) L 217.

cous exercise of jurisdiction had been made out. But as observed in *Tej Ram*¹⁶ sub-sec. (6) has converted the High Court into a Court of appeal on facts against the order of conviction. The Bombay¹⁴ and the Lahore views¹⁵ have also ignored S. 561-A as has been held in *Ramesh Pada Mandal v. Kadambini Dassi*¹⁷ that under the Code as amended the High Court has ample powers to vacate its previous order.

The provision in S. 439(6) is that the accused shall be entitled to show cause against his conviction, means that he can show cause in accordance with law, where the conviction is based on the verdict of the jury, he has no greater right of appeal than he possesses under S. 423 and cannot challenge the facts.¹⁸ But in showing cause against a conviction under S. 302 I. P. C. he can show cause on facts as well.¹⁹ The Supreme Court has held that the right which is conferred on the accused of showing cause against his conviction under S. 439(6) is a right which accrues to him on a notice for enhancement of sentence being served on him and he is entitled to examine the same irrespective of what has happened in the past (*e.g.* summary dismissal of the appeal filed by him) unless and until there is a judgment of the High Court already pronounced against his conviction after a full hearing in the presence of both the parties on notice being issued by the High Court in their behalf. That right of his is not curtailed by anything contained in either S. 369 or 430.²⁰

The High Court can entertain under S. 439 the application for enhancement of sentence even when it has already dismissed the appeal presented by the accused from jail summarily under S. 421.²¹

See also Commentary on this section *ante* headed "Effect of Amendment".

54. Sub-section (4).—Interference with orders of acquittal in revision.—This sub-section is composed of two parts:—(1) limitation to interfere with an entry made under S. 273; (2) limitation in revision against the orders of acquittal which it would otherwise have under sub-sec. (1) read with S. 423 (1) (a). This sub-clause states clearly that revision does not lie against the order of the High Court in trials before the Jury in the High Court Sessions where at any time before the commencement of the trial the Judge has made an entry to the effect that any charge or portion thereof is clearly unsustainable and the effect of such entry shall stay proceedings. Sub-sec. (4) lays down that the High Court although possesses revisional powers over the subordinate Courts, would not have the power of revising or interfering with any order passed by that Court under S. 273.²²

"To convert a finding of acquittal into one of conviction".—This is the limitation that has been put by the sub-section that in revision under S. 439 the High Court cannot pass an order of conviction but may only direct a retrial. But for this clause the High Court acting under S. 439 (1) exercising the powers conferred on a Court of Appeal by S. 423 (1) (a) could

16. 27 PLR 112 : 92 IC 892.

17. (1927) 31 CWN 960.

18. *Ramjivalla*, A 1940 B 279 : 41 Cr LJ 916; *Biswanath*, A 1936 A 850 : 38 Cr LJ 137; *Aleph Sheikh*, 62 C 952; 37 Cr LJ 859; *Khoda Bux*, A 1934 C 105; *Fazar Ali*, 43 CWN 1082; *Ratna Sabhapathy*, 59 M 904 : A 1936 M 416; *Ganesh*, A 1955 Ass 51 : 1955 Cr LJ 437.

19. *Mahabir*, 48 CWN 113 (FB); 45 Cr LJ 309.

20. *U. J. S. Chopra v. State of Bombay*, (1955) 2 SCR 94 : A 1955 SC 633 : 1955 Cr LJ 1419.

21. *Bhawani Shankar*, A 1953 Raj 17 : 1953 Cr LJ 301; *Debicharan*, A 1942 A 339.

22. *per Mitter J.*, in *Gibbons*, (1886) 14 C 42 (48).

have 'found the accused guilty and passed sentence on him according to law'. Hence the *distinction between appeals on behalf of the State Government* against the order of acquittal preferred under S. 417 *supra* and '*motions against orders of acquittal*' at the instance of a private complaint as they are popularly termed. In an appeal under S. 417 *supra* the High Court acting under the provisions of S. 423 (1) (a) can convert the finding of acquittal into one of conviction, which it cannot do in revision under this section at the instance of a private party.

The High Court acting under S. 439 cannot convert an acquittal into conviction but can direct a retrial and can ask the trial Court to conclude the trial according to law.²³ The Lahore High Court has held that the High Court in revision under S. 439 is competent to alter the conviction of an accused person under S. 304 I. P. C. to one under S. 302 of the Penal Code.²⁴

Where at the instance of the complainant High Court was moved against an order of acquittal, the High Court could not convert the acquittal into one of conviction and had no power to set aside the order under S. 517 regarding the disposal of property, because to do so is to convert the acquittal into one of conviction.²⁵

Acquittal.—Means a complete acquittal and discharge of all the allegations and facts charged, and not an acquittal on one charge and conviction on another.²⁶ But the Madras High Court in case²⁷ has held that the finding of acquittal referred to in this section need not be a complete acquittal.

Revision against an order of acquittal.—An application for revision contemplated under this section is by the complainant or private prosecutor.

Whatever doubts we had in view of the following decisions²⁸ which held that an application by a private prosecutor was not contemplated by the Code and had been discouraged on public grounds, the law has been set at rest after the decision in *Fauzdar Thakur v. Kasi Chaudhury* and other cases²⁹ which have held that the High Court has jurisdiction to interfere with an acquittal at the instance of a private prosecutor, but it should ordinarily exercise the jurisdiction sparingly and only when it is urgently demanded in the interests of public justice. Revisional jurisdiction could be exercised only in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of gross miscarriage of

23. *Narain Das v. Mewa Singh*, (1921) 22 Cr LJ 312 : 60 IC 1000 ; *Balwant*, 9 A 134 FB; *Hardeo*, 1 A 139 FB; *Tirthidas*, 6 SLR 120 : 13 Cr LJ 771; *In re Semmi Ammal*, ILR (1960) M 917 : A 1960 M 573.

24. *Fazal Khan*, (1926) 8L 136; *Ibid*; *Bhola*, 12 PR 1904, dissented from in *Shivaputrajaya*.

25. *Kashiram v. Bhagwandas*, A 1959 MP 75 : 1959 Cr LJ 201.

26. *Durunodaya*, (1924) 26 Bom LR 438.

27. *In re Subba Chukli*, (1925) 50 M 259 : 52 MLJ 707, following *Sheodharshan Singh*, (1922) 44 A 332 : 20 ALJ 191 : 23 Cr LJ 202 and dissenting from *Re Bali Reddi*, (1914) 37 M 119.

28. *Poona*, (1881) 7 C 447 ; *A. David*, 6 CLR 245 ; (1879) 7 CLR 142 ; *Thandavan*, (1890) 14 M 363.

29. *Fauzdar Thakur v. Kasi Chaudhury*, (1914) 42 C 612 : 19 CWN 184 : 21 CLJ 52 ; *Pramatha Nath Barat v. P. C. Lahiry*, (1920) 47 C 818 : 22 Cr LJ 5 : 59 IC 37 ; *Suman Mukhia v. Ajodhiya Mukhia*, A 1958 p. 88 : 1958 Cr LJ 203 ; *Faradoon*, 41 A 560 ; *Basirulla*, 33 CWN 576 ; *Pramatha*, 47 C 518 ; *Moula Baksh v. Reaz Ahmed*, A 1937 Oudh 77 : 37 Cr LJ 490 ; *H.L. Raeson v. Triloki Nath*, A 1942 Oudh 318 ; *Md. Sattar*, A 1948 A 339 ; *Damodar v. Jujhar Singh*, A 1926 N 115 : 26 Cr LJ 1348 ; *Sarkaralinga Mudaliar v. Narayan Mudaliar*, 45 M 913 FB : 23 Cr LJ 583 ; *Gulzar Chamar v. Uggan Chamar*, A 1952 p. 242 : 1952 Cr LJ 792 ; *Md. Jalal*, A 1959 Mys 54 ; *Pareesh*, A 1950 C 346 ; *Mindhandas Agarwalla v. Sriaharan Barma*, A 1956 Ass 170.

justice.³⁰ Where the order is not so perverse or contrary to the record that to uphold it would be a travesty of justice and would mean that a guilty person has been wrongly acquitted the exercise of the *suo motu* power of revision was not called for.^{30a}

The jurisdiction is not invoked merely because the lower Court has taken a wrong view of the law. The High Court cannot in the absence of error of law reappraise the evidence and reverse the findings of fact.³¹ Even an error of law does not make interference obligatory in all cases; where serious or substantial injustice is caused by an error of law the order may be interfered with.³² When a complainant who has been given the right of appeal under S. 417 (3) has not taken requisite steps for filing the appeal, the revision proceedings at his instance are competent.³³ A different view of the evidence could have been taken but that is not enough to justify interference in revision when there is an application by a private party to set aside an order of acquittal.³⁴ If in deciding the case the Courts below had brought a judicial mind to bear upon the evidence the order of acquittal should not be interfered with.³⁵ Where the Magistrate decided the case on a preliminary point of law, *i.e.*, on the question of sanction and the decision was manifestly wrong, the Court in revision interfered.³⁶ In an appeal by the State against his acquittal of the charge for a major offence, the High Court has power under S. 439 (1) to acquit the accused where the facts found are incompatible with his guilt even for the minor offence.³⁷

Locus standi of private prosecutor:—In *Sibani's case*³⁸ Macpherson, J., (*Dissentiate*) held that the private prosecutor had no *locus standi* in such a case. The Patna High Court in *Sibani's case*³⁸ and the Madras High Court³⁹ has followed *Fauzdar v. Kasi*.²⁹ The Upper Burma Chief Court held the same view.⁴⁰ The Rangoon High Court has held in *Nga Ayung Gyaw*⁴¹ that the High Court does not ordinarily interfere in revision with an order of acquittal where no appeal has been preferred under S. 417. The Bombay High Court held in an earlier decision in *Heerabhai v. Framji*⁴² that though it has the power to review an order of acquittal yet ordinarily it does not interfere in the exercise of its revisional jurisdiction because an appeal can always be made by the State Government under S. 417 and the complainant may move the State Government, but it would interfere where the order has been passed without

30. *State v. Md. Jalal*, A 1959 Mys 54 : 1959 Cr LJ 344; *Narayanvalji v. Ramjit Singh*, A 1955 B 42; 1955 Cr LJ 103; *Amulya Ranjan v. Narayan Roy*, A 1956 Tripura 2; *Bijoy Kumar Basu v. Kalipada Ghosh*, A 1955 C 590 : 1955 Cr LJ 1483.

30a. *Kissan Singh*, A 1963 Punj 170.

31. *Stephens*, 1951 SCR 284 : A 1951 SC 196 : 52 Cr LJ 510; *Logendra Nath Jha v. Shri Prasad Biswas*, 1951 SCR 676 : A 1951 SC 316; *Harihar*, A 1954 SC 266; 1954 Cr LJ 724.

32. *Md. Saheb Ali v. Thuleswar Birch*, A 1955 Ass 211 : 1955 Cr LJ 1318; *Shiv Prasad v. Bhagwandas*, A 1958 Punj 228.

33. *State of Bombay v. N. G. Tayawade*, A 1959 B 94 : 1959 Cr LJ 170; *Bakhori Gape v. Abdul Halim*, A 1941 p. 262.

34. *Dhirendra Nath Mitra v. Mukunda Lal Sen*, A 1955 SC 584 : 1955 Cr LJ 1299.

35. *Raghubir Saran v. Ram Prasad*, A 1956 A 267 : 1956 Cr LJ 470.

36. *Kashiram v. Bhagwan Das*, 1959 MP 75 : 1959 Cr LJ 201.

37. *State v. Sheodayal*, A 1956 N 6; 1956 Cr LJ 83.

38. *Sebani Rai v. Bhagwat Das*, (1925) 5 p 25.

39. *Sankaralinga Mudaliar v. Narayan Mudaliar*, (1922) 45 M 913 (F B); 43 M L J 579 : 23 Cr L J 583.

40. *Nga Po Pyaw v. Nga Pwe*, (1917) 3 UBR 19 : 18 Cr LJ 970 : 42 IC 330.

41. *Nga Ayung Gyaw*, (1923) 1 R 604 : 25 Cr LJ 270 : AIR (1924) R 98 referred to in *Kan Thein*, (1926) 4 R 140.

42. 15 B 349, followed in *Fauzdar v. Kasi*, 42 C 612; *In re Faredom Cowasji Prabhu*, (1917) 41 B 560 : 18 Cr LJ 668 : 40 IC 316; *Joite Bechar v. Parshottam*, (1923 April) 25 Bom LR 488 : 24 Cr LJ 734.

giving notice to the District Magistrate.⁴³ The Allahabad High Court has held that the power to interfere with an order of acquittal is to be exercised sparingly and only in most serious cases and in case of a grave miscarriage of justice,⁴⁴ although it held in an earlier case that the High Court will not interfere with an order of acquittal.⁴⁵ The High Court has no power except through the medium of State Government to convert acquittal into conviction,⁴⁶ but even when the Crown applies for revision of an order of acquittal, it would be better if Government were to refrain from appealing to the revisional jurisdiction of the High Court, unless they feel that violence has been done to some *general principle* which requires immediate and authoritative inference.⁴⁷ The Lahore view is that the complainant should apply to the District Magistrate to move the State Government to file an appeal⁴⁸ but it has the power in revision to set aside an order of acquittal and may well do so when the order is based on a misapprehension of law.⁴⁹ The same High Court has held that the High Court has under S. 439 (4) power to alter conviction under S. 304 to one under S. 302 I. P. C. and thus may convert a finding of acquittal to one of conviction⁴⁹ although it will not ordinarily interfere in such cases.⁵⁰ It seems that *Fazal Karim's* case⁴⁹ is wrong as it is against the plain words of sub-sec. (4) and the Allahabad view which it has dissented from is the right view. The Oudh Judicial Commissioner's Court held that the law gives power to the Courts of Revision to interfere even with orders of acquittal, but only in exceptional circumstances,⁵¹ but the practice is not to interfere in revision as an appeal will lie at the instance of the State Government.⁵² In view of the insertion of S. 417 (3) the private complainant can prefer an appeal.

Motions against acquittal.—Appeals against acquittal lie at the instance of the State Government under S. 417 *ante* and that is the proper procedure to set aside an order of acquittal. A private prosecutor should therefore if he is aggrieved by an order of acquittal move the District Magistrate praying that the appeal may be filed by the State Government under S. 417. But under this section the private prosecutor may move the High Court in revision or prefer an appeal under S. 417 (3) in cases instituted upon complaint. The *practice* in such cases is to move the Legal Remembrancer either (1) through the District Magistrate or (2) by a petition to the Legal Remembrancer and after that is refused to move the High Court within 60 days of the final order excluding of course the time requisite for copies. In case the Legal Remembrancer takes sufficient time to dispose of the application one has to get the application noted by mentioning the facts before the Criminal Bench or move the application as the said Bench might be pleased to direct.

Where the case is a serious one and is of an exceptional character and

43. *Shivilingappa*, 24 Bom LR 450: 24 Cr LJ 700: 7 IC 812: AIR (1923) B 74.

44. *Pehelwan Singh v. Sahib Singh*, 19 ALJ 382: 22 Cr LJ 597: 62 IC 869; *Harak Chand Marwari*, 40 A 84: 15 ALJ 897: 19 Cr LJ 145: 43 IC 433.

45. *Gur Dayal*, 12 ALJ 255: 15 Cr LJ 304: 23 IC 512.

46. *Sheodarshan*, (1921) 44 A 332: 20 ALJ 190: 23 Cr LJ 202: 65 IC 858: AIR (1922) A 487 and *Nand Ram v. Khazam*, (1922) 19 ALJ 589, followed in *Dulli v. Mangli*, (1926) 24 ALJ 414.

47. *Nasarullah*, (1928) AIR (1928) A

287.

48. *Fakir Chand v. Fakir*, 23 Cr LJ 699 (L): 69 IC 379; see *Mt. Alhadi*, (1927) 29 PLR 533: AIR (1928) L 844 (L).

49. *Fazal Karim*, (1926) 8 L 136, dissenting from *Sheodarshan*, (1922) 44 A 332: 20 ALJ 190.

50. *Babu Mal*, (1927) 29 Cr LJ 34: 106 IC 450: AIR (1925) L 185.

51. *Municipal Board Fayazabad v. Vidyadhari*, 22 Cr LJ 638: 63 IC 334 (Oudh); *Dr. Zahiruddin v. Nasiruddin*, 24 Cr LJ 186: 17 IC 602 (Oudh).

52. *Tilak Ram v. Bhagga Singh*, 2 OLJ 190: 16 Cr LJ 352: 28 IC 736.

the order of acquittal has occasioned a grave miscarriage of justice, the High Court will interfere.⁵³ But when the acquittal is under S. 247 of the Code revision will not lie unless there is an error of law on the face of the record.⁵⁴

Reference by the District Magistrate in orders of acquittal.—The Patna High Court has held that it may interfere with an order of acquittal even on a reference under S. 438 of the Code by a District Magistrate⁵⁵ but the Calcutta High Court has held that a reference under S. 438 recommending the setting aside of an order of acquittal should be treated in the same way as an application by a private party for revision of an order of acquittal and should not be entertained.⁵⁶

55. Sub-section (5).—This sub-section was new in the Code of 1898 and gave effect to the case-law on the subject which held that the High Court will not exercise revisional powers in a case where the party has got a right of appeal.⁵⁷

Scope.—“Under S. 439, sub-sec. (5) we are precluded from exercising our powers of revision at the instance of an accused who had a right of appeal and did not exercise it. . . . The jurisdiction of the High Court to interfere on questions of fact has often been affirmed and that in very exceptional cases this power should be exercised is obvious. . . .”⁵⁷

It is possible for a private complainant to present an appeal to the High Court under S. 417 (3) in cases instituted on a complaint. Where the complainant has not taken the steps for filing the appeal, the revision proceedings at his instance are incompetent.⁵⁸ The bar imposed by sub-sec. (5) will apply in those proceedings the Sessions Judge or the District Magistrate calls for and examines a record and passes an order either under S. 436 or 437 or makes a report under S. 438.⁵⁹ The petition cannot be treated as an appeal under S. 417 (3), if it is filed after the period of limitation.⁶⁰ The expression ‘party’ occurring in this sub-section includes not only private parties, but also the State if it happens to be the party in police cases.⁶¹

The bar under sub-sec. (5) can operate only against a party and can not operate to deprive the High Court of its undoubted jurisdiction.⁶²

It has been observed in commentary on sub-sec. (4) *ante*, that the High Court has the jurisdiction to interfere with an order of acquittal at the instance of a private party but that it exercises such powers very sparingly and only in cases of public importance where it is urgently demanded in the interests of the public justice.

Acquittal of accused who had not preferred a revision.—Under this section the High Court has power in a proper case, while trying the appeal preferred by another accused, to deal with the case of an accused person not appealing against his conviction and set aside his conviction.⁶³

53. *Panchanan Banerji v. Upendra Nath Bhattacharji*, 25 ALJ 100 : 27 Cr LJ 1047 : 98 IC 719.

54. *Lakshminarain v. Nellari Bepari*, 52 MLJ 173 : (1927) MWN 274 : 100 IC 238 : AIR (1928) M 473.

55. *Wazir Kunjre*, (1928) 7 P 579, where *Saban Rai v. Bhagwat Dass*, (1926) 5 P 25 was referred to.

56. *per* Mukherjee, J., in *Dabiruddin Nasker v. Sheikh Mollah*, (1928) 33 CWN 258.

57. *Nandeyappagowda*, (1906) 8 Bom LR 851 (852) : 4 Cr LJ 446.

58. *State of Bombay v. N. G. Tayawada*, A 1959 B 94 : 1959 Cr LJ 170 ; *City*

Board Mussorie v. Sri Kishen Lal, A 1959 A 413 ; 1959 Cr LJ 800 (Revision filed after the period of limitation for filing appeal under S. 417 (3)).

59. *City Board Mussorie v. Sri Kishan Lal*, A 1959 A 413 : 1959 Cr LJ 800.

60. *Shiv Prasad v. Bhagwan Das*, A 1958 Punj 226 ; 1958 Cr LJ 936.

61. *State v. Lachman Murty*, A 1958 Or 204 : 1958 Cr LJ 1074.

62. *Md. Jalal, In re* 1959 MLJ (Gr) 409.

63. *Broja Rakhal*, (1900) 5 CWN 330 ; *Mir Mouse Ali*, (1920) 31 CLJ 305 : 56 IC 858 ; *Raghu Bhumji*, (1920) 5 PLJ 430 : 21 Cr LJ 705 : 58 IC 49.

56. Death.—Of the convict has no real bearing on an order under S. 517. Legal representatives can move the High Court under S. 520. Strictly speaking there is no abatement of such a proceeding.⁶⁴

57. Ss. 439 and 561A—Magistrate directing payment of Currency notes to the surety.—Where the Magistrate in spite of the requests of the Insolvency Court and the Interim Receiver, directed under S. 561-A that the currency notes in respect of which the offence was committed should be handed over to the person who had stood surety for the accused and who had reimbursed the Bank its loss, *held*, that it was a fit case for interference.⁶⁵ Apart from the provisions of S. 561-A the High Court has jurisdiction under S. 439 to pass a suitable order having regard to the illegality with respect to a defective proclamation under S. 87.⁶⁶

58. Ss. 439 and 528.—The High Court would not interfere with the order of a District Magistrate transferring a case to his own file even if he has failed to take a correct view of the law.⁶⁷

Orders passed by a Presidency Magistrate.—If the High Court calls for the record of any proceeding before a Presidency Magistrate, the latter is empowered to submit along with the record, a statement setting forth the grounds of his decisions or order and the High Court should then consider such statement before overruling or setting aside the said decision or order. S. 441 is so widely worded as to include the decision or order of a Presidency Magistrate.⁶⁸

59. Explanation of Lower Court.—The explanation must be written in proper language and not a language of annoyance.⁶⁹ Where a point was taken in revision petition that the petitioner was not given an opportunity of being heard, the Magistrate in his explanation saying that there was enough evidence on the record to indicate that such opportunity had been given but he did not point out on whose evidence he acted, *held*, the explanation was not sufficient.⁷⁰

440. Optional with Court to hear parties.—No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect Section 439, sub-section (2).

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Judge has a discretion to hear counsel in case of revision. |
| 2. Exceptions. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 297 of the Code of 1872.

64. *N. A. Kamladevi*, A 1961 Ker 250.

65. *S. G. Tambe v. State of Delhi*, 58 Punj LR 448 : 1957 Cr LJ 92.

66. *Birad Dan*, A 1958 Raj 167 ; 1958 Cr LJ 965.

67. *Joy Singh Rajput v. Rachbhraj Dugar*, A 1957 Ass 148; 1957 Cr LJ 1101; *Derwish*

Hussain, 46 M 253 ; 24 Cr LJ 84.

68. *Ramgopal Ganpatra Raiya v. State of Bombay*, A 1958 SC 97 ; 1958 Cr LJ 244.

69. *Kartick*, A 1930 C 278.

70. *Dhanapati Devi v. Corporation of Calcutta*, 55 CWN 751 : 1952 Cr LJ 973.

2. **Exceptions.**—See (1) S. 437 proviso (a) and (2) S. 439 (2) and (6).

3. **Judge has a discretion to hear Counsel in case of revision.**—There is no established practice in the Allahabad High Court to hear Counsel in all reference cases. Each case must depend on its merits.⁷¹ It was pointed out by Richards, J. in *Ram Nihore*⁷² that the Court was willing, as a rule, to get the help and assistance of legal gentleman as *amici curiae*.

In matters of importance the Calcutta High Court has always heard Counsel in Criminal references.⁷³

Although under the section the petitioner or his Counsel has no right to be heard in revision or reference under S. 438 the practice prevailing in the Calcutta High Court is to hear him.

The Madras High Court declined to hear a Counsel in *Thandavan v. Perianna*⁷⁴ because on public grounds applications against an order of acquittal should be discharged.

It was pointed out in *Bibhuty Mohan Roy v. Dasimoni Dassi*⁷⁵ that it was open to the Court to determine the questions raised by the rule without hearing Counsel or pleader, and in *Nobin Kristo Mukherji v. Rashik Lal Laha*⁷⁶ that as a matter of strict law the accused was entitled to be heard by the District Magistrate while disposing of the application under S. 435.

S. 440 applies to an accused and therefore still more strongly does it apply to a complainant. If the High Court issues a Rule because some palpable error has been committed in the Court below, the High Court should direct a rule to hear what is to be said on the other side.⁷⁷ S. 440 expressly provides that in the case of revision petitions the High Court can interfere in proper cases without giving either party an opportunity of being heard but on the question of sentence the Court will naturally desire to hear the parties.⁷⁸

441. Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.—When the record of any proceeding of any Presidency Magistrate is called for by the High Court under Section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision or order.

SYNOPSIS

1. Corresponding section in former Codes.
2. Scope.

1. **Corresponding sections in former Codes.**—This section corresponds to S. 182 of Act IV of 1877.

2. **Scope.**—This section merely allows a Presidency Magistrate to supplement the reasons which have already been stated, under Ss. 263 and 370, for convicting an accused person. S. 441 does not abrogate the terms of S. 263 or S. 370.⁷⁹

71. *Sripati Narain Singh v. Gahbar Rai*, (1927) 25 ALJ 1010 : AIR (1927) 724 (2).

72. 8 ALJ 237 : 12 Cr LJ 231.

73. *Haradon*, (1892) 19 E 380.

74. (1890) 14 M 363 (364).

75. 10 CLJ 80 (83).

76. 10 C 268.

77. *Shamdasani, In re* ; A 1929 B 443 ; 31

Cr LJ 383.

78. *Amir*, A 1947 L 47 : 48 Cr LJ 175 (SB) ; *Sat Narayan Lal*, A 1940 A 426 : 41 Cr LJ 876.

79. *Durvish Hussain*, (1922) 46 M 253 : 44 MLJ 84 : 24 Cr LJ 84 ; *In re Dakshinamurthy*, A 1942 M 603 ; 43 Cr LJ 859.

Section 441 is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given but to enable them to supply reasons when in exercise of their powers under S. 370 they have given no reason at all.⁸⁰ It does not abrogate the terms of Ss. 263 and 370.⁸¹

442. High Court's order to be certified to lower Court or Magistrate.—When a case is revised under this Chapter by the High Court, it shall, in manner hereinbefore provided by Section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

Corresponding sections in former Codes.—This section corresponds to S. 406 of the Code of 1861 and S. 299, paragraphs 1 and 2 of the Code of 1872. It is the same as in the Code of 1882 excepting that the words '*in manner hereinbefore provided by S. 425*' were inserted in the Code of 1898.

80. *Swarnanal v. K. Muniaswamy Chetty*, A 1930 M 225 ; 31 Cr LJ 460.

81. *Debendra*, 52 CWN 336 (Case under S. 228 IPC).

PART VIII
SPECIAL PROCEEDINGS

CHAPTER XXXIII

Ss. 443 to 463. *[Repealed by the Criminal Law (Removal of Racial Discriminations) Act 1949 (XVII of 1949), S. 3, with effect from 6th April 1949.]*

CHAPTER XXXIV

LUNATICS

464. Procedure in case of accused being lunatic.—

(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the State Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of Section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Plea of Insanity when can be availed of. |
| 2. Legislative Changes. | 6. Omission to examine Medical Officer. |
| 3. Scope. | —Effect. |
| 4. Procedure. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 388 of the Code of 1861 and Ss. 423, 424, paragraph 3 of the Code of 1882 and in the Code of 1898 before amendment was similarly worded as that of the Code of 1882.

2. Legislative Changes.—Sub-section (1-A) and the words 'shall record a finding to that effect and' in sub-sec. (2) were inserted by S. 120 of Act XVIII of 1923.

3. Scope.—"There is no provision of law in India making it incumbent upon a committing Magistrate to order a medical inquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable by reason of mental infirmity, of taking his trial, that this issue of insanity

must be tried before the trial for the offence is proceeded with. That is provided by Ss. 464 and 465 of the Code".⁸²

Court must take into consideration his mental condition at time of inquiry or trial against him and not at any previous occasion.⁸³ Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence, it is imperatively necessary that this question should be inquired into or tried under the provisions of S. 464 or S. 465 before the Court proceeds to inquire into or try the substantive charge against the accused.⁸⁴

4. Procedure.—If a prisoner committed to a Court of Session appears to be of unsound mind and consequently incapable of making his defence, the law requires that the Court should try the fact of such unsoundness and incapacity before calling on the prisoner to stand his trial in the first instance, and should not continue trying the fact throughout the trial of the prisoner.⁸⁵ ".....although it might be established that the prisoner at the time when the acts were committed was not by reason of unsoundness of mind incapable of knowing the nature of the acts charged yet his physical and mental conditions might be such as to cause a Judge to weigh carefully the measure of punishment to be inflicted".⁸⁶ Where a Magistrate finds an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts, he should hold an inquiry under Chapter XXXIV into the questions whether the accused is a lunatic either at the time of the trial or was a lunatic when he committed the offence with which he is charged.⁸⁷ A Magistrate rightly commits for trial in the sessions a prisoner charged with murder, whom he finds to be sane at the time of the preliminary investigation although he was insane when he committed the act.⁸⁸

5. Plea of insanity when can be availed of.—What is protected is the inherent or organic incapacity and not an erroneous belief which might be the result of a perverted potentiality. 'Legal insanity' is not the same thing as medical insanity. Further, the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity.⁸⁹

6. Omission to examine Medical Officer—Effect.—If the Committing Magistrate does not examine the Medical Officer who issues the certificate about the mental condition of the accused the committal order is bad.⁹⁰

It is the duty of the Magistrate to examine the Civil Surgeon.⁹¹ Opportunity to rebut Civil Surgeon's evidence should be given.⁹²

465. Procedure in case of person committed before Court of Session or High Court being lunatic.—(1) If any

82. *Bahadur*, (1927) 9 L 371 : 29 Cr LJ 204 : 106 IC 796.

83. *Madho Singh*, A 1953 Pepsu 17 : 1953 Cr LJ 382.

84. *Jhabbu*, (1919) 42 A 137 (140).

85. *Niaz Ali*, (1904) 2 Cr LJ 91 ; *Raman Audheekaree*, (1868) 10 WR (Cr) 37 ; see *Chadami Lal*, (1900) AWN 47.

86. *Vaimbiloo*, (1880) 5 C 826.

87. *In re Adala Yerrivadu*, (1911) MLT 24 : 13 Cr LJ 24 : 13 IC 211.

88. *Ram Rutton Dass*, (1808) 9 WR (Cr)

23.

89. *Lakshi*, A 1959 A 534 : 1959 Cr LJ 1033 where *Ashiruddin Ahmed*, A 1949 C 182 ; 50 Cr LJ 255 was dissented from.

90. *Cochin State v. Madhwan*, A 1955 TC 32 : 1955 Cr LJ 328 ; *Narayan Shankar*, A 1935 S 267 ; 35 Cr LJ 200.

91. *Shendil Sher Bux*, A 1938 Pesh 24 ; *Narain Shankar*, A 1933 S. 267.

92. *Onkar Dat Nigam*, A 1933 Oudh 362 ; 34 Cr LJ 914.

person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Procedure. |
| 2. State Amendment.—Madras. | 5. Burden of Proof. |
| 3. Scope. | 6. Provisions are mandatory. |
| 4. Sanity of Prisoner, doubtful. | 7. 'Shall postpone discharge.' |
| | 8. Medical officer. |

1. Corresponding sections in former Codes.—This section corresponds to 232 of the Code of 1861 and S. 425 of the Code of 1872.

The words "and if the jury or Court . . . shall be discharged" occurring in sub-sec. (1) were introduced by S. 121 of Act XVIII of 1923 and seem to have restored the view in *Bhukoo Kulwar*.⁹³

2. State Amendment.—

Madras.—The words 'or a High Court' have been omitted by Madras Act 34 of 1955.

3. Scope.—A full bench of the Patna High Court has held that the word "postponed" in this section is not fortuitous but has been deliberately chosen to indicate something different from an "adjournment" as used in other sections of the Code. Sub-section (2) of S. 465 is merely an enabling enactment giving the Court, if any, which subsequently tries an accused person, power to take into consideration the earlier proceedings as if they were a part of the record in the trial, without the necessity of formal proof.⁹⁴ The moment the question of insanity of the accused is raised, the Judge must put to the jury as a preliminary issue to be tried by them as to whether or not the jury are satisfied that the accused is a person of sound mind and is in a position to understand the proceedings which are going on in Court. Evidence must be led on that point and the Judge must come to a finding on the basis of such evidence.⁹⁵ Where the Judge, on a verbal application by the accused's counsel for adjournment in order that the accused may be kept under medical observation, found that there was no reason for thinking that the accused was of unsound mind rejected the prayer, *held*, it was not incumbent upon the Judge to hold the enquiry.⁹⁶

Where a person charged with murder, is by reason of being deaf and dumb, unable to understand the proceedings of the trial, he should be treated

93. 10 Beng LR App 10 : 19 WR (Cr) 15.

94. *Ghinna Oraon*, (1917) 3 PLJ 291 : 19 Cr LJ 135.

95. *Radhanath Mandal*, A 1927 C 259 ; 27 Cr LJ 896 ; *Ramnath*, A 1930 A 450 ;

31 Cr LJ 899 ; *Shibdas Kundu*, 51 C 581 Bharat 44 Cal LJ 288 ; *Chalu*, A 1954 P 129.

96. *Durgachan Singh*, 41 CWN 1322 ; A 1938 C 8.

as a lunatic and the case reported for the orders of the Local Government under this section.⁹⁷

4. Sanity of prisoner doubtful—Procedure.—Where in the course of his examination under S. 364 of the Code the accused said that he was not in his senses when he tried to rob, *held* that the Court of Sessions should have acted under S. 465 and tried the fact whether on the date the accused was called on to plead, the accused was or was not of unsound mind and capable or incapable of making his defence.⁹⁸

The moment the question of insanity is raised the Judge must put it to the Jury as a preliminary issue.⁹⁹ The case is reported in 44 CLJ 255 as Bherat Patra and others. It may be pointed out that the appeal of Radhanath alone being submitted, the name of the case in 44 CLJ 285 is misleading. If it appears to the Judge that the accused is incapable of making his defence it becomes his duty to follow the procedure prescribed in this section. There is a distinction between incapacity at the time of doing the act charged and incapacity at the time of trial. While both are induced by unsoundness of mind, the former is substantive which excused the offence under S. 84, I. P. C., the latter affects procedure and merely postpones the trial under this section.¹

5. Burden of proof.—The *onus* is on the prosecution to establish that a person is capable of standing his trial.^{1a} If enquiry is to be commenced under this section, the prosecution ought to commence and give their evidence,² and it is for them to prove that the accused is sane.³

6. Provisions are mandatory.—Non-compliance with the mandatory provisions of S. 465 must vitiate the trial. The High Court in setting aside the conviction and sentence directed the Judge to hold a fresh trial which would commence with the proceedings required by S. 465 to be followed by a formal finding as to the capacity of the accused for making his defence.⁴

7. 'Shall postpone discharge'.—The Judge in such circumstances should proceed under the next section (465).

8. Medical officer.—Should be called in, his written certificate is not enough.⁵

466. Release of lunatic pending investigation or trial.—(1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

97. *Dost Muhammad*, (1911) 13 PR 1911 Cr : 12 Cr LJ 613, following *Gahna*, 37 PR 1889 Cr.

98. *Niaz Ali*, (1905) AWN 2.

99. *Radhanath Mandal*, (1926) 44 CLJ 285; 27 Cr LJ 896; 96 IC 160; *Jagdeo*, (1917) 18 Cr LJ 470 (P).

1. *Supdt. and Remembrancer Legal Affairs v. D. C. Barman*, 65 CWN 290; *Nabi Ahmad Khan*, A 1932 Oudh 190; *Durga*

Charan Singh, 41 CWN 1322; 39 Cr LJ 308; *Arakhit*, (1953) Cr LJ 289.

1a. *Shib*, 25 Cr LJ 105.

2. *Gour Mohan Saha*, 51 C 827; A 1925 C 479.

3. *Kochan*, A 1954 TC 435.

4. *Santok Singh*, (1926) 7 L 315. *Shibdas Kundu*, 51 C 581; 25 Cr LJ 1051.

5. *Ram Rattan Das*, 19 WR (Cr) 45.

Custody of lunatic.—(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the State Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
| | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 390 of the Code of 1861 and S. 426 of the Code of 1872.

2. Legislative Changes.—The words “whether the case or not” in sub-sec. (1) and sub-sec. (2) together with the proviso were substituted by S. 122 of Act XVIII of 1923.

3. Scope.—This section applies to both Magistrate and Courts of Sessions. Sub-sec. (1) provides that after the Magistrate or the Sessions Judge finds that the accused is of unsound mind and incapable of making his defence he shall be granted bail irrespective of the question whether the offence is bailable or not and release him on furnishing security that he shall be properly taken care of and for production before the Court when required, sub-sec. (2) provides for custody of the lunatic, e.g., sending him to a lunatic asylum where he can be kept under medical observation. S. 473 provides for procedure when the lunatic is capable of making his defence. The only power vested in the Magistrate under sub-sec. (1) of this section is to order release of the accused on sufficient security being given that he shall be properly taken care of and produced before the Court when called upon. There is nothing in this section to empower the Magistrate to add any other conditions where the Magistrate has ordered that the accused be released provided ‘a responsible gentleman comes forward to take care of her outside Karachi’ the order of conditional release cannot be sustained.⁶

467. Resumption of inquiry or trial.—(1) Whenever an inquiry or a trial is postponed under Section 464 or Section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under Section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

6. *Narain Shankar Kanush*, A 1933 S 267 ; 35 Gr LJ 200.

Corresponding sections in former Codes.—This section corresponds to S. 391 of the Code of 1861 and S. 427 of the Code of 1872.

468. Procedure on accused appearing before Magistrate or Court.—(1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of Section 464 or Section 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of Section 466.

SYNOPSIS

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|--|-------------------------|
| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
| | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 392 of the Code of 1861 and S. 428 of the Code of 1872 and the Code of 1898 before amendment was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The addition of the words in sub-sec. (2) by S. 123 of Act XVIII of 1923 is consequential on the amendment of S. 466.

3. Scope.—Under S. 468 (1) there is no injunction upon the Magistrate or the Court to take evidence as to the capacity of the accused to make his defence. The view of the Magistrate or the Court is made the criterion of whether action is required under sub-sec. (2).⁷ Where the Superintendent of a Mental Hospital informed the Sessions Judge that accused's insanity was feigned and acting on it the judge held a trial, it was not contrary to law although he should have placed on record that he found the accused capable of making his defence.⁸

469. When accused appears to have been insane.—When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

7. *Ahmed Ali*, A 1935 P 501.

8. *Ibrahim*, A 1934 L 123.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 3. Accused found to be of unsound mind—both at the time of committing offence and at trial. |
| 2. State Amendment.—Madras. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 424, Paragraphs 1 and 2 of the Code of 1872 and is the same as that of the Code of 1882.

2. State Amendment—

Madras.—The words ‘or High Court’ and the words ‘or the High Court as the case may be’ have been omitted by Madras Act 34 of 1955.

3. Accused found to be of unsound mind both at the time of committing the offence and the time of his trial.—“The procedure prescribed by S. 469 assumes that the person about to be tried is of sound mind, and then goes on to lay down that if on trial the Court be satisfied that the accused committed the offence alleged, but that at the time he committed it he was of unsound mind, the Magistrate shall proceed with the case, and if the offence be one which ought to be committed to the Court of Session, or High Court he shall commit accordingly”.^{8a} The test to determine whether a person who has committed an act which is charged against him as an offence, was of sound mind at the time of its commission is whether he knew that he was doing wrong.⁹ Where the Magistrate was of opinion that the accused was of sound mind at the time of the trial, but insane when he committed the offence, *held*, that the Magistrate should have proceeded under Ss. 470 and 471.¹⁰ When a prisoner is found to be insane at the time of his trial, the proper procedure applicable to his case is that prescribed by Ss. 391 and 392 of the Code of 1861.¹¹

470. Judgment of acquittal on ground of lunacy.—Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Scope. |
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1. Corresponding sections in former Codes.—This section corresponds to S. 393 of the Code of 1861 and S. 429 of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope.—“Sections 470 and 471, which prescribe that when a person is acquitted on the ground that he was of unsound mind at the time when he committed the act constituting the alleged offence, a finding to that effect shall be recorded, and thereupon the Magistrate or Court is directed to retain such person in custody and report the case to Government”.¹²

8a. *Chadami*, (1900) AWN 47.

9. *Jugo Mohun Mala*, (1875) 24 WR (Cr) 5; *Govindaswamy Pandaychi*, A 1952 M 479; *Madho Singh*, (1953) Cr LJ 382.

10. *Kurumuhan*, 2 Weir 582.

11. *Ram Rutton Doss*, 9 WR (Cr) 23.

12. *Chadami Lal*, (1900) AWN 47.

When a Court acquits an accused under S. 470, on the ground of his lunacy, it should simultaneously pass orders under S. 471.¹³ Where an accused is acquitted on the ground of insanity, the Court is bound to order him to be detained in safe custody and to report the action to the Provincial Government and cannot release him on the ground that he appeared to be insane at the time of the trial.¹⁴

471. Person acquitted on such ground to be detained in safe custody.—(1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the State Government :

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912.

Power of State Government to relieve Inspector General of certain functions.—(2) The State Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under Section 473 or Section 474.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 4. Acquittal of criminal lunatic—Court can order detention in Jail. |
| 2. Legislative Changes. | 5. "Detained in safe custody". |
| 3. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 394 of the Code of 1861 and S. 430 of the Code of 1872.

2. Legislative Changes.—The words "and shall report the action taken to State Government" in sub-sec. (1) and the proviso and sub-sec. (2) were inserted by S. 124 of Act XVIII of 1923. Sub-secs. (3) and (4) have been omitted by Act IV of 1912. The word 'detained' has been substituted for the word 'kept'.

3. Scope.—Section 471 confers the power to order the insane accused to be kept in safe custody in such place and manner as the Magistrate or Court may think fit. Clauses 2 and 3 have been repealed by Act IV of 1912 and the powers of the Court are wide. I see nothing in the section as it now stands compelling the Court to send the accused to a lunatic asylum.¹⁵ Where an accused is acquitted on the ground of lunacy and the Court is satisfied that he was not capable of understanding the nature of his act,

13. *Mahammad*, (1921) 23 Cr LJ 71 : 65
IC 423.

14. *Kishna Gopula Maratha*, A 1945 N 77 ;

46 Cr LJ 745.

15. *A. B. Mahammad*, 42 MLJ 72 (73) : 23
Cr LJ 71.

it has an absolute duty imposed on it to declare the accused to be a Criminal Lunatic within the meaning of Act IV of 1912 and direct him to be detained in a Lunatic Asylum.¹⁶

4. Acquittal of criminal lunatic—Court can order his detention in Jail.—*Report not necessary.* Under the amended S. 471, the Court, in a case where it finds that an offence has been committed by a lunatic, must confine itself to making an order that he should be kept in safe custody in such place and manner as the Court thinks fit. It is then for the Government to decide under their own powers the future fate of the person concerned.¹⁷ In a case where the accused takes the plea of insanity in a jury trial, verdict of the jury is to be obtained. The appellate Court can pass order under S. 471.¹⁸ Such order being consequential within the meaning of S. 423 (1) (d).¹⁹ Where the accused is acquitted on the ground that he was insane at the time of the commitment of the offence, medical evidence as to his insanity is not necessary under S. 471 for his being ordered to be kept in safe custody. Medical evidence is necessary only in such proceedings as those under S. 464 (1).²⁰

5. 'Detained in safe Custody'.—The Calcutta High Court, finding that the appellant did the act of murder but was of unsound mind at the time, directed him to be detained in a Mental Hospital.²¹ The expression 'detained in safe custody' does not mean, having regard to the language used in S. 475, 'detained in the custody of friends or relatives'.²² Under this section as amended in 1923 it is essential that the accused should be detained in 'a place'. The word 'detained' denotes the curtailment of liberty, that is made clearer by the subsequent use of the words 'in a place'. Therefore it is obligatory upon the Court to order the detention in a place and not with a person. Hence an order of the Court detaining the accused in the custody of his father-in-law and brother is illegal.²³ Detention in a mental hospital was ordered in the case of *Karma*,²⁴ but that must be done according to the rules framed by the State Government under the Lunacy Act (*see* Proviso to this section). The Government may under S. 473 make over the accused lunatic to his relatives.²⁵

472. [*Lunatic prisoners to be visited by Inspector General.*] *Rep. by the Indian Lunacy Act, 1912 (4 of 1912), Section 101 and Sch. II.*

473. Procedure where lunatic prisoner is reported capable of making his defence.—If such person is detained under the provisions of Section 466, and in the case of a person detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum, or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken

16. *Anadi*, 45 A 329 ; 24 Cr LJ 225.

17. *Imam Hasan*, (1923, Feb.) 25 Bom LR 286 dissenting from *Sourya Hirya Maher*, (1918) 43 B 134 : 20 Bom LR 629 : 19 Cr LJ 629.

18. *L. R. v. Fatik Narayan*, 61 CWN 1196 : A 1961 C 436.

19. *Kala Naya*, A 1941 R 352.

20. *Kala Naya*, A 1941 R 352 ; 43 Cr LJ 228.

21. *Kama Urang*, (1927) 32 CWN 342.

22. *Legal Remembrancer v. Srish Chandra Roy*, (1925) 48 CLJ 148.

23. *Nellayappo Pillai*, A 1948 M 291 ; 49 Cr LJ 313 following *L. R. v. Srish Chandra Roy*, 56 C 308 ; 1928 C 653 ; *Kandaswami Mudali*, A 1853 M 355 ; 1953 Cr LJ 642 ; *Onseph Thomas*, A 1952 JC 52 ; *Tun Tun Khin*, 10 R 460.

24. 23 GWN 342.

25. *Kandaswami*, 1952 1 MLJ 607 : A A 1952 M 485.

before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 468 ; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
| | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 395, Cl. (2) of the Code of 1861 and S. 432 of the Code of 1872 and the Code before it was amended was similarly worded as that of 1882.

2. Legislative Changes.—The word 'detained' after the words 'such person is' and the words 'in the case of a person detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them' after 'S. 466, and' were substituted by S. 125 of Act XVIII of 1923.

3. Scope.—The Magistrate, when an accused is brought before him under S. 468 on a certificate of the Superintendent of a mental hospital shall place on record that he found the accused capable of his defect, as under S. 473 he can be tried on such certificate which shall be receivable in evidence.²⁶ A certificate of visitors of lunatic asylum upon the prescribed Government form signed by the Superintendent of a mental asylum is a public document within the meaning of S. 73 Evidence Act.²⁷

474. Procedure where lunatic detained under Section 466 or 471 is declared fit to be released.—(1) If such person is detained under the provisions of Section 466 or Section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the State Government may thereupon order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum ; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the State Government, which may order his release or detention as it thinks fit.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
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1. Corresponding sections in former Codes.—This section corresponds to S. 395, Cl. (3) of the Code of 1861 and S. 433 of the Code of

26. *Ibrahim*, A 1934 L 123 ; 35 Cr LJ 869 (report was that the insanity was

feigned).
27. *Kali Das Sarkar*, 63 C 425.

1872 and the Code before it was amended was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The word “detained” was substituted for the word “confined” and the words “released” and “release” for “discharged” and “discharge” by S. 126 of Act XVIII of 1923.

475. Delivery of lunatic to care of relative or friend.—

(1) Whenever any relative or friend of any person detained under the provisions of Section 466 or Section 471 desires that he shall be delivered to his care and custody, the State Government, may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government that the person delivered shall—

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
- (b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct, and
- (c) in the case of a person detained under Section 466, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of Section 468, and the certificate of the inspecting officer shall be receivable as evidence.

SYNOPSIS

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|--|-------------------------|
| 1. Corresponding sections in former Codes. | 2. Legislative Changes. |
| | 3. Scope. |

1. Corresponding sections in former Code.—This section corresponds to S. 397 of the Code of 1861 and S. 444 of the Code of 1872.

2. Legislative Changes.—This section has been substituted for the old section by S. 127 of Act 18 of 1923.

3. Scope.—This section provides for delivery of the lunatic to the care of any relative or a friend of the lunatic on his application and the State Government on conditions mentioned in this section may deliver the lunatic to such relative or friend and under sub-sec. (2) may call upon such relative or friend of the lunatic to produce the lunatic, if he is accused of an offence,

for trial before the Court on the certificate of fitness by the Inspecting Officer that such lunatic is capable of making his defence.

CHAPTER XXXV

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

476. Procedure in cases mentioned in Section 195.—

(1) When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate :

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

For the purposes of this sub-section, a Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under Section 200.

(3) Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

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1. Corresponding sections in former Codes.—This section corresponds to S. 171 of Act XXV of 1861, S. 471 of Act V of 1872, S. 135 of Act X of 1875, S. 44 of Act IV of 1877. Section 476 of the Code of 1898 was almost the same as that of Act X of 1882. Sub-section (2) was inserted in the Code of 1882 for the first time.

2. Legislative Changes.—The *proviso* to Cl. (1) was added by Act II of 1926 and the word "Presidency Magistrate" was substituted for the word "Chief Presidency Magistrate" by the said Act.

3. History of the section.—Section 171 of the Code of 1861 read as follows.—

"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for *investigating* any charge in cases mentioned in the last three preceding sections, the Court after making such preliminary inquiry as may be necessary, may send the case for investigation to any Magistrate having power to try or commit for trial the accused person for the offence charged, and such Magistrate shall thereupon proceed according to law, and the Court, shall have power to send the accused person in custody or to take sufficient bail for his appearance before such Magistrate and may bind over any person to appear and give evidence on such investigation."

"The last three preceding sections" are Ss. 168, 169 and 170 of the Code of 1861; S. 168 is analogous to S. 195 (1) (a), S. 169 to S. 195 (1) (b), and S. 170 to S. 195 (1) (c) and correspond to Ss. 467, 468 and 469 of the Code of 1872 and Ss. 40, 41 and 42 of Act IV of 1877.

Section 471 of the Code 1872 was similarly worded as S. 171 of the Code of 1861 with the modification regarding the numbering of the 3 sections noted above and the words in the third paragraph which ran as follows:—"The Magistrate receiving the case may, if he is authorised to make transfer of cases, transfer the inquiry to such other competent Magistrate instead of completing the inquiry himself" as also with the modification that before the words 'such Magistrate', which occurred in the second paragraph of S. 471, the word 'and' occurred in the Code of 1861 and the words 'on such trial or inquiry' after the word 'evidence' were substituted in the 1872 Code for the words 'on such investigation' which is consequential on the substitution of the word 'inquiry' in the section for the word 'investigation' used in S. 171 of the Code of 1861.

Section 135 of Act X of 1875 was almost similar in terms to S. 471 of the Code of 1872.

Section 44 of the Presidency Magistrate's Act IV of 1877 was worded as follows :—

“When any Civil, Criminal or other Court inferior to the High Court is of opinion that there is sufficient ground for inquiring into any complaint mentioned in Ss. 40, 41 or 42, such Court may either itself inquire into and commit the case for trial before the High Court, or may send the case for disposal to any Presidency Magistrate having jurisdiction. The Court may send the accused person in custody or take sufficient bail for his appearance before such Magistrate and may bind over any person to appear and give evidence in the case.”

Nothing in this sub-section shall prevent a Presidency Magistrate from disposing of cases under Ss. 172, 173, 174 and 175, I. P. C., where he himself is the Public Servant concerned.”

Sir Arnold White, C. J., in *Rahimadulla Sahib*,²⁸ in discussing the corresponding provisions amongst others observed :—“The sections of the Code of 1861 to which reference has been made were reproduced in the Code of 1872 (see Ss. 468 to 471) under a Chapter bearing the same title as in the Code of 1861. In the Code of 1898 the sanction provisions were reproduced in S. 195 under a sub-heading ‘Conditions requisite for initiation of proceedings’ whilst the express provisions that sanction might be given at any trial disappeared. In the Code of 1898 the enactment empowering the Court to act on its own initiative in regard to offences referred to in S. 195 was reproduced as S. 476 under the heading ‘Proceedings in the case of certain offences affecting the Administration of Justice’ in close juxtaposition to a section empowering the Court to take action in certain cases of contempt (S. 480)—a section which expressly provides for a procedure of an immediate and summary nature”. Wallis J., in the said decision observed : “the provisions of S. 476 when first enacted as S. 171 of the Code of 1861 were suggested by the provisions of S. 19 of the Criminal Procedure Act, 1851 (14 and 15 Vict. Cap. 100)” and discussed the history and language of the English enactment.

Sub-section (2) in the Code of 1882 appears to have been introduced to give legislative effect to the decision in *Ishri Prasad v. Shamlal*,²⁹ which hold that the order of the Court “was a sufficient complaint within the meaning of S. 195”.³⁰

The additions of the words “as if upon a complaint made and recorded under S. 200” in sub-sec. (2) appears to have been introduced in order to give legislative effect to the decision of the full bench in *Ishri Prasad*,²⁹ and in order to remove the doubts which previously existed as to whether an order under S. 476 could be treated as a complaint within the meaning of Ss. 190 and 195 (c), and also as to whether the Magistrate to whom the case was sent was bound under S. 200 to examine the complainant, i.e., the presiding officer of the Court upon oath.³¹ It was further held in the above decisions³¹ that the effect of the amendment in sub-sec. (2) as also the amendment of S. 200 by the addition of the words “Subject to the provisions of S. 476” was that the order of the Court under sub-sec. (1) was to be regarded as a complaint and was to be regarded as having been recorded under S. 200. The above full bench case over-ruled³¹ the view in *Eranholi Athan*,³² and held

28. (1907) 31 M 140 (142, 143).

29. (1885) 7 A 871 (FB).

30. *Per Banerjee, J.*, in *Bhup Kunwar*, (1904) 26 A 249 (262).

31. *Somayajipad*, (1909) 33 M 48 (FB) (51); see *In re Lakshmidas Lalji*, (1907) 32 B 184 (189).

32. (1903) 26 M 98 (FB).

that the addition of the words in sub-sec. (2) was not to alter the previously existing law as to the revisional power of the High Court under S. 439. The Bombay High Court in the case of *Bal Gangadhar Tilak*,³³ has held the same view as in *Somayajipad*,^{33a} and held further that the words introduced by the amendment in 1898 were peremptory and a Magistrate was bound to proceed with the investigation of a case sent to him by a Civil Court.

4. Report of the Select Committee—"The changes that we have made in the proposed S. 476 are not of great importance. We have provided that a Court can act on application made to it or *suo motu* and after such preliminary inquiry, if any, as it thinks necessary. For the words "committed before it or brought under its notice in the course of a judicial proceeding", we have substituted the phraseology used in the proposed new S. 195. We have substituted 'may make a complaint' for 'shall make a complaint' and in view of the criticism of the words "nearest first class Magistrate" we have provided that a complaint should be sent to a first class Magistrate having jurisdiction. For the words 'if he thinks expedient in the interests of justice' which we think might hamper a Magistrate in the exercise of his powers of adjournment, we have substituted 'if he thinks fit.' In order to give effect to the decision arrived at in our consideration of clause 114 that proceedings under S. 476, etc., should be subject to revision, we have introduced words which will make it necessary for the Court to record an order".

Report of the Select Committee, 1926.—"The Lahore High Court has represented that it is needless waste of time of the Judges of a High Court that they should be required to sign all complaints under S. 476. The proposed change enables any officer of such a Court whom the Court may appoint to sign the complaint"—*G. I. Part V 1925, p. 215.*

The Lahore High Court in *Pir Qadir Baksh Singh* (1924) 6 L 34 (40) observed:—"It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint".

5. Effect of the 1923 Amendment.—(1) The words "*whether an application made to it in this behalf or otherwise*" seem to..... suggest that the Court can act under S. 476 either on an application from a party as in S. 195 or *suo motu*.

(2) The words "*that it is expedient in the interests of justice that an inquiry should be made*" have been inserted in place of "there is ground for inquiry into any offence" for the reason that under the amended section the Court will be required to make a finding to the effect that "*it is expedient....made*".

(3) The words "*referred to in S. 195 sub-sec. (1) Cl. (b) or Cl. (c)*" substituted in place of the words "referred to in S. 195" seem to be a better drafting. Section 195 (1) (a) has no application to offences against Public Justice which is dealt with under Chapter XXXV, although it was held in the case of *Waman Nikar*,³⁴ that the words "referred to etc.," were merely descriptive of the offences which could be dealt with under this section. These words, it seems, have also set at rest the conflict of the following decisions,³⁵ which held that the section was applicable to S. 195 (1) (c) and the

33. (1902) 26 B 785 ; see also *Ram Sahai*, (1917) 40 A 144.

33a. *Somayajipad*, (1909) M 48 (FB) (51) ; see *In re Lakshmidas Lalji*, (1907) 32 B 184 (189).

34. (1918) 43 B 300 (310) ; *Rajkumar Singh*, (1916) 1 PLJ 298 : 18 Gr LJ 135.

35. *Akhil Chandra De*, (1895) 22 G 1004 (1006) ; *Ram Sahai*, (1917) 40 A 144 (146).

contrary view in *Abdul Khedal*,³⁶ or the doubt about the applicability of S. 476 to S. 195 (1) (c) as expressed in *Jadunandan Singh*.³⁷

(4) The words "*which appears to have been committed in or in relation to a proceeding in that Court*" have been substituted for the words "committed before it or brought under its notice in the course of a judicial proceeding." These words, as pointed out by the Select Committee, have been drawn in conformity with the new phraseology in S. 195, and this clause seems to suggest that the offence must have been committed in the proceeding before it, or if not committed then, the said offence must be in relation to such proceeding brought under its notice. But see S. 478 *infra* where the words 'judicial proceeding' have been retained.

It has been held that under S. 476 of the unamended Code all that was required was that the offence referred to there should be either committed before the Court or brought under its notice in the course of a judicial proceeding and that *it was not necessary that the person proceeded against should be a party or a witness in the proceeding*.³⁸ We need not consider what are "judicial proceedings" as that expression has been omitted by the amendment. We need not also consider the case of *Kamta Pershad* and other cases³⁹ where the clause "brought under the notice of the Court in the course of a judicial proceeding" was interpreted as being wide enough to cover an offence which may have been committed in another *forum* and on some previous occasions.

The words "*in or in relation to a proceeding in that Court*" seem to connote that the offence must have some relation or connexion with 'any proceeding' in that Court. Hence the view in *Girwar Prasad*⁴⁰ that there must be a judicial proceeding seems no longer tenable. The Calcutta High Court in a recent decision⁴¹ has interpreted this clause.

It seems that the amendment has the effect of superseding the following cases⁴² which held that the section is not restricted, as regards the persons against whom an order may be made, to *parties* to proceedings, and the view in *Ejaz* and other cases⁴³ where it has been held that the section applies to a *witness*. But the view in *V. M. Abdul Rahman*⁴⁴ which has followed the full bench decision in *Govinda's* case⁴⁵ that the section is applicable only to *parties* to the proceeding does seem to be right. It was further observed in⁴⁴ that the decisions under the old Code *e.g.*, the observations in *Begu*, 34 C 551 F. B. which was a leading case under the old Code have no application to the present section. The attention of the learned Judges of the Rangoon High Court in *Abdul Rahman*⁴⁴ does not appear to have been drawn to a later Special Bench decision of the Calcutta High Court in *Bahadur v. Eradatulla Mullick*,⁴⁶ but all the same the view⁴⁴ seems to be the

36. (1892) 15 M 224.

37. (1909) 37 C 250 : 14 CWN 330 : 10 CLJ 534 : 11 Cr LJ 37.

38. *In re Keshav Narayan Manalker*, (1912) 14 Bom LR 968.

39. (1911) 33 A 396 ; *Girwar Prasad*, (1909) 6 ALJ 392 (398) ; *Subbaraya Pillai*, (1895) 18 M 487 ; *Haibat Khan*, (1905) 33 C 30 ; *Balmakund*, (1909) 14 CWN 1xiii ; *Nomal*, (1869) 12 WR (Cr) 69 ; *Girijananda*, (1922) 26 CWN 600 ; *Chandrakishore*, (1916) 21 CWN 755.

40. 6 ALJ 392 (398).

41. *Tarakeswar Mukhopadhyaya*, (1925) 53 C

488 : 30 CWN 504.

42. *Ganga Ram*, (1917) 40 A 24 ; *Bechu Behari Lal*, (1919) 20 Cr LJ 630 (P) : 52 IC 39 ; *Ramsarup*, 19 Cr LJ 236 : 43 IC 828.

43. *Ejaz*, 23 Cr LJ 328 ; *Narayan Dhonddeo*, (1910) 12 Bom LR 383 ; *In re Devijivalad Bhawani*, (1893) 18 B 581.

44. (1924) 3 R 95 (99) ; *Manug Shwe Phe v. Ma Me Hmoke*, (1924) 3 R 48.

45. *Govind Iyer*, (1918) 42 M 540 (FB) ; see *Baheruddy Sikdar*, (1924) 28 CWN 880.

46. (1910) 37 C 642 SB overruling *Begu Singh*, (1907) 34 C 551 FB.

correct view. The Legislature adopts the language of Cl. (b) S. 195 (1) and not the language of Cl. (c) which has reference to a 'party' but as was pointed out in *Govind Iyer*,^{46a} S. 476 incorporates the conditions laid down in S. 195, and is restricted to a party when the offence is as is mentioned in S. 195 (1) (c). The Lahore High Court however has held that Ss. 195 and 476 were considerably altered in 1923, that nowhere in the Code it is said that the Magistrate or the presiding officer of a Civil Court cannot take action against persons who are not parties to the proceedings before him in respect of the offences mentioned in S. 195, and if there is any such restriction it is only there by implication.⁴⁷ The learned Judges in *Balmokund*⁴⁷ considered the cases under the old Code. It seems the attention of the learned Judges was not drawn to an earlier decision in *Bhau Vyanktesh Chokrekar*⁴⁸ which supports the view taken in *Giridharilal Serowgee*⁴⁹ and although it may be argued as was contended for in the decisions⁴⁸ and⁴⁹ that S. 476 is a self-contained section, or as was held in *Raj Kumar Singh*⁵⁰ that the general power of the presiding officer to complain against a person is not taken away by implication, these decisions^{47, 48, 49} and⁵⁰ seem to be wrong.

True, S. 476 incorporates the language of S. 195 (1) (b) and not of S. 195 (1) (c) and the words in S. 476 "which appear to have been committed in or in relation to a proceeding in that Court" are wide enough to cover a case of complaint against a person who is not a party, but the opening words of S. 476 have reference to action being taken in respect of offences mentioned in S. 195 (1) (b) and *cognizance* by the Magistrate has to be taken in such cases under S. 195. Hence it follows that the Court is *helpless* where the offences mentioned in S. 195 (1) (c) are committed by persons who are no parties to the proceedings. The offences mentioned therein are Offences against Public Justice and a private person has got no *locus standi* to move the Court. Hence the Lahore view in *Balmokund*⁴⁷ although commented upon as the *correct view* in⁵¹ as also the view of the Bombay High Court⁴⁸—decisions under the present Code and the Patna view⁵⁰—a decision under the old Code seem to be wrong.

(5) The amendment uses the word 'may make a complaint' in place of 'shall make a complaint'. It follows therefore that the Court is not bound to make a complaint, but should he decide to make a complaint he has got to comply with the terms of the section.

(6) The words 'nearest first class Magistrate' introduced for the first time in the Code of 1882 have now been substituted by the words "*a Magistrate of the first class having jurisdiction.*" The word 'nearest' has been deleted in consequence of the decisions⁵² where *held* that the word 'nearest' must be construed reasonably; it has reference to the *area* of the jurisdiction of the Magistrate to whom the case is required to be sent under S. 476 and not necessarily to *his headquarters*. It is not necessary to consider the view in *Suppaya Thavagan*⁵³ which held that sending the case to a Magistrate other than the 'nearest' Magistrate was an irregularity curable under S. 537 (b).

46a. *Govind Iyer*, (1918) 42 M 540 (F B); see *Baheruddy Sikdar*, (1924) 28 CWN 880.

47. *Balmokund*, (1928) 9 L 678; *Giridhari Lal Serowgee*, (1916) 21 CWN 950.

48. 49 B 608.

49. 21 CWN 950.

50. (1917) 37 IC 487 (P).

51. 33 CWN lxxi.

52. *Perumal*, 2 Weir 590 see *Donaldson*, (1916) 43 C 542.

53. (1912) 37 M 317; see also *Newahd Lal Sadhu*, (1908) 8 Cr LJ 209.

The view of the majority of the full bench of the Calcutta High Court in *Colin Mackenzie Mackay*,⁵⁴ that the Chief Presidency Magistrate in taking cognizance of a complaint made by himself and sending it to another Presidency Magistrate made a technical mistake, not going to the root of the case does not seem to be right. The dissentient views of Rankin and Chakraverty, JJ., however seem to be right.

(7) '*Signed by the presiding officer of the Court*'.—These words are new. As illustration to S. 537 *infra* has been deleted it seems the Legislature condemns putting 'initials': The Criminal Procedure Amendment Act (II of 1926) by inserting a *proviso* to sub-sec. (1) has made an exception in the case of the High Court where the complaint may be signed by such officer of the Court as the High Court may appoint. This provision renders signature by Courts other than the High Court *mandatory*.

(8) Presidency Magistrates are, as S. 6 would show, a class by themselves. They are not necessarily 'Magistrates of the First Class'. The Amending Act XVIII of 1923 by S. 128 provided that a 'Chief Presidency Magistrate' for the purposes of this sub-section was to be deemed a Magistrate of the First Class. The Amending Act (II of 1926) made all Presidency Magistrates 'Magistrates of the First Class' for the purpose of this section. This provision is new. Under the Code of 1898 in Presidency Towns the difficulty was felt in sending cases to 'nearest Magistrate of the first class'. Although the Presidency Magistrate exercised the powers of the Magistrate of a first class under S. 32 in awarding sentence, it was held in *Kedar's* case and other cases⁵⁵ that he was not a Magistrate of the first class. The High Court of Calcutta in *Donaldson*⁵⁶ sent the case to Alipur (Dt. 24 Parganas) as the Presidency Magistrate was not treated as the 'nearest Magistrate of the first class', and held further that the papers should be laid before the Government Solicitor for taking action. In view of the *proviso* added by Act II of 1926, *Donaldson's* case⁵⁶ has been modified.

6. Sub-section (2).—Owing to the introduction of S. 200 (a) by Act XVIII of 1923 when the complaint is by a Court as under this section the examination of the complainant has been dispensed with. It follows therefore that the words "and recorded" which have been deleted is a consequential amendment.

The expression "proceed according to law," requires the Magistrate receiving the reference to proceed under Chapters XVIII to XXI of the Code.⁵⁷

Under S. 200 proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complaint.⁵⁸ The Magistrate is competent to proceed against persons not named in the complaint if it appears that they are concerned in the offence⁵⁹ and neither S. 200 nor S. 202 requires preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against.⁶⁰

7. Sub-section (3).—Is altogether new and provides for stay of proceedings or adjournment when an appeal is pending against the decision of

54. 30 CWN 276 (FB).

55. *Kedar Nath Kar*, (1905) 3 CLJ 357 (359); *Aditram*, (1907) 9 Bom LR 1160; *Chote Singh*, (1908) 32 M 303 (304).

56. (1916) 43 C 542.

57. *Devidin v. Narayanram*, (1920) 21 Cr

LJ 310 : 55 IC 470.

58. *Rathnaswamy*, A 1943 M 50.

59. *Giridhari*, 21 CWN 950; *Nilai*, 40 CWN 573.

60. *Ranjit Singh v. State of Pepsu*, A 1959 SC 843 : 1959 Cr LJ 1124.

the Court complaining under S. 476. It has given effect to the view in *Debi Mahto* and other cases.⁶¹

The language in sub-section (3) may be compared with S. 344 *ante* and gives the Magistrate a discretion at any stage of the proceeding to adjourn until the decision of the appeal. The Bombay High Court held in *Bal Gangadhar Tilak*⁶² the full bench decision of the Calcutta High Court in *Ram Prosad Hazra*⁶³ and of the Division Bench in *Raj Kumari Debi v. Bamasundari Debi*⁶⁴ that a Magistrate was bound to proceed and *not stay* the investigation of the case. It has been held however in *Jadulal Saha v. Lewis* and other cases⁶⁵ that criminal proceedings should not go on during the pendency of the civil litigation. The Madras High Court in *Anna Ayyar*⁶⁶ distinguished *Rajkumari's* case.⁶⁴ Although the Calcutta High Court in *Hem Chandra Roy v. Atal Behari*⁶⁷ doubted whether the High Court exercising civil jurisdiction had the power to stay criminal proceeding under this section, the said view was overruled in *Hara Prasad Das*.⁶⁸ Sub-section (3) has set at rest the doubt.

There is no hard and fast rule.⁶⁹ Sub-section (3) does not enjoin on a Magistrate the obligation to adjourn every trial whenever an appeal is filed. It is in his discretion to do so having regard to the facts of each case.⁷⁰

'Pending against the decision arrived at in the judicial proceeding out of which the matter has arisen'.—The words 'judicial proceeding' which have been deleted from sub-sec. (1) is used in sub-sec. (3) perhaps to indicate the nature of the proceeding out of which the matter *i.e.*, subject of complaint under S. 476 had arisen, *viz.*, whether it is a proceeding before a Civil, Revenue or Criminal Court as that would determine the forum of appeal mentioned in S. 476-B.

8. Distinction between Ss. 195 and 476.—The expression suggested by Pigott J., in *Bhawani Das*⁷¹ *viz.* that the 'offence alleged to have been committed by a party' which was loosely used in the old section for "offence committed by a party" has actually been adopted by the legislature as observed in *Kanhaiya Lal v. Bhawan Das*.⁷² "The expression 'committed in or in relation to any proceeding in that Court' which occurs in S. 476 and also occurs in S. 195 (b) does not occur in S. 195 (c), where the words are 'alleged to have been committed by a party to a proceeding in respect of a document produced or given in evidence in such proceeding.' There would be no conflict between the two sections whatsoever. Section 476 (1) (2) therefore defines the form, scope and nature of the complaint mentioned in cls. (b) and (c) of S. 195. And the two clauses of the former section must be read with the two clauses of the latter, when any question about a prosecution started upon the complaint of a Court arises."⁷³ Sections 195 and 476 must be read together and S. 476 prescribes the *procedure* to be adopted by the Courts when making a complaint.⁷⁴ Sankaran Nair, J., in the same case held "A complaint may be under S. 195 when the matter requires investigation. An order is to be passed under S. 476 when a *prima facie* case is made out. This will

61. (1916) 20 CWN 116 : 18 Cr LJ 125 : 37 IC 477 ; *Tilak Pandey*, (1915) 37 A 344.

62. (1902) 26 B 785.

63. (1866) Beng LR (Supp. Vol.) 426.

64. (1896) 23 C 610.

65. 34 C 848 ; see *Asrabuddin Sardar v. Kalidyal Mullick*, 19 CWN 125 ; *Gobordhone Pramanik v. Iswar Chandra Pramanik*, (1900) 5 CWN 44.

66. (1906) 30 M 226.

67. (1908) 35 C 909.

68. 40 C 477 FB.

69. *N. C. Sheriff v. The State of Madras*, A 1954 SC 397 ; (1954) SCA 576.

70. *Venkatarami Lokshminarayan Chetty*, ILR 1957 AP 299.

71. (1915) 38 A 169 (173-4).

72. (1925) 48 A 60 (65).

73. *Lakshmidas Lalji*, (1907) 32 B 184 (189) dissenting from *Begu Singh*, (1907) 34 C 551 (FB) ; *Mathur* A 1945 P 362.

74. *per* Pinhey, J., in *Aiyakannu Pillai*, (1908) 32 M 49 (FB).

explain many of the differences which will now be referred to." In view of the amendment the view of Sankaran Nair, J., is no longer tenable. Miller J., by a dissentient judgment⁷⁴ followed *Begu Singh*.⁷⁵ The Rangoon High Court has held that an application under S. 476 now occupies exactly the same position as one made formerly under S. 195. Section 476 has been modified so as to allow the Court to act either on its own motion or on application.⁷⁶ Section 476 has to be read with S. 195 and is therefore restricted by the limitation contained in cl. (b) of that section. An order for prosecution under S. 476 cannot therefore be made for alleged perjury during a police investigation.⁷⁷ This view is no longer tenable as it distinguished the cases referred to therein on the ground that the Bombay case and the earlier Calcutta cases turned upon S. 478 read with S. 195 (1) (c). The Patna High Court has held that the present Ss. 476, 476A and 476B have taken the place of the old Ss. 195 and 476.⁷⁸ See also Commentary on S. 195 *supra*. The Allahabad High Court has held, (1) that in view of the amendments of Ss. 476 and 195 made by the Amending Act of 1923, there was strong ground for holding that the legislature intended S. 476 to be co-extensive in its scope with cls. (b) and (c) of S. 195 (1), (2) that S. 195 being a restrictive section, there was nothing in that section and S. 476 to prevent the Munsiff from making a complaint under ordinary law, in respect of an offence under S. 471, I. P. C., which he found to have been committed before him.⁷⁹

9. Scope.—The question whether a complaint should be made under S. 476 is almost invariably a matter of discretion,⁸⁰ and the High Court will not interfere with the exercise of that discretion except in extraordinary cases.^{80a}

Section 476 (1) is very wide in its scope and includes offences not actually committed in the presence of the Court during Trial but also offences committed in relation to a Court proceedings outside the Court.⁸¹ If the Court makes a complaint under this section for one offence the Magistrate cannot convict the accused under another section.⁸²

10. Nature of Inquiry.—What a Court has to decide under this section is (a) whether an offence of the kind contemplated *appears* to have been committed, (b) whether it is expedient in the interest of justice that it should be further inquired into. In order to arrive at a decision, the Court may, if it thinks fit, hold such preliminary inquiry as it considers necessary. *The nature, method and extent of the preliminary enquiry are entirely at his discretion.* It is no valid objection to such inquiry that the future accused were not allowed to cross-examine the witnesses who gave evidence against them at the inquiry.⁸³ In this case⁸³ the view in *Perumala Venkata Subbiah*,⁸⁴ viz., that the party should be given an opportunity to cross-examine the witnesses against him and the view in *Ganeshwar Paharaj*⁸⁵ which was not only to the same effect as *Perumala's* case⁸⁴ but the future accused was entitled to produce evidence in his defence,

75. (1907) 34 C 551 FB subsequently overruled in *Bahadur v. Eradulla Mullick*, (1910) 37 C 642 FB.

76. *Maung Shwe Phe v. Me Me Honoke*, (1924) 3 R 48.

77. *Jadunandan Singh*, (1909) 37 C 250 : 10 CLJ 564, following *Dharamdas Koiri*, (1908) 7 CLJ 373 and distinguishing *In re Debji*, (1893) 18 B 581 and *Akhil Chandra*, (1895) 22 C 1004 ; *Kushal Ram*, A 1931 A 443.

78. *Chamari Singh v. Public Prosecutor of Gaya*, (1924) 4 P 24.

79. *Dwarka Prosad v. Makund Sarup*, (1925)

24 ALJ 122.

80. *Sombhai v. Aditram*, (1924) 26 Bom LR 289.

80a. *Ranjit Narain Singh v. Rambahadur Singh*, (1925) 5 P 262.

81. *Md. Abubacker v. Md. Mohiuddin*, (1955) 1 MLJ 46.

82. *Karan Singh v. State*, A 1956 MB 193 ; 1956 Cr LJ 1072.

83. *In re Raja Rav*, (1926) 50 M 660 : 51 MLJ 331.

84. (1922) 44 MLJ 74.

85. (1921) 6 PLJ 146.

were not accepted, but the view in *Abdul Ghafur v. Reza Hussain*⁸⁶ was followed.

Any preliminary inquiry that may be deemed necessary under S. 476 need not be of an exhaustive nature.⁸⁷

11. No complaint by Court necessary in respect of Abettors.—There is nothing to prevent the trial of an abettor of an offence committed by a party to a proceeding in Court without a complaint by the Court under S. 476.⁸⁸

12. Nature of complaint.—Under the present law a Court must make a complaint and cannot directly order prosecution. The complaint must set forth the offence, the precise facts on which it is based and the evidence available for proving it.⁸⁹

13. Power of withdrawal.—Is regulated under S. 195 (5). Hence complaint under S. 476 in respect of an offence under S. 211, I. P. C., cannot be withdrawn.⁹⁰

14. Practice and Procedure.—No prosecution under S. 476 should be directed unless there is a reasonable probability of a conviction though the authority taking action under S. 476 should not decide the question of guilt or innocence.⁹¹

(1) Time-limit.—There is nothing in S. 476 which requires a Court to take action if at all immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter.⁹² This case was distinguished in *Ashraf Ali*.⁹³

Although it is clear as was pointed out in *Gyan Chand Roy*⁹⁴ that the responsibility of the prosecution under S. 476 rests upon the Judge entirely, there is a difference of opinion between different High Courts which are noticed below regarding 'time-limit'.

(a) View before Amendment.

Calcutta.—The Calcutta High Court by a full bench decision held in *Begu Singh*⁹⁵ that the power under S. 476 is exercisable *only, or immediately after the conclusion of the trial*; an application for sanction under S. 195 can be made later on as an entirely different and independent proceeding and it was further held therein that the word 'Court' in S. 476 means the officer or Judge before whom the offence was committed and not his successor in office.

Rangoon.—The Rangoon High Court in *Maung Shwe Phe v. Ma Me Hmke*⁹⁶ referring to the decision of the Full Bench of the Calcutta High Court in *Begu Singh*⁹⁵ and that of the Madras in *Aiyekannu Pillai*⁹⁰ held that they had been rendered obsolete by the amendment in 1923.

86. (1912) 34 A 267 following *Mutabudal*, (1903) 26 A 249.

87. *Bhuban Chandra Prodhan*, (1927) 55 C 279.

88. *Fakir Singh*, AIR (1928) 787, following *Ghansam Singh*, (1910) 32 A 74; *Debi-lal v. Dhajadheri Goshami*, (1911) 15 CWN 565 and dissenting from *In re Narayan Dhonddev*, (1910) 12 Bom LR 383.

89. *Ram Prosad*, (1927) 49 A 752.

90. *Ibid.*

91. *Jadunandan Singh*, (1909) 37 C 250 : 10 CLJ 564.

92. *Tilak Panday*, (1915) 37 A 344 (346) following *Girwar*, 6 ALJ 392; *In re Lakshidas Lalji*, (1907) 32 B 184; *Rustamji Hormusji Tarwalla*, (1902) 4 Bom LR 778.

93. (1916) 39 A 91; *Rahimulla Sahib*, (1907) 31 M 140 FB.

94. (1881) 7 C 208.

95. (1907) 34 C 551 FB : 5 CLJ 508 : 11 CWN 569, overruled in *Bahadur v. Pradatulla Mullick*, (1910) 37 C 642 : 12 CLJ 45 the meaning of 'Court'.

96. (1924) 3 R 48 (50).

Madras.—The Madras High Court by a full bench decision in *Aiva Kannu Pillai*⁹⁷ held that the power conferred by this section can be exercised by the Court only in the course of a judicial proceeding or at its conclusion or so shortly thereafter as to make it really a continuation of the same proceeding in the course of which the offence was committed. This view was explained in *Pichai Rowothan*⁹⁸ and distinguished in *Venkanna Patrudu*⁹⁹ on the ground that the question decided in the said full bench case⁹⁷ was not how early, but how late a stage the Court's powers under S. 476 could be exercised and it was held that action might be taken *at any time during the course of the trial*.

Allahabad.—The Allahabad High Court in *Tilak Pandey*¹ did not follow the Madras view⁹⁷ but in *Girwar Prasad*^{1a} accepted the Calcutta view in *Begu Singh*⁹⁵ expressed by Geidt, J., in 34 C 551 FB (562).

Bombay.—The Bombay High Court² dissented from the view in *Begu's* case.⁹⁵

Lahore.—The Lahore High Court in *Khan Muhammad*^{2a} distinguished the said full bench decision of the Madras High Court⁹⁷ on the ground that there was no delay in the case under consideration.

Sindh.—The Judicial Commissioner of Sindh in *re Jethmal Wadhmal*³ follows the Bombay view in *Lakshmidas Lalji* and *Wamay Dinkar's*² cases, viz., that there is nothing in S. 476 either impliedly or expressly limiting the trial within which action under the section should be taken.

Although there is no time limit as held by the Allahabad, Bombay, Lahore, Patna, Sindh and Oudh Courts which seem to be the correct view, application under S. 476 should be made promptly, but in view of sub-sec. (3) such proceedings should be stayed pending appeal.

(b). View after Amendment.

Andhra.—It cannot be put as a matter of law that action should be taken under this section either in the course of Judicial proceedings or immediately after its closure.⁴ The accused cannot take advantage of the delay, when it is not even alleged that the other party is responsible for the delay.⁵

Allahabad.—Delay in filing complaint under S. 476 is fatal.⁶

Bombay.—Under S. 476 as it now stands, the application need not be made in the course of the proceedings out of which it arises or immediately thereafter.⁷ Where after issue of notice for perjury, nothing has been done for more than four years, the proceedings may well be dropped.⁸

97. (1908) 32 M 49 FB ; *Rahimdulla Sahib*, (1907) 31 M 140 (FB) ; see *In re Padmanabha Hebbera*, (1918) 42 M 422 (424) FB ; *Venkanna Petrudu*, (1916) 31 MLJ 440 (453, 454).

98. *Pichai Rowthan*, (1912) MWN 1206 : 13 Cr LJ 825.

99. (1916) 31 MLJ 440 (446).

1. (1915) 37 A 344.

1a. (1909) 6 ALJ 392, followed in *Sunder Lal*, (1922) 44 A 642 : 20 ALJ 666.

2. *Lakshmidas Lalji*, (1907) 32 B 184 (192) *Waman Dinkar*, (1918) 43 B 300.

2a. (1922) 4 L 58 (60) : 93 IC 991.

3. 7 SLR 187 : 15 Cr LJ 541.

4. *Uggirclu Danaich, In re*, (1955) An WR 837.

5. *Kuldip Singh v. Amar Singh*, A 1958 Punj 166 ; see also *Sundarasami Reddy v. Venkatappa Naidu*, (1958) 2 An WR 480.

6. *Narain*, A 1948 A 287 ; 49 Cr LJ 361 where *Md. Kuka v. Dt. Judge Assen*, A 1937 R 62 and A 1946 A 156 referred to.

7. *Bhagwadas Naraindas v. D. D. Patel and Co.*, A 1940 B 131 ; 41 Cr LJ 526.

8. *Krishnaji Narain v. Bhagvan Ganesh*, A 1943 B 113.

Nagpur.—There is no time limit prescribed for such applications. A delay of two months in filing the application is not so great that the application should be dismissed on that ground alone.⁹

Oudh.—Has taken the same view as in Nagpur.¹⁰

Lahore.—An order under S. 476 should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceedings.¹¹

Madras.—Mere delay in the trial during which the father of the accused, who might have given pertinent evidence died, is no ground for not sanctioning the prosecution, unless the accused makes out that the delay was avoidable and deliberate.¹²

(2) **Appeal.**—The Amending Act XVIII of 1923 by S. 128 has provided for an appeal in S. 476B. But the Calcutta High Court has held in the case of *Ahamade Rahman v. Dwip Chand Chowdhury*,¹³ and the Bombay High Court in the case of *Somabhai Valabhai v. Aditbhai Parshottam*,¹⁴ that there is no second appeal to the High Court. The contrary view in the case of *Hamidali v. Madhusudan*,¹⁵ and in *Ranjit's case*¹⁶ seems to be wrong.

Limitation for Appeal.—Is governed by Art. 154 of the Limitation Act. The period of limitation for filing such appeal, when the Appellate Court is not the High Court is *thirty days*.¹⁷

(3) **Revision.**—Under the Code as it stood before the amendment it was held that it was the High Court which was competent to revise orders under this section under S. 439 and the Sessions Judge had no such powers.¹⁸ The present Code has provided for an appeal in S. 476B and has provided for a revision by introducing the words “record a finding to the effect” in sub-sec. (1). It was held by a full bench of the Madras High Court in *Eranholi Athan*¹⁹ that the High Court had no powers of revision, which view however was over-ruled by a later full bench decision of the same Court in *Samayajipad*²⁰ where it was held that the High Court could revise under S. 439.

That the High Court alone has the power of revision has at the same time by the introduction of S. 476A provided that the superior Court as mentioned in S. 195 (3) may exercise the powers under S. 476 when the subordinate Court has neither made a complaint nor rejected an application for the making of such application.

Now what is the proper forum or proper section under which the High Court should be moved?—The section contemplates ‘Civil, Revenue or Criminal Court.’ When the revision is directed against an order of the ‘Criminal Court,’ the High Court will revise under S. 439 and it follows that the application will have to be moved before the Criminal Bench. One need not term it as a Civil Revision although the *practice*

9. *Bholanath v. Acchram*, A 1937 N 91.
10. *Sajjad Hussain*, A 1935 Oudh 113.
11. *Chota Ram*, A 1930 L 316 ; 31 Cr LJ 1135.
12. *Guruppa Nainker*, In re A 1929 M 510 ; 30 Cr LJ 866.
13. (1927) 55 C 765 : 32 CWN 164.
14. (1924) 48 B 401 (403).
15. (1926) 31 CWN 281 : 100 IC 351 : AIR (1927) C 284.

16. (1925) 5 P 262.
17. *Chandra Kumar Sen v. Sm. Mathuriya Debya*, (1925) 29 CWN 1035.
18. *Gopal Barik*, (1906) 34 C 42 : 11 CWN 125 : 4 Cr LJ 460 ; see *Ankanna*, (1899) 28 M 205.
19. (1903) 26 M 98 FB.
20. (1909) 33 M 48 (FB) following *Srinivasulu Naidu*, (1898) 21 M 124 FB ; see *In re Bal Gangadhar Tilak*, 26 B 785.

of the Calcutta High Court was to move the Criminal Bench against orders directed against Ss. 195 and 476 and term the same as 'Civil Revision' and the section applicable was S. 115 of the Civil Procedure Code and *formerly 90 days' time* was allowed for such motions or applications as in Civil Applications for revision. See the full bench decision of *Hara Prasad Das*.²¹

Motions against applications under S. 476 against the order of a Civil Court.—In cases arising out of applications against orders from the Civil Court, the *Appeal* will lie to the civil side of the High Court or the District Court as provided in S. 476B²² and *revision under S. 115 C. P. C.* will lie to the High Court. But on which side?

The *practice* prevailing in the Calcutta High Court is to move the Criminal Bench in such cases under S. 115 of the Civil Procedure Code, *although 60 days time*, and not 90 days are allowed. The Criminal Bench hears such applications as these cases are by standing orders for distribution of business, taken up by the Criminal Bench. A full bench of the Allahabad High Court held in the case of *Bhup Kunwar*,²³ (Banerji J., dissenting) that the order under S. 476 passed by a Civil Court could not be revised under S. 439. In decision²³ the same High Court pointed out that the alterations in S. 476 had not affected the arguments or the decisions in *Bhup Kumar's* case,²³ and that even in revision against an order passed by the Civil Court S. 115, Civil Procedure Code is not applicable, but in the later decision²⁴ it held that revision lay under S. 115 Civil Procedure Code against an order passed under this section by a Civil Court.

Orders passed by Revenue Courts—motion.—In applications directed against order of Revenue Courts the proper *forum* for revision seems to be the Board of Revenue and not the High Court²⁵ since the High Court cannot revise orders passed by the Collector of a District as was held in *Ram Sahai*,²⁶ although it might be argued that the High Court can exercise the powers of general superintendence under S. 107 of the Government of India Act.

Orders under S. 476-A.—Revision.—The Lahore High Court in *Bechram*²⁷ and the Bombay High Court in *Somabhai's* case²⁸ have held that as a general rule it is inadvisable for the High Court to interfere in revision with an appellate order refusing to withdraw a complaint.

(4) Points for consideration.

A. It is expedient in the interest of justice that an enquiry should be made.—If an action is taken under S. 476 the finding must be recorded to the above effect. The Select Committee observed :—"In order to give effect to the decision arrived at in our consideration to Cl. 114 that proceedings under S. 476 etc., should be subject to revision we have introduced words which will make it necessary for the Court to record an order." It has been recently held in *Munnusami Naidu*²⁹ that the provisions to record

21. (1913) 40 C 477 FB.

22. *per* Duval J., in *Hamid Ali v. Madhusudan Das*, (1926) 31 CWN 281.

23. (1903) 26 A 249 : 9 (1904) AWN FB ; *Swamippa Mudaliar*, A 1959 M 107 following *Kumarivalu*, ILR 1940 M 107 ; A 1940 M 465 (FB) ; *Hara Prasad* 40 C 477 FB ; *Surendra*, 35 CWN 775.

24. *Abdul Haq v. Sheo Ram*, (1927) 28 Cr LJ 296 : 100 IC 376 : AIR (1927) A 334.

25. *Behari Lal*, AIR (1928) A 588.

26. *Ram Sahai*, (1917) 40 A 144 (147) ; *Ashruf Ali*, (1916) 39 A 91 distinguishing ; *Bhajan Tewari*, (1915) 37 A 334.

27. (1928) 7 L 108.

28. *Somabhai Vallabhai v. Aditbhai Parshotam*, (1924) 48 B 401.

29. (1928) MWN 229 : AIR (1928) M 783 ; *Sharda Bai v. Laxminarayan Rao*, A 1955 Mys 59.

a finding that an offence has been committed is *mandatory* and failure to so record is not merely an irregularity curable by S. 537, *infra*, for an appeal lies. It was further held therein that complaint should not be made unless interests of justice so require.

The expression 'it is expedient in the interests of justice' means to attain or do what is right and proper in the circumstances. As used in S. 476 it does not mean that the prosecution should be ordered just to satisfy the private grudge of a party.³⁰ The only relevant consideration is whether 'it is expedient in the interests of justice' that a complaint should be made. That involves a careful balancing of many features.³¹

These words are the key-note to the section.³²

Whether it is expedient in the interests of justice, no hard and fast rule can be laid down and each case must be decided on its own facts.³³

Two things are necessary. The Court has to be satisfied that (a) it 'appears' that an offence under S. 195 (1) (b) or (c) has been committed in or in relation to a court, (b) it is expedient in the interests of justice that an enquiry should be made.³⁴ It is necessary that a strong *prima facie* case should be made out.³⁵ Prosecution should not be directed unless there is reasonable probability of conviction.³⁶

The mere existence of contradiction in the evidence of a witness is not sufficient for sentencing prosecution under S. 476. If the statement even if false is immaterial it is not expedient in the interests of justice to sanction prosecution.³⁷ The judges in³⁷ should have used complaint by Court instead of sanction which must have been loosely used.

B. 'May Record a finding to that Effect.'—In the absence of an express finding that the prosecution is expedient in the interests of justice an order under S. 476 cannot stand as the defect is incurable.³⁸ It has been held however in³⁹ that the absence of such finding is not necessarily fatal, it can be cured by S. 537. It is sufficient if the record shows clearly that the Court has applied its mind to the expediency.⁴⁰

C. 'Into any offence referred to in Section 195 (1) (b) or (c) which appears to have been committed in or in relation to a

30. *Kedarnath v. Kailashnath*, A 1955 MB 42; 1955 Cr LJ 484; *Bikram Singh*, A 1924 L 680.
31. *Shroff*, A 1954 SG 397; 1954 Cr LJ 1019; *Jani*, A 1934 S 155.
32. *In re Chator Jethaji*, A 1932 B 551; 34 Cr LJ 33.
33. *Kuldip Singh v. Amar Singh*, A 1958 Punj 166; 1958 Cr LJ 681.
34. *Tashkhir*, A 1945 A 397; *Nawabali*, A 1931 C 760; *John Peter*, A 1953 TC 343; 1953 Cr LJ 1419.
35. *In re Chatur Jethajai*, A 1932 A 351; 34 Cr LJ 38; *Mathura Sahu v. Damri Ram*, 15 Cal LJ 337; 18 Cr LJ 291.
36. *Narain Singh*, A 1948 A 287; 49 Cr LJ 861; *Liaqat Hussain v. Vinay Prakash*, A 1948 A 156; 47 Cr LJ 545; *Gopal Das v. Jnanendranath*, A 1938 C 677; 40 Cr LJ 450; *Agha Ali Ahmad*, A 1944 34; *Ganwar*, A 1944 S 155.
37. *Balabhadra Narayandu, In re*, 1955 An

- WR 575.
38. *In re Pakriswami Pillai*, A 1948 M 297; 49 Cr LJ 340; *Nabani Nath*, A 1933 C 147; 34 Cr LJ 684 (1); *Surendra Nath v. Kuncha Charan*, A 1930 C 352; *Nand Kumar*, A 1937 P 534; *Maniswami Naidu*, A 1928 M 783; *Sharda Bai v. Lakshminarayan Rao*, A 1955 Mys 59 see *Fakir*, A 1953 Or 337; 1953 Cr LJ 1834; *Satish Chandra Malik*, A 1930 C 705; *In re Chilikaxi Ramayya*, A 1933 M 67 (1); 33 Cr LJ 960; *Surajlal v. Sheo Shankar Lal*, A 1934 Oudh 272.
39. *Bachu Singh v. Tribeni Singh*, A 1939 P 178; *Nawabali Jha*, A 1936 P 162; *Charan Das*, A 1930 S 170; *Lal Behari*, A 1962 A 251.
40. *L. R. v. Ijjatulla Paikar*, 58 C 1117; 32 Cr LJ 842; *Dwaraka Prasad*, A 1940 N 227; 41 Cr LJ 157; *Ram Prasad Ojha v. Moheshanand Pandey*, A 1948 P 5; *Ibu Ali*, A 1935 A 608 (1).

proceeding in that Court'.—Sub-section (1) does not authorise a complaint with reference to offences described in S. 195 (1) (a) committed in relation to a proceeding in Court.⁴¹

The proper authority to make a complaint under S. 476 is not the Court which took cognizance and issued process, but the Court which tried and disposed of the original case.⁴² The Court contemplated by Ss. 195 and 476 is the Court before which the offence of which inquiry is contemplated is committed.⁴³ When a false information to police is followed up by a complaint in Court, *held* accused should be prosecuted under S. 211 I. P. C. and not under S. 182 I. P. C.⁴⁴

Powers under this section should not be exercised unless the offence referred to in S. 195 (1) (c) is committed by parties to proceeding.⁴⁵ Ss. 195 and 476 must be read together. S. 476 lays down the procedure as to how the bar imposed by S. 195 sub-cl. (1) (b) and (c) is to be removed. From S. 195 (1) (c) it is clear that it bars the cognizance of the offence of forgery and certain other connected offences when the offence is committed by a party to proceedings in Court. If such offence is committed by a person who is not a party to any proceeding in Court, this section has no application.⁴⁶ The Court has no power under this section to complain against witnesses.⁴⁷ Where the offence charged does not fall within the purview of S. 195, the Court has no jurisdiction to complain under S. 476.⁴⁸ Offence under S. 193 I. P. C. is an offence which clearly falls within S. 195 (1) (b); The fact that the District Munsif has also complained that the facts establish offences under other sections not mentioned in S. 195 (1) (b) or (c) is not a ground for cancelling the complaint so far as offence under S. 193 I. P. C.⁴⁹ S. 195 does not bar trial of an accused person for a distinct offence disclosed by some facts, which is not included within the ambit of the section.⁵⁰

Illustrative cases :

Complaint in case of perjury.—In order to prosecute a man, it must be shown that he has not merely given evidence which is contradictory or which has not been believed but evidence which is intentionally false so as to form the basis of an enquiry or a complaint.⁵¹ Usually it would not be expedient to prosecute a witness who has made contradictory statements in the course of the same deposition, but this does not apply where different depositions are recorded after an interval of time.⁵² Proceedings for perjury against a witness should be stated after conclusion of the case in which the

41. *Ramanath Bux Singh*, (1926) 98 IC 63 ; AIR (1927) Oudh 51.

42. *Tarakdas Makhopadhaya*, (1925) 53 C 488 : 30 CWN 504.

43. *In re Maneklal Garabddas*, (1926) 28 Bom LR 1296.

44. *Rambrose*, (1928) 6 R 578.

45. *Rahimdino*, (1927) 28 Cr LJ 989 : 105 IC 802 : AIR (1928) S 69 (6); see also *Girdhari Lal Serowgee*, (1916) 21 CWN 950.

46. *Mathur Prasad v. Pitambar Singh*, A 1945 P 362 ; 47 Cr LJ 183 ; *Abdul Rahim v. Pusia Bai*, A 1939 N 85 ; 40 Cr LJ 572.

47. *Sengada Goendan v. Vayyapuri Goendan*, A 1932 M 129 ; 33 Cr LJ 218 (1). *Contra Dwaraka Prasad v. Mukund Swarup*, A 1926 A 21 ; 26 Cr LJ 1506 ;

K. S. Ibrahim, A 1925 R 28.

48. *Ambika Sahi*, A 1948 A 80 ; 48 Cr LJ 41.

49. *In re Papllugari Veera Reddy*, N 1941 M 576 ; 42 Cr LJ 800.

50. *Bashirul Huque*, (1953) SCA 1061.

51. *In re Chatur Jethaji*, A 1932 B 551 ; 34 Cr LJ 33 ; *Karmat Ali*, 55 C 1312 : 30 Cr LJ 221 ; *Subha Singh*, A 1941 P 165 ; 42 Cr LJ 446 ; *Baldeo Das Tansuk Das*, A 1918 C 97 (Statements made in Course of Lengthy cross-examination); *Bata Krishna Pal*, A 1945 P 295 (routine statement made by witnesses); *Mannalal Sardarmal Jain v. Ram Kishan Jodhray Maharaj*, A 1959 MP 264 ; 1959 Cr LJ 848.

52. *Jit Singh*, A 1945 N 145 ; 36 Cr LJ 935.

witness gives evidence.⁵³ Where a witness gives false or fabricated evidence in judicial proceedings, prosecution can be only under S. 479A and not under S. 476.⁵⁴ If during the course of proceedings which are *ultra vires* or illegal any offence under S. 193 or S. 471 I. P. C. was committed it cannot be said that it was committed in or in relation to or by a party to any judicial proceedings to attract the provisions of this section.⁵⁵

Complaint in respect of offence under S. 211 I. P. C.—Courts should consider whether an attempt to use the law in aid of a private grudge and also what facts can be proved and whether these facts are likely to be sufficient for conviction.⁵⁶ Court has authority to complain against false accusation.⁵⁷ Where false information is lodged with the police and the case is cancelled on final report from police, the Magistrate, in accepting such report, does not act as a Court. Complaint of Court is not necessary for a prosecution of informant under S. 211 I. P. C.⁵⁸

Offences under S. 195 (1) (c).—It is true that by reason of S. 195 the jurisdiction of the Court to proceed under S. 476 in respect of an offence referred to in S. 195 (1) (c) arises only when the offence is alleged to have been committed by a party to the proceeding and once the proceeding starts it is empowered to deal with the offence as a whole and it is not bound to confine its complaint to the party and may also complain against a person who was not a party to the proceeding but participated in the commission of the offence.⁵⁹ In an earlier case the same Court held that S. 476 is restricted to the party in a case arising from S. 195 (1) (c). Where a pleader forges a compromise petition on behalf of his client and withdraws the amount the Court is not competent to start a proceeding against him under S. 476.⁶⁰ An order under S. 476 cannot be made against a person who is not a party to the proceedings in relation to which the offence is alleged to have been committed.⁶¹

D. "Which appears to have been committed in or in Relation to Any Proceeding in that Court".—Where the statements made by the witnesses under S. 164 and before the committing Magistrate are irreconcilable the factor whether an offence appears to have been committed by the witnesses is *prima facie* established.⁶² The section assumes that an offence appears to have been committed.⁶³ An application under S. 476 may be entertained at the instance of a stranger to the proceedings in the course of which the offence is alleged to have been committed.⁶⁴

Neraji petition.—A neraji petition or a petition impugning the police

53. *Kalu v. Tikaram*, A 1925 N 412.

54. *Dhan Singh v. Ramsaran*, A 1961 MP 305.

55. *Sumat Prasad*, A 1942 A 11; 43 Cr LJ 319.

56. *Bachu Singh v. Tribeni Shah*, A 1939 P 178.

57. *Ramdas v. Ganga Ram*, A 1928 A 333; *Gopal Barik*, 11 CWN 125.

58. *Pukhraj v. Shashmal*, A 1961 Raj 231.

59. *Ram Prasad Ojha v. Moheshanand Pandey*, A 1948 P 5; 48 Cr LJ 942 where A 1931 B 305 relied on; *Dwaraka Prasad v. Mukund Swarup*, N 1926 A 21 (witness proceeded against).

60. *Mathur Prasad v. Pitambar Singh*, A 1945 P 362; 47 Cr LJ 183; *Abdul Rahim v. Pusia Bai*, A 1939 N 85; *In re Mahalinga Nadar*, A 1935 M 1944; *Sengoda Goundan v. Vyyapari Goundan*, A 1931 M 129.

61. *Jogendra Mohan Mondal v. The Union Credit Bank*, ILR (1956) 1 C 293.

62. *In re Popamma*, A 1948 M 471; 49 Cr LJ 713.

63. *Rambilas Harsukhdas v. Jaikisan*, A 1941 N 155.

64. *Shamugram S. T. v. Chagalavaraya Mudaliar*, A 1955 M 611; 1955 Cr LJ 1365.

report and praying that the accused be placed on trial is a "complaint" under the Criminal Procedure Code.^{64a}

Offence must be specified.—The law does not authorise a Judge in issuing a general roving commission to a Magistrate to inquire into the truth or falsehood of depositions, but the judicial inquiry must be as regards a specific charge.^{64b}

Accused persons must be specifically named.—The section requires that the offence has been committed by some definite person or persons against whom proceedings in the Criminal Court are to be taken.^{64c}

E. Necessity of Preliminary Inquiry.—‘*After such preliminary inquiry if any, as it thinks necessary.*’—These words have been substituted for the words ‘after making any preliminary inquiry that may be necessary.’ The alteration in the language is slight and seems to be a verbal alteration.

In the following cases⁶⁵ it has been held that the preliminary enquiry is discretionary as the Court thinks fit, but in⁶⁶ it has been held that although the holding of preliminary enquiry is discretionary, it should be held whenever necessary in the interests of justice and in *Darpa Narain Bera v. Bepin Behari Mitra*⁶⁷ that a party cannot complain unless he has been prejudiced by the omission. The Patna High Court has held that in an inquiry under S. 476, the accused is entitled to cross-examine the witnesses of the opposite party.⁶⁸

F. Notice if essential.—It has been held in *Raja Rao*⁶⁹ that *the law does not intend* that a Court which has complete discretion to refuse to hold an enquiry at all, *must if it holds an inquiry, issue notice* to the party and give him the equivalent of a full dress trial, but the Patna High Court in⁷⁰ has held that ample opportunity should be given to the accused to show cause why he should not be prosecuted.

Preliminary Inquiry or Notice.—Though not legally necessary has been held to be desirable in the following cases.⁷¹ It is not necessary that there should always be a preliminary enquiry before the Court can make an order under sub-sec. (1). It is a matter left entirely to the discretion of

64a. *Gangadhar Prodhan*, (1915) 43 C 173 ; *Tayebulla*, (1915) 43 C 1152 : 20 CWN 1265.

64b. *Baijor Lal* 1 C 450 ; *Kashi Shukul*, 38 A 695 : 14 ALJ 814.

64c. *Mahomed Bhakku*, (1896) 23 C 532 following *Chowdry Mahomed Izarne Haq*, 20 C 349 : 534.

65. *Pir Jadir Baksh Shah*, (1924) 6 L 34 (39) ; *Raja Ram*, (1926) 50 M 660 : (1927) MWN 63 ; *Surja Hariani*, (1901) 6 CWN 295 (297) ; *Niyamat Miah*, (1905) 1 CLJ 630 ; *In re Narayana Nadan*, (1914) 26 MLJ 486 : 15 Cr LJ 271.

66. (1920) Pat Supp CWN 61 : 54 IC 173.

67. (1911) 15 CWN 691 : 14 CLJ 123 : 12 Cr. LJ 209.

68. *Ganeshwari Patharaj*, (1921) 6 PLJ 146.

69. (1926) 50 M 660 : (1927) MWN 63 ; *Raghavi v. Baldev*, A 1944 N 359 : 46 Cr LJ 766 ; *Nagar Md. v. Harnam Singh*, B 1938 L 841 : 40 Cr LJ 140 ; *In re Varadajalu Naidu*, A 1937 M 716 ;

Gura, A 1923 R 79 (1) ; *Babu Ulfat Rai*, A 1919 A 15 : 21 Cr LJ 276 ; *M. C. Ganti v. P. L. Harbart*, 58 C 215 : 32 Cr LJ 826.

70. *Ramoo Singh*, (1920) Pat Supp CWN 61 : 54 IC 173 ; see *Lalji Gope v. v. Giridhari Chaudhury*, (1900) 5 CWN 106 ; *Ram Prasad*, 37 C 13 (20) ; *Liquat Hussain v. Vinay Prakash*, A 1946 A 156 : 47 Cr LJ 543 ; *Sajjad Hussain*, A 1935 Oudh 113 : 36 Cr LJ 319 ; *Bai Kasturi Bai v. Anmalidas Lakhidas*, 49 B 710 : 26 Cr LJ 1189 ; *Imam Ali*, A 1924 A 435 ; *Perumali Venkata Subbiah*, A 1923 M 228.

71. *Ram Prasad*, 37 C 13 (20) ; *Lokenath*, 10 CWN 109 ; *Ram Piary Roy*, (1912) 10 ALJ 247 ; *Darpa Narain Bera v. Bepin Behari Mitra*, (1911) 15 CWN 691 ; *Choudhuri Muhammad Izherul Huq*, 20 C 349 ; *Baparam Surma*, 20 C 474 ; *In re Jirabhal Mhosah*, 7 Bom LR 84 : 2 Cr LJ 54 ; *Sarat Chandra v. Hari-charan*, 51 Cal LJ 43 : A 1930 C 282.

the Court.^{71a} It is not necessary where a *prima facie* case has been made out.^{71b} S. 476 does not make a preliminary enquiry essential in law and the proceedings under S. 476 without such enquiry would not be illegal.^{71c} Where the application is supported not by oral evidence but by documents no further preliminary inquiry is necessary.^{71d} The terms of S. 476 do not make it obligatory to hold a preliminary enquiry before the making of the complaint, such preliminary enquiry may be held only when the offence is one of those referred in S. 195. There is no reason why there should be a preliminary enquiry before a complaint under S. 182 I. P. C. referred to in S. 195 (1) is actually made by a public servant.^{71e} The Allahabad High Court has however held that no person can be prosecuted under S. 476 unless an enquiry is made, and further held that the Judge or the Magistrate desiring to take action must himself make the inquiry.⁷² Although preliminary enquiry is desirable in cases of perjury, as was pointed out in *Mathura Prasad*,⁷³ on a strict interpretation the view in *Shabbir Hussain*⁷² does not seem to be right. Besides under S. 559 *infra* the Successor-in-office may hold an enquiry.

Evidence in Preliminary enquiry how to be recorded.—Although the Code does not expressly provide with regard to the manner in which the evidence in a preliminary enquiry under this section should be recorded a summary of the statements of the witnesses examined thereat should be made.⁷⁴ A person against whom the Court holds a preliminary enquiry cannot claim to cross-examine witnesses.⁷⁵

15. Court.—“Section 476 speaks of ‘Civil, Revenue or Criminal Court.’ It does not refer to any Court other than such Courts whereas S. 195 refers to Courts in general. To my mind it is clear that the expression ‘Courts’ in S. 195 is of wider scope than the expression ‘Civil, Revenue or Criminal Court’ in S. 476. This is made particularly clear by the amendment of S. 195 (2).⁷⁶ The expression ‘Civil, Criminal or Revenue Court’ in S. 476 cannot of course include a private Court of arbitration or commissioner.⁷⁷ Under S. 200 (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither S. 200 nor 202 requires preliminary inquiry before the Magistrate can assume jurisdiction to issue process.⁷⁸ High Court in writ petition deciding Civil rights is a Civil Court.⁷⁹ A Tribunal hearing election petition is not a Court.⁸⁰ A Com-

71a. *Narajappa v. Chikramappa*, A 1959 Mys 117 : 1959 Cr LJ 618; *Darpa Narain Bera v. Behin Behari Mitra*, 15 CWN 691; *Asharfila*, A 1952 A 306 : 1952 Cr LJ 621; *Kailashpati Mishra v. Nandlal Ahir*, A 1952 P 10; 1953 Cr LJ 285; *Sajjad Hussain*, A 1935 Oudh 113; *M. Mohd. Kaka*, A 1937 R 62 : 38 Cr LJ 615; *Purna Chandra Datta v. Sk. Dhalu*, 58 C 374 : A 1930 C 721 (2); *Fazlur Rahman*, A 1930 C 515.
71b. *Jamuna Singh v. Lal Dhari Singh*, A 1934 P 538.
71c. *Md. Tahir*, A 1941 L 52 : 42 Cr LJ 351; *Nand Kumar*, A 1937 P 534.
71d. *N. C. Ganti v. F. L. Harbart*, 58 C 215 : 32 Cr LJ 826; *Sundarami Reddy v. Venkata Subba Naidu*, (1958) 2 An WR 480.
71e. *Gopal Chandra Mondal*, 61 CWN 967; A 1957 C 382.
72. *Shabbir Hussain*, (1927) 26 ALJ 46 :

105 IC 810 : AIR (1928) A 21; see *Tarak Das Mitra*, (1916) 21 CWN 125 : 28 CLJ 209 : 37 IC 469.
73. *Mathura Prasad*, (1917) 15 ALJ 517 : 18 Cr LJ 883 : 41 IC 995.
74. *Jugendra Nath Ghose*, (1914) 42 C 241.
75. *Raja Rao*, 50 M 660; *Bakir Sahib*, A 1946 B 218; *Abdul Ghafoor*, 34 A 267; *Ganeswar Pakaraj*, A 1921 P 121, *Contra*, *Bahla*, A 1938 R 297; 40 Cr LJ 56 (2); *Md. Kaka v. Dt. Judge Basim*, A 1937 R 62; 38 Cr LJ 615.
76. *Kanhaiya Lal v. Bhagawan Das*, (1925) 48 A 60 (65, 66).
77. *In re Nataraja Iyer*, (1912) 36 M 72 (89).
78. *Ranji v. State of Uttar Pradesh*, (1959) 2 SCA 552 : A 1959 SC 843.
79. *Ugan Singh*, A 1961 Raj 268.
80. *Har Prasad*, A 1947 A 139; *Bilas Singh*, A 1925 A 737; *P. C. Mahabaleswarappa*, A 1935 M 673.

missioner acting as Election Judge under U. P. Municipalities Act is not a Court.⁸¹ A Special Judge constituted under the Special Court Ordinance cannot transfer a proceeding under S. 476 before it.⁸² Where a complaint is filed by a Munsif and the District Judge hearing dismisses the appeal holding that there was sufficient material for a complaint, he is not precluded from dealing with the case.⁸³ A Divisional Commissioner acting under the Income Tax Act is not a Court.⁸⁴

16. Power of successor in office to make the order.—A full bench of the Calcutta High Court held that the expression “Court” could only mean the Judge who tried the case.⁸⁵ This decision was over-ruled by a full court of seven Judges in *Bahadur’s* case⁸⁶ and includes a successor in office. A complaint under S. 476 should be made by the Magistrate who is presiding in the Court at the time of the complaint and not his predecessor in office before whom the offence specified in S. 195 was committed.⁸⁷ The Rangoon High Court has held that after the amendment this section has been so modified as to allow the Court to act either on its own motion or *suo motu* and an application under S. 476 now occupies the same position as made formerly under S. 195 and there is no objection to action being taken by the successor of the judge who tried the case, although it was observed, that such application should be made promptly.⁸⁸ The Legislature has now provided by S. 559 that the powers exercisable by a Court can be exercised by his successor in office—see also *Bechram* and other cases.⁸⁹

The Bombay High Court has held dissenting from *Begu Singh*⁸⁵ that the words ‘committed before it or brought under its notice in course of a judicial proceedings’ relied on in *Begu*⁸⁵ which are no longer to be found in the section and that the alternative procedure under S. 195 is no longer open upon the amended section. Where the offence is alleged to have been committed in a proceeding before a Judge of the High Court, the word ‘Court’ in the section must be taken to mean “High Court” and any other Judge of that High Court would have the power to dispose of that application.⁹⁰ It has been held that no prosecution under S. 211 I. P. C. is sustainable without complaint being first made by the Court which tried the case of the accused against the petitioner.⁹¹ The Court trying this case and not the Court before which proceedings are instituted and by which process is issued, is the proper authority to complain.⁹² The Patna High Court has held that a Court to which an application under S. 83, Transfer of Property Act, is made is entitled under S. 476 to make a complaint with respect to documents filed with the application.⁹³

17. The Court forwarding an order for prosecution to the District Magistrate—whether a sufficient complaint.—Where the Court

81. *Satyanarain v. Lal Chand*, 1960 Cr LJ 1178 : A 1960 A 561 following *Kedarnath*, A 1957 A 484 (F B).

82. *Sree Kant Pathak*, A 1945 P 84.

83. *In re Kaathammathinakim Kumhannad*, A 1942 M 753.

84. *In re Nataraja*, 36 M 72.

85. *Begu Singh*, (1907) 34 C 551 (FB) (556).

86. *Bahadur v. Eradullu Mullick*, (1910) 37 C 642 SB followed in *Khan Muhammad*, (1922) 4 L 58 (60) ; *P. C. Beharilal v. Abdul Kader*, A 1940 L 292 : 41 Cr LJ 843 ; *Purna Chandra Datta v. Sheikh Dhalu*, 34 GWN 914 : 32 Cr LJ 377.

87. *Subramania Chattiari*, In re A 1957 M

442 ; 1957 Cr LJ 765.

88. *Maung Shwe Phe v. Ma Me Hmoke*, (1924) 3 R 48 (51, 52).

89. (1925) 7 L 108 (110) see also *Baldeo Prasad*, (1924) 22 ALJ 772.

90. *Baikasturbai v. Vanmalidas Lakhmidas*, (1925) 49 B 711.

91. *Sheikh Samir v. Sajider Rahman*, (1926) 53 C 824 (826) following *Brown v. Ananda Lal Mullick*, (1916) 44 C 650 : 20 GWN 1347 ; *Rambrose*, (1928) 6 R 578 ; *Muragan v. Ranmi Naidu*, (1927) 53 MLJ 455.

92. *Tarakeswar Mookerjee*, (1925) 53 C 488.

93. *Chamari Singh v. Public Prosecutor of Gaya*, (1924) 4 P 24.

instead of making a formal complaint as required under this section merely directed a copy of his order to the District Magistrate for necessary action, it was held that this was only a formal defect and did not vitiate the order.⁹⁴ But the Calcutta High Court has held a contrary view in a case under S. 211 I. P. C. where the Magistrate instead of preferring a complaint in writing simply sent the proceeding to the S. D. O. for disposal.⁹⁵

476A. Superior Court may complain where subordinate Court has omitted to do so.—The power conferred on Civil, Revenue and Criminal Courts by Section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of Section 195, sub-section (3), in any case in which such former Court has neither made a complaint under Section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of Section 476 shall apply accordingly.

SYNOPSIS

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| 1. Legislative Changes. | 6. Rejected. |
| 2. Report of the Select Committee. | 7. Ss. 476A and 526. |
| 3. Effect of Amendment. | 8. Appeal. |
| 4. Scope. | 9. Appeal to Supreme Court. |
| 5. Expediency of prosecution. | |

1. Legislative Changes.—This section and the next was added by S. 128 of Act XVIII of 1923.

2. Report of the Select Committee.—"We have entirely redrafted Ss. 476A and 476B. S. 476A in our draft is now confined to the case where a superior Court takes action after no action whatever has been taken under S. 476 in an inferior Court."

3. Effect of the Amendment.—This section gives effect to *Bechu Behari Lal's* case⁹⁶ which held that the Sessions Judge on appeal was entitled to direct the prosecution of the petitioner for forgery irrespective of the fact that he was not a party to the original proceedings and supersedes the view in *Ram Prasad Malik*⁹⁷ which held that neither the High Court nor the Sessions Judge had power to direct a prosecution for an offence committed before the Provincial Small Cause Court.

4. Scope.—The pendency of an application for sanction before a lower Court (but not rejected) is no bar to the superior Court from granting the sanction under S. 476A.⁹⁸ S. 476 contemplates that a Court may either of its own motion or on application make a complaint. S. 476A contemplates that an appellate Court may make a complaint if its subordinate Court has taken no action under S. 476 *suo motu* or has rejected any application made to it to do so. S. 476B gives a right of appeal to an appellate Court under

94. *Maung Shwe Phe v. Ma Me Hmoke*, (1924) 3 R 48 (50).

95. *Durjodhan Bhat*, (1925) 52 C 666.

96. (1919) 20 Cr LJ 630 : 52 IC 390 (P).

97. (1909) 37 C 13 ; *Harinandan*, A 1941

P 592 ; *Nironjanlal Mitalal*, A 1944 A 40 ; 45 Cr LJ 403.

98. *In re Ramdas Vishnudass*, (1924) 26 Bom LR 713.

certain circumstances.⁹⁹ Under this section the power conferred on a Court by S. 476 (1) may be exercised by the Court to which such former Court is subordinate within the meaning of S. 195 (3). No appeal lies against the decision of the claims Commissioner appointed by the Government under the provisions of the Railways Act to enquire into and decide the claims arising out of railway accident. It is not competent for the High Court to make a complaint in respect of the offence under Ss. 420 and 193 I. P. C. alleged to have been committed in or in the course of the proceedings before the Railway Claims Commissioner.¹

5. Expediency of prosecution.—If the perjury would not very much affect the result of the trial in which it was committed, it is not expedient in the interests of justice to prosecute the perjurer.^{1a}

6. "Rejected".—Sections 476A and 476B do not talk about dismissing an application but in the case of rejecting and in the other of refusing to make a complaint on application.² A dismissal for default does not amount to a refusal, an application in revision lies to the High Court.³ The word "rejected" means rejected after consideration in the merits.⁴

7. S. 476A and S. 526.—It is impossible to allow the same Judge or the same Magistrate to be the complainant and the Court.⁵ Transfer was not directed in *Sai*⁵ but the proceedings were quashed as fresh trial was thought in the circumstances of the case inadvisable and the principle of '*nemo debet bis vexari*' applied in the spirit if not in the letter.

8. Appeal.—Would lie from the decision equally whether the Court refused to make a complaint under S. 476A or whether he made a complaint under S. 476.⁶ The proceeding in the Committing Court in which the person deposed can be a proceeding both in relation to the Sessions trial as well as in relation to the Criminal appeals heard by the Court. The High Court can therefore file a complaint under this section.⁷ The High Court is competent by virtue of S. 476A to institute a complaint under S. 476 against the accused for using forged documents before a Sessions Judge.⁸

9. Appeal to Supreme Court.—Where the plaintiff made an application in the Court of the Successor of the Court which had tried the plaintiff's suit as a Subordinate Judge first class, asking that a complaint be filed against the appellant under Ss. 193 and 471 I. P. C. but before it could be heard the successor was transferred. The District Judge thereupon transferred the matter to the Senior Subordinate Judge who made the complaint. On appeal to the Additional District Judge it was held that the Senior Subordinate Judge had no jurisdiction to make the complaint as he was not the successor. The High Court in revision set aside the order of the Judge. The Supreme Court held that the High Court was neither the Original Court nor the Court to which the original Court was subordinate according

99. *Ranjit Narain Singh v. Ram Bahadur Singh*, (1925) 5 P 262 (273); see *Chandra Kumar Sen v. Mathuraya Debys*, (1925) 29 CWN 1035 (1036); 42 CLJ 120.

1. *Ambarao, In re*, A 1959 AP 235; 1959 Cr LJ 558.

1a. *Jai Bir Singh v. Malkahan Singh*, A 1858 A 364; 1958 Cr LJ 591.

2. *Jwala Prasad v. Ram Prasad*, A 1940 L 526; 42 Cr LJ 324.

3. *Niranjana Lal Mittal*, A 1944 A 40; 45

Cr LJ 403; *Jahan Khan*, A 1928 L 429; 39 Cr LJ 698.

4. *Vasudevmal*, A 1929 S 50; 29 Cr LJ 1051.

5. *Sai*, (1926) 8 L 496.

6. *Ahamdder Rahaman v. Dwip Chand Chowdhury*, (1927) 55 C 765; 32 CWN 104.

7. *State v. B. K. Pal Choudhury*, A 1959 Ass 197; 1959 Cr LJ 1147.

8. *Jainarain Singh*, A 1954 P 354; 1956 Cr LJ 169.

to the special definition in S. 195 (3), it had no jurisdiction to make the complaint of its own authority. Therefore all that the High Court could, and should, have done was to send the case to the District Judge for disposal according to law.⁹

476B. Appeals.—Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under Section 476 or Section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of Section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under Section 476, and, if it makes such complaint, the provisions of that section shall apply accordingly.

SYNOPSIS

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| 1. Legislative Changes. | 8. Appeal if governed by Criminal Procedure Code. |
| 2. State Amendment.
—Bombay. | 9. Appellate Court should consider on the merits. |
| 3. Report of the Select Committee. | 10. Appellate Court has no jurisdiction to take additional Evidence. |
| 4. Scope. | 11. Procedure. |
| 5. Limitation. | 12. Revision. |
| 6. Does a second appeal lie? | |
| 7. Forum of Appeal. | |

1. Legislative Changes.—This section is new and was added by S. 128 of Act XVIII of 1923.

The section was inserted to avoid the difficulty pointed out in *Bhagirthi*.¹⁰

2. State Amendment

Bombay.—After S. 476B, the following new section was inserted by Bombay Act 46 of 1948, namely “S. 476C—*Power to order Costs*—A Criminal Court dealing with an application made to it for filing a complaint under Ss. 476 or 476A, and a Court dealing with an appeal under S. 476A and the High Court dealing with an application in revision shall have power to make such order as to costs as may be just. Provided that no such order shall be made against the Government or any public servant acting on behalf of the Government.

3. Report of the Select Committee.—“Section 476B provides specifically for an appeal against the making of a complaint or against a refusal to make a complaint.”

4. Scope.—Section 476B gives a right of appeal to a person against whom a complaint *has been made* and if such person succeeds on appeal, the appellate Court's order would be to direct *the withdrawal of the complaint*. This clearly contemplates that an appeal is to be filed *after* a complaint has actually been made and not before.¹¹ The Bombay High Court has held that in quashing under S. 476B the direction should be a ‘withdrawal of the complaint’ and it is not enough to direct that the sanction granted by the trial Court be withdrawn.¹² A full bench of the Punjab High Court has held that the appeal under S. 476A is entirely a creature of and governed

9. *Kuldip Singh v. State of Punjab*, 1956 SCJ 387 ; A 1956 SC 391 ; 1956 Gr LJ 781.

10. 12 ALJ 684.

11. *Fitz Holmes*, (1925) 7 L 77.

12. *Sanabhai v. Aditram*, (1924) 48 B 401 : 26 Bom LR 289 : AIR (1924) B 347.

by the provisions of the Criminal Procedure Code and has nothing to do with the Civil Procedure Code. As such the appeal is a Criminal appeal and not a Civil appeal, although decided by the Civil Court. The Court deciding such an appeal whether it is a Criminal, Civil or Revenue Court, is acting as a Criminal Court under the provisions of the Cr. P. Code and there cannot be any revision under S. 115 Civil Procedure Code against the decision in a Criminal Appeal, which must logically be governed by the provisions of S. 439 Cr. P. Code. Further any Court subordinate to the High Court whether it is a Criminal, Civil or Revenue Court when it is deciding an appeal under S. 476A must be deemed to be an inferior Criminal Court within the meaning of S. 439.¹³ The Allahabad High Court in a case where the proceedings initiated under S. 476 arose out of a Civil suit and was heard by a Civil Court which directed the filing of a complaint and the appellate Court dismissed the appeal against the order for default but subsequently ordered its restoration, *held* that the proceedings must be treated as Civil proceedings to which Civil Procedure Code applies and not Criminal proceedings to which Criminal Procedure Code will apply. Although the appeal is provided for in S. 476-B, its procedure for hearing would be governed by Or. 41 R. 11 Civil Procedure Code and as such when the appeal was dismissed for default an application for its restoration was made under Or. 41 R. 19, C. P. C., the lower Court had jurisdiction to restore the appeal.¹⁴ The Calcutta High Court has held that the provisions of Or. 4 R. 11 Civil Procedure Code will not apply, it is a statutory appeal but has held that when this appeal is from a Civil Court, Revision lies under S. 115, C. P. C., but the Criminal Bench hears such applications as the Chief Justice allots such cases to be heard by the Criminal Bench.¹⁵ In *Hamid Ali v. Madhusudan Das*,¹⁶ Chotzner, J., held in view that the appeal is regulated by S. 424, Cr. P. Code. Duval, J., held the view that it is regulated by Or. 41, Civil Procedure Code. The Madras High Court has held that when the order is passed by a Civil Court revision lies under S. 115 Civil Procedure Code and not under S. 439.¹⁷ If the complaint relates to offences mentioned in S. 195 (1) (b) and S. 195 (1) (c), an appeal would be competent. No appeal lies in respect of an offence mentioned in S. 195 (1) (a). Where the Legislature does not provide for an appeal it is preposterous on the part of the appellant to invite the Supreme Court to interfere in Special appeal.¹⁸ Ss. 476B gives an appeal against a refusal to make a complaint, not against dismissal for default.¹⁹ Appeal under S. 476-B is against making a complaint and not recording a finding. Starting date of limitation is the date on which the complaint is signed and not forwarded to the nearest Magistrate.^{19a} In such cases an application for revision lies to the High Court.²⁰ Section 476A gives a right of appeal to an applicant against refusal

13. *Hakkim Rai*, A 1957 Punj 134 : 1957 Cr LJ 790 (FB) ; *Dhanpat*, 13 L 342 (FB) ; *Thimna Reddi v. Gangamma*, A 1955 Mys 46 : 1955 Cr LJ 558 ; *Bhatu*, A 1938 B 225 : 39 Cr LJ 495 (FB) ; *Dhup*, A 1934 P 78 (FB).

14. *Mt. Abida Khatoon v. Chuta Khan*, A 1956 A 155 : 1956 Cr LJ 193 (1) ; *Surendra Nath v. Sushil Kumar*, 59 C 88 : 35 CWN 775 : 33 Cr LJ 38 ; *Nasaruddin Khan*, 53 C 827 : A 1927 C 98.

15. *Sarat Chandra v. Hari Charan De*, 51 CLJ 45 : A 1930 C 282.

16. 54 C 355 : A 1927 C 284.

17. *Swamiappa Mudaliar*, A 1959 M 107

following *Kumaravel v. Shamuga Nadar*, A 1940 M 465.

18. *Virindar Kumar Satya Wadi v. State of Punjab*, 1956 SCJ 138 : A 1956 SG 153 : 1956 Cr LJ 326 ; *Manindra Haribarayalu v. Annavarapu Bangaraya*, A 1953 569 (Revision lies against order under S. 195 (1) (a) ; *Brijendranath*, A 1927 A 828.

19. *Jwala Prashad v. Ram Proshad*, A 1940 L 526 : 42 Cr LJ 324.

19a. *Ramchandra*, A 1963 A 352.

20. *Niranjanlal Mittal*, A 1944 A 40 : 45 Cr LJ 403 ; *Johan Khan*, A 1928 L 429 : 39 Cr LJ 698.

of Court to make a complaint and not against dismissal of the proceedings started by the Court *suo motu*.²¹

5. Limitation.—The Lahore High Court has held that *limitation* begins to run from the *date of the making* of the complaint and not from the order of the District Judge directing that a complaint be drawn up.²² The Bombay High Court in *Daga Deviji Patil*,²³ holds this view and further held that the delay can be excused under S. 5 of the Indian Limitation Act. Article 155 of the Limitation Act governs an appeal to the High Court under this section,²⁴ and it has been held that an appeal under this section to a Court subordinate to the High Court is governed under Art. 154 of the Limitation Act. It was observed in *Rajani's case*²⁴ that extension of time could be granted under S. 5 of the Limitation Act.

There is no rule or law that the accused is presumed to have known that the complaint has been filed in the trial Court on the date it is filed. The Cr. P. Code or the Indian Limitation Act does not clearly or specifically prescribe any period for filing appeal under this section. Hence time would be taken to start from the date of the appellant's knowledge of the filing of the complaint and in every case he will be entitled to extension of time on the score of his inability to file the appeal in time if any specific period is supposed to govern the appeal.^{24a}

6. Does a Second Appeal lie?—The Calcutta High Court in²⁵ has held following *Somabhai*²⁶ and *Idris*²⁷ and distinguishing *Ranjit*²⁸ that no second appeal lies: Two Courts and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not. The Oudh Court in²⁹ held the same view following *Idris*.²⁷ The Madras High Court in *Moidun Rowthers*³⁰ has dissented from³⁰ the view in *Ranjit's* case²⁸ which was doubted in *Ram Chandra's case*.³¹

The contrary view in *Ranjit's case*²⁸ where *Kali Sundar Addya v. Nanilal Hazra*³² was distinguished on the ground that this point about the possibility of an appeal was not discussed, seems to be wrong.

True, there is no provision for second appeal but it is submitted that the view in *Ahmedar Ruhaman v. Dwip Chand Chowdhry*²⁵ so far as it says by implication that the High Court cannot exercise the powers of revision whether under S. 115, C. P. C. or S. 439, Cr. P. Code, as the case may be, can hardly be supported. As a matter of fact in a later decision³³ the same learned Judges revised the order under S. 115, C. P. C.

21. *Ram Prasad*, 52 A 79 : A 1929 A 899 (1) ; *Dashondi Mal v. Asa Ram Radhu Mal*, A 1953 Pepsu 110 : 1953 Cr LJ 1221 ; Contra *M. Nambusand Chetty v. Nainiappa Mudali*, 54 M 331 and *Prabhu Dayal*, 31 Punj LR 153 ; *Thirai*, A 1929 L 641.
22. *Fitz Holmes*, (1925) 7 L 77 : 98 IC 393 : AIR (1927) L 54.
23. (1927) 52 164 : 30 Bom LR 76 : AIR (1928) B 64.
24. *Rajani Kanta Kayal v. Bistoomoni Dassi*, (1927) 46 CLJ 40 ; *Chander Kumar Sen v. Mathuriya Debya*, 29 CWN 1035 : 42 CLJ 120.
25. *Ahameder Rahaman v. Dwipchand Chowdhury*, (1927) 55 G 765 : 32 CWN

164 : 106 IC 711 : AIR (1928) C 281.
26. *Somabhai Vallabhai v. Aditbhai*, 26 Bom LR 289 : 48 B 401 : AIR (1924) B 347.
27. *Mahammed Idris*, 6 L 56 : AIR (1925) L 322.
28. *Ranjit Narain Singh v. Ram Bahadur Singh*, (1925) 5 P 262.
29. *Bismilla Khan*, 5 OWN 38 : AIR (1928) Oudh 494.
30. 51 M 777.
31. *Ramchandra Padhi*, (1928) 8 P 428.
32. *Kali Sunder Addya v. Nanilal Hazra*, (1925) 52 C 478.
33. *Kanai Lal Saha v. Makhan Lal Saha*, (1927) 55 C 836.

7. Forum of Appeal.—The section uses the expressions “any Civil, Revenue or Criminal Court” and enjoins that appeals lie to the “Court to which such former Court is subordinate within the meaning of S. 195 sub-section (3)”.

See Commentary on S. 195 (3).

In *Mohim Chandra Nath Bhowmick*³⁴, Mukherji and Graham, JJ., held that appeals would not lie to a Magistrate to whom appeals are transferred for disposal under S. 407 (2).

The Madras High Court in *Kalayanji v. Ramdeen Lala*³⁵ held that an appeal against an order of a Judge of the Presidency Small Cause Court, Madras, directing under S. 476 the prosecution of a person for offences under Ss. 193 and 196 lies only to the Appellate side of the High Court and not to the full bench of the Presidency Small Cause Court under S. 38 of the Presidency Small Cause Court Act (XV of 1882) or to the Original side of the High Court.

An appeal lies under the provisions of the Code against an order made by the Court to which the Court making the complaint is subordinate³⁶.

Appeal lies from the order of a single judge of the High Court to the Division Bench of the High Court and not to the Supreme Court³⁷. An appeal from an order of the Division Bench of the High Court lies to the Supreme Court³⁸.

8. Appeal if governed by Criminal Procedure Code.—Chotzner, J., held that an appeal under this section against an order under S. 476 by a Civil Court must be dealt with as an ordinary appeal under the Code as is provided by S. 424, but Duval, J., held that the appeal must be treated as a Miscellaneous Civil Appeal and registered under Or. 41 of the Code of Civil Procedure³⁹.

For the purpose of limitation an appeal under S. 476-B is an appeal under the Criminal Procedure Code and the delay may be condoned under S. 5 of the Limitation Act^{39a}.

It has been held that an appeal from an order under Section 476 from a Civil Court lies to the Civil Court^{39a} though it is heard by the Criminal Bench.^{39b}

9. Appellate Court should consider on the merits.—The Legislature intended that an Appellate Court in cases of appeals under S. 476-B, should consider the entire matter on its merits⁴⁰.

34. (1928) 49 CLJ 342 : 33 CWN 285.

35. (1924) 48 M 395 following *In re Shival Padma*, (1910) 34 B 316 and explaining *Munisamy Mudaliar v. Rajaratnam Pillai*, (1922) 45 M 928 (FB).

36. *Somnabhai v. Aditpathi*, (1924) 48 B 401 : 26 Bom LR 279 : AIR (1924) B 347.

37. *In re maintainability of appeal—Narain Das v. State of U. P.* A 1961 SC 181 : 59 ALJ (SC) 158 : (1960) Cr LJ 307.

38. *M. C. Shariff*, A 1954 SC 397 distinguished in *Naraindas v. State of U. P.*, A 1961 SC 181.

39. *Hamid Ali Bepari v. Madhusudan Das Sarkar*, (1926) 31 CWN 281.

39a. *Janardhan*, A 1946 A 245 ; *Surendra-nath Maity*, 35 CWN 775 ; *E. P. Kumaraswami Nadar*, A 1940 N 465 FB ; *Deouandan*, A 1948 P. 225 (FB) ; *Dhupnarain Singh*, A 1954 P. 76 (FB) ; *Nasaruddin*, 53 C 827 ; *In re Subramania Aiyar*, A 1955 M 12 ; *Janardana*, 57 M 177 FB.

39b. *Sarat Chandra Bhattacharjee v. Hari Charan Dey*, 51 CLJ 45 ; *Hukum Rai*, A 1957 Punj, 134 (FB) ; *Dhup Narain Singh*, A 1954 P. 76 (FB).

40. *Ram Charan Das*, (1925) 23 ALJ 5 followed in *Jagabandhu Choudhury v. Abdul Subhan Sarkar*, (1929) 33 CWN 945 (946).

10. Appellate Court has no jurisdiction to take additional evidence.—A District Judge has no jurisdiction to take additional evidence in a matter coming up under this section⁴¹.

The appellate Court acting under this section has no jurisdiction to remand the case to the lower Court for recording additional evidence and to base its conclusions on the additional evidence so collected⁴².

The appellate Court acts illegally if it remands the case directing the Court of first instance to file a complaint; it must do so itself⁴³.

A Court hearing an appeal has no power to remand the case but has power to take additional evidence⁴⁴. The Andhra High Court has held a contrary view⁴⁵.

11. Procedure.—Where an appeal is preferred under S. 476-A against an order of the Munsif under S. 476 refusing to direct a complaint to be made on the view that he had no jurisdiction in the matter, *held*, it is the duty of the Judge to decide first of all whether the Munsif was correct in the view he took about jurisdiction⁴⁶.

12. Revision.—The Bombay High Court in *Somabhai v. Aditbhai*⁴⁷ in view of the amendment of S. 439 by deletion of S. 195 doubted whether it could exercise revisional powers under S. 439 in a case under S. 476, although it held that it had such powers in extraordinary cases.

Superior Court to which appeals ordinarily lie and which is empowered under S. 476-B to hear an appeal cannot necessarily be deemed to be a Criminal Court. It can continue to be a Civil Court if it is in fact a Civil Court and in that view where an order is passed by a superior Civil Court the case does not fall under S. 439 and the High Court has no power of interference either under S. 439 or S. 107 of the Government of India Act⁴⁸. This case is a decision by Sulaiman, J.,—a single Judge. True, there is no revision under S. 439 or S. 107 of the Government of India Act but the decision cannot be supported, although it has followed the decision of the full bench in *Bhup Kunwar*⁴⁹ in so far as it has held that the *High Court has no power of interference in revision*. The High Court, it may be pointed out, has in such cases, the powers of revision under S. 115 C. P. C. See *Kanai Lal Saha v. Makhan Lal Saha*⁵⁰ and *Abdul Huq v. Sheo Ram*⁵¹.

Revision lies under S. 115 Cr. P. C. if the order is from a Civil Court^{51a} and under S. 439 if it is from a Criminal Court⁵².

41. *Swami Vanniya Naiyar v. Periaswami Naidu*, (1928) MWN 73 : 106 IC 421 : AIR (1928) 391 (2) M following *Krishna Reddi*, (1910) 33 M 90.

42. *Mani Subba Rao v. K. Anantha Bhatta*, A 1959 Mys 153 : 1959 Cr LJ 744 where *Surendra Nath Maity v. Sushil Kumar Chakravorty*, A 1931 C 604 and A 1934 M 53 (FB) dissented from.

43. *Sharda Bai v. Lakshminarayana Rao*, A 1955 Mys 59 : 1955 Cr LJ 718 ; *State v. B. K. Pal Choudhury*, A 1959 Ass 197 overruled by *Dr. Pal Choudhury*, A 1960 SC 133.

44. *Ramzani*, A 1960 A 350 following *Manni Lal*, A 1937 A 305.

45. *K. Narahari Pillai*, A 1959 A P. 51.

46. *Kanai Lal Saha v. Makhan Lal Saha*, (1927) 55 C 836 : 47 CLJ 277.

47. (1924) 48 B 401 : 26 Bom LR 279 : AIR (1924) B 347.

48. *Banwari Lal v. Jhunka*, (1925) 24 ALJ 217.

49. (1903) 26 A 249.

50. 55 C 836 : 47 CLJ 277.

51. 49 A 536, *see cases referred to therein*.

51a. *Hakim Rai*, A 1957 Punj 134 FB ; *Thimma Reddi*, A 1955 Mys 40 ; *Dhanpat*, A 1942 N 73.

52. *Mohim Chandra Bhowmik* 33 CWN 285 ; *Purna*, 34 CWN 914 ; *Bachu Singh v. Tribeni Shah*, A 1939 P 178.

477. [*Power of Court of Session as to such offences committed before itself.*] *Rep. by the Code of Criminal Procedure (Amendment) Act, 1923 (18 of 1923), S. 129.*

478. Power of Civil and Revenue Courts to complete inquiry and commit to High Court or Court of Session.—

(1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under Section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may, exercise all the powers of a Magistrate ; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, and shall be deemed to have been held by a Magistrate.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 6. Case sent by a subordinate Judge to a D. M. for investigation. |
| 2. Legislative Changes. | 7. Inquiry. |
| 3. State amendments (1) Madras (2) West Bengal. | 8. Sub-section (2). Preliminary inquiry. |
| 4. Scope. | 9. Power of High Court. |
| 5. Sub-section (1). 'Any such offence'. | 10. Jurisdiction of Sessions Court—District Munsif—Inferior Criminal Court. |

1. Corresponding sections in former Codes

This section corresponds to Ss. 173 and 175 of the Code of 1861 and Ss. 474 and 476 of the Code of 1872. The section in the Code of 1898, before it was amended was similarly worded as that of the Code of 1882.

2. Legislative Changes

In sub-section (2) the words "subject to the provisions of S. 443" after the word "may" were omitted by S. 28 of the Criminal Law Amendment Act (XII of 1923) and the words, "*and of Chapter XXXIII in cases where that chapter applies*" were inserted by the same Act.

Ss. 443-464 were deleted by Act 12 of 1923, Section 28 and the words "and of chapter XXXIII in cases where that chapter" applies were omitted by Act 17 of 1949.

3. State Amendments

(1) **Madras.**—In sub-section (1), the words 'High Court or' wherever they occur and the words 'as the case may be' were omitted by Madras Act 34 of 1955.

(2) **West Bengal.**—Same as in Madras Amendment, vide City Sessions Court Act, (W. B. Act 20 of 1955).

4. Scope.—This section applies only to Civil and revenue Courts. The words “any such offence” relate to offences referred to in Section 195.⁵²

POWER OF CIVIL AND REVENUE COURTS TO COMPLETE ENQUIRY AND COMMIT TO HIGH COURT OR COURT OF SESSION

5. Sub-section (1) ‘any such offence’.—“These words mean an offence referred to in S. 195 and not (in the case of the offences mentioned in clause (c) Section 195 an offence referred to) in that section qualified by the circumstances under which it is committed, *i. e.*, committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding, as described in cl. (c) of the section. We have no doubt that the former is the right construction, and that the offences referred to in S. 478 of the Code are the offences mentioned in S. 195.”⁵³ It extends also to such offences when committed by a witness of the party.⁵⁴ Mookherjee and Chatterjee, JJ., after reviewing authorities observed: “The result of the authorities, therefore, is that, upon the question of the effect of clause (c) of S. 195 upon S. 478, judicial opinion is divided; but upon the question of the effect of cl. (b) of S. 195 upon S. 476, we have recent decisions of this Court in favour of the view that the qualification mentioned in the latter section is to be treated as incorporated in the latter provision.”⁵⁵

Where in the course of a judicial proceeding before the Munsif of Fatehabad in the District of Agra, certain offences under Ss. 193, 209, 210, 467 and 471, I. P. C. which appeared to have been committed in Bengal were brought under the notice of the Court, and the Munsif committed the person suspected of such offences for trial to the Court of Session at Agra, *held*, that the Court had jurisdiction under S. 478 read with S. 476 of the Code to make the commitment.^{55a}

Revenue Court is not barred from proceeding under this section with regard to offence committed in mutation proceeding.^{55b}

6. Case sent by a Subordinate Judge to a District Magistrate for Investigation—Refusal of Magistrate to investigate.—It was held that the Magistrate of the District was bound to proceed with the investigation according to S. 16 of Act XXIII of 1861.^{55c}

7. ‘Inquiry’.—The granting of a sanction to a private person under clause (c) of Section 195 does not debar a Civil Court from proceeding under Section 478, nor can the dismissal by a Magistrate of a complaint made by a private person, be held to be a bar, till set aside, to a proceeding under that Section.⁵⁶

8. Sub-section (2)—Preliminary Inquiry prior to commitment is essential.—Where the Court elects to commit the accused itself, the pro-

52a. *Abdul Khadar Sahib v. Mera Sahib*, 15 M 224 (225); 2 MLJ 148.

53. *Akhil Chandra De*, (1895) 22 C 1004 (1005).

54. *In re Devji Valad Bhawani*, (1893) 18 B 581, *contra Abdul Khaddar v. Meera Sahib*, (1892) 15 M 224.

55. *Jadu Nanda Singh*, (1909) 37 C 250

(256)—see cases referred to.

55a. *Khusali Ram*, (1917) 40 A 116.

55b. *Lachman Prasad Joshi*, A 1930 Oudh 58 : 31 Cr LJ 679.

55c. *Amruta Nathu*, (1870) 7 BHC Cr. ca. 29.

56. *Shankar*, (1888) 13 B 384.

cedure as to preliminary enquiries into cases triable by a Sessions Court (Chapter XVIII) must be strictly followed.⁵⁷

The power of a Civil Court to commit a case to the Court of Session, after completing the preliminary inquiry, is given by S. 474 of the Code of 1872 and is restricted to the class of cases provided in that section, *viz.*, where offences exclusively triable by a Court of Session are committed before the Civil Court.⁵⁸ A Civil Court making an inquiry under Section 478 should proceed in the same way as a Magistrate would do in enquiry into a case before committal.⁵⁹

‘Exercise all the powers of a Magistrate.’—Stanley, C.J., held : — “In the one and only case in which I know of criminal jurisdiction being conferred upon Civil or Revenue Courts, *viz.*, Sections 478 and 479 of the Code of Criminal Procedure, the powers and the procedure are laid down in very precise and well-defined terms.”⁶⁰

9. Power of High Court.—(1) *to quash commitment*, see S. 215. Assuming for the sake merely of argument that an appeal lies under cl. (15) of the Letters Patent from an order of commitment made under S. 478 by the Judge of the High Court trying a civil suit on the original side, the order cannot, under S. 215 be set aside except on a point of law.⁶¹

(2) *to interfere in revision*.—The High Court has power to revise the proceedings of the District Munsif purporting to act under Section 478.⁶²

10. Jurisdiction of Sessions Court—District Munsif—Inferior Criminal Court.—A Civil Court acting under Section 476 of the Code is not an “inferior criminal Court” within the meaning of S. 435 ; a Sessions Judge has therefore no jurisdiction to call for the records of a Civil Court under Section 435 and to stay the proceedings relating to an enquiry into a charge of an offence held by that Court under Section 478.⁶³

479. Procedure of Civil or Revenue Court in such cases.—When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

SYNOPSIS

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| 1. Corresponding Sections in former Codes. | —Saurashtra. |
| 2. State Amendments. | —Madras. |
| —Bombay. | —West Bengal. |

57. *Chinna Vedagiri Chetti*, (1881) 4 M 227 : 2 Weir 584 ; *Rangatoonee*, (1874) 22 WR (Cr) 52—case under S. 474 of Act X of 1872.

58. *Popat Nathu*, (1879) 4 B 287.

59. *Babu Prasad*, (1917) 40 A 32 : 15 ALJ 805 : 19 Cr LJ 40 : 42 IC 1000.

60. *Salig Ram v. Ranji Lal*, (1906) 28 A

554 (560) FB.

61. *Venkatagiri Aiyar v. N. M. Firm*, (1919) 43 M 361 : 37 MLJ 652 ; *Umrai*, A 1934 Oudh 185 (2).

62. *Abdul Khadar Sahib v. Meera Sahib*, (1892) 15 M 224 : 2 MLJ 148.

63. *Ramchandra Raju v. Subramania Pillai*, (1895) 5 MLJ 226 : 2 Weir 602,

1. Corresponding sections in former Codes

This section corresponds to S. 174 of the Code of 1861 and S. 475 of the Code of 1872 and is the same as that of the Code of 1882.

2. State Amendments

(1) **Bombay.**—The words “District Magistrate” were deleted by Bombay Act 23 of 1951.

(2) **Saurashtra.**—Same as Bombay Amendment, *vide* Saurashtra Act 4 of 1952.

(3) **Madras.**—The words “High Court or” and the word “as the case may be” were deleted by Madras Act 34 of 1955.

(4) **West Bengal.**—Same as Madras Amendment, *vide* City Sessions Court Act, 1953 (W. B. Act 20 of 1953).

479A. Procedure in certain cases of false evidence.—

(1) Notwithstanding anything contained in Sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the first class having jurisdiction, and may, if the accused is present before the Court, take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence before such Magistrate :

Provided that where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

Explanation.—For the purposes of this sub-section, a Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under Section 200.

(3) No appeal shall lie from any finding recorded and complaint made under sub-section (1).

(4) Where, in any case, a complaint has been made under sub-section (1) and an appeal has been preferred against the decision arrived at in the judicial proceeding out of which the matter has arisen, the hearing of the case before the Magistrate to whom the complaint was forwarded or to whom the case may have been transferred shall be adjourned until such appeal is decided ; and the Appellate Court, after giving the person against whom the complaint has been made an opportunity of being heard, may, if it so thinks fit, make an order directing the withdrawal of the complaint ; and a copy of such order shall be sent to the Magistrate before whom the hearing of the case is pending.

(5) In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under sub-section (1), the power conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the Appellate Court ; and where the Appellate Court makes such complaint, the provisions of sub-section (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard.

(6) No proceedings shall be taken under Sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section.

SYNOPSIS

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| 1. Legislative Changes. | 8. When may complaint be made. |
| 2. Report of the Joint Committee. | 9. Sub-section (2)—Complaint by High Court. |
| 3. Scope. | 10. Sub-section (3). |
| 4. Object. | 11. Sub-section (4). |
| 5. Applicability. | 12. Sub-section (5). |
| 6. Sub-section (1). | 13. Sub-section (6). |
| 7. Opportunity of being heard. | |

1. Legislative Changes.—This section was added by Act 26 of 1955.

2. Report of the Joint Committee.—*Statement of Objects and Reasons*—

“The Committee have inserted a new S. 479-A—when any person appearing as a witness before any Court gives or fabricates false evidence and the Court is of opinion that such person should be prosecuted for the offence committed by him, the Court which sees and hears the witness should at the time of delivery of the judgment, record a finding to that effect and make a complaint to a Magistrate of competent jurisdiction. No further enquiry is required in such a case. The person against whom such a complaint is made shall have no right to appeal against such an order. If however an appeal is preferred against the decision arrived at in the judicial proceedings out of which the matter has arisen, the appellate Court will hear the person complained against and pass necessary orders and may, if it thinks fit, withdraw the complaint. In cases where no complaint has been made by a Court of trial the appellate Court while hearing the appeal may, if it thinks fit, make a complaint.

"The Committee have made it clear that for the prosecution of a person who appears as a witness and gives false evidence, the provisions of this section shall apply and the provisions of Ss. 476 to 479 inclusive shall not apply." Joint Committee Report, Gaz. of Ind. 1954, Extra. Part II, S. 2 at p. 423.

3. Scope.—This section contemplates three steps:—(a) the recording of a finding in terms of sub-sec. (1) at the time of delivery of judgment or final order disposing of the judicial proceeding in the course of which a witness has given false evidence; (b) the issue of notice to the witness and giving him an opportunity of being heard; and (c) the making of a complaint in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false and forwarding the case to a Magistrate of the 1st Class having jurisdiction to try the case.⁶⁴ Section 479-A was enacted for the more expeditious and effective manner of dealing with perjurers. It was meant to be fair to both sides, *i. e.*, to bring a criminal to book promptly and not to harass him after long delays. There is a clear remedy at least in some cases where perjury is discovered after the disposal of the proceedings. When an appeal is taken from the decision of the case, the appellate Court has the same powers to deal with the offender under this section as the trial Court. The provisions of S. 479-A override the provisions of Ss. 476 to 479, in so far as they relate to the giving of false evidence or fabricating false evidence by a person who gives evidence during the course of the judicial proceedings.⁶⁵

The conditions necessary for the application of S. 479-A are that a Court before delivering judgment must form an opinion that a particular witness or witnesses are giving false evidence.⁶⁶ The prosecution against a witness who has intentionally given false evidence in any stage of judicial proceeding or has intentionally fabricated false evidence for the purpose of its being used in any stage of the Judicial proceeding can only be under S. 479-A and not under S. 476.⁶⁷

In relation to the prosecution of any person appearing before a Court as a witness for giving false evidence or fabricating a false evidence, this section engrafts an exception to S. 476.⁶⁸ Section 479-A is a self-contained section.⁶⁹ It is clear from the wordings of S. 476 and S. 479-A, and its marginal note that S. 479-A does not contain an exhaustive and self-contained procedure relating to all cases of perjury. Section 479-A applies where the Court acts *suo motu* and to certain cases of false evidence, namely, serious, flagrant and patent cases of perjury and then S. 476 applies to all other cases of perjury where the Judge has not recorded a finding under S. 479-A(1).⁷⁰

The condition precedent to taking action under this section is that there

64. *Virudan*, (1962) MWN 290; A 1962 M following *Munianmh*, (1958) 2 An W R 509 and *Chidamilal Jain*, A 1960 SC 41 following *Jai Bir Singh v. Makhan Singh*, 1958 Cr LJ 591; *Dhan Singh v. Ramsuwa*, A 1958 A 364; A 1961 MP 303; *Bijli Pathak*, 39 P 203; A 1961 P 387; *Amlok*, ILR (1959) 9 Raj 290; A 1961 Raj 220; *Shabir Hussain*, A 1963 Sc 816.

65. *Parshottam Lal v. Madan Lal*, A 1959 Punj 145; 1959 Cr LJ 511.

66. *Kasi Thever v. Chinniah Koya*, A 1960 M 79; *Raydesp Singh v. Shyama Singh*, A 1961 P 71.

67. *Dhan Singh v. Ramsaran* A 1961 MP 305 (307); 1961 (2) Cr LJ 646 (*see cases referred to*).

68. *Mannalal Sadarmal Jain v. Ram Kishan Jodhraj Maheraj*, A 1959 MP 264; 1959 Cr LJ 348 followed in *Dhan Singh v. Ramswaran*, A 1961 MP 305.

69. *S. Abdul Jabbar, In re*, A 1958 AP 469; 1958 Cr LJ 856.

70. *State of Bombay v. Premdas*, A 1960 B 483; 1960 Cr LJ 1426 where *Dr. B. K. Pal Chaudhury*, A 1960 SC 133 distinguished.

must be a finding recorded by the Court concerned at the time of the judgment or final order disposing of the main proceeding that the witness has intentionally made false evidence or fabricated false evidence.⁷¹ Where complaints were made long after the termination of committal proceedings, they are made without jurisdiction.⁷²

4. Object.—The object of inserting S. 479-A was to avoid any further inquiry contemplated under S. 476.⁷³ Section 479-A, was enacted for the more expeditious and effective manner of dealing with perjurers.⁷⁴

5. Applicability.—This section comes into play only when a witness is sought to be proceeded against for perjury committed before it and that too when the Court has to make a complaint under S. 476. This provision is not attracted to S. 193, I. P. C.⁷⁵

This section applies only when any person appearing before a Court as a witness gives false evidence but does not apply to a case of false affidavit where Section 476 applies.^{75a}

The application of the provisions of this section to a person appearing as a witness before Court cannot be obviated merely by reason of the fact that the said person also happens to be a party to the said proceedings.⁷⁶ Section 479-A applies to a case under S. 193 I. P. C. where the gist of the complaint is an offence within the purview of S. 196 or 471 I. P. C. the provisions of S. 479-A do not apply.⁷⁷

6. Sub-section (1).—“*Presiding officer of the Court*”—An Additional Sessions Judge who heard the Sessions case out of which petitions for action under S. 476 arise is competent to entertain them without an order of transfer by the Sessions Judge.⁷⁸

7. “Opportunity of being heard”.—Means giving a right of audience.⁷⁹

8. When may complaint be made.—All that S. 479-A requires is that the finding should be recorded at the time of the delivery of the judgment or final order and the formal complaint itself may be filed subsequently after giving the witness an opportunity of being heard.⁸⁰

9. Sub-section (2).—The Magistrate shall proceed in the same way as mentioned in S. 200 and when complaint has been filed by the Court, the complainant need not be examined *vide* S. 200 (aa).

Complaint by High Court.—The complaint should specify the part of the statement which the High Court considers to have been false and made intentionally.⁸¹

10. Sub-section (3).—Mentions that no appeal shall lie from any finding recorded and the complaint filed under sub-sec. (1).

71. *Sudhir Kumar*, 65 CWN 600.

72. *S. Abdul Jabbar, In re*, A 1958 AP 469 : 1958 Cr LJ 856.

73. *B. K. Pal Chowdhury*, A 1959 Ass 197 : 1959 Cr LJ 1147 Overruled by *B. K. Chowdhury*, A 1960 SC 133.

74. *Parshottam Lal v. Madan Lal*, A 1959 Punj 145 ; 1959 Cr LJ 511.

75. *Jagmohan Reddy, Public Prosecutor v. Kusuba Sanjamma*, (1959) 2 An. WR 326 : A 1959 AP 567, *Contra. C Lal v. Uchit Mahto*, A 1961 P 175.

75a. *Shabir Hussain v. State of Maharashtra*, A 1963 SC 816 followed in *Mohalinga*, A 1963 Ker 315 and overruling *Durga, Prasad Khosla*, A 1959 A 704, *Lalbehari*,

A 1962 A 251 and *Premdas*, A 1960 B 483 ; *Bamdev Misra*, A 1963 Or 179 following *State of Bombay v. Kuthukati Ojha*, A 1961 SC 808.

76. *Narajappa v. Chikuraniah*, A 1959 Mys. 117 : 1959 Cr LJ 618.

77. *C. Lal v. Uchit Mahto*, A 1961 P 175.

78. *Uggirallah Duniah, In re* ; 1955 An WR 837.

79. *Mahmud Khan*, A 1945 N 127.

80. *Munniamma, In re* (1958) 2 An WR 509 ; *Ponnari Dasi Rdddi, In re* A 1958 AP 657 ; 1958 Cr LJ 1289.

81. *B. K. Pal Chowdhury*, A 1959 Ass 197 : 1959 Cr LJ 1147.

11. Sub-section (4).—Provides that in case of an appeal from the original proceedings after the complaint under S. 479-A has been filed, the appellate Court may adjourn the hearing of the complaint for perjury and may also, as in S. 476-A direct the withdrawal of the complaint, although Ss. 476-479 do not apply to a proceeding under this section.

12. Sub-section (5).—*Power of Appellate Court*—In a case governed by sub-sec. (5) of this section terms of both sub-secs. (1) and (5) have to be complied with. The combined effect of these sub-sections is to require the Court intending to make a complaint to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interest of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be prosecuted an opportunity of being heard as to whether a complaint should be made or not. The finding required to be made by S. 479-A(1) was only of a *prima facie* nature and it could not be a finding which would have any force at the trial upon the complaint pursuant to that finding.⁸²

13. Sub-section (6).—Makes it abundantly clear that the procedure laid down in sub-sec. (1) is not alternative to the one in Ss. 476-479. The expression 'may be taken' in sub-sec. (6) does not mean discretionary proceedings but means proceedings which could be taken.⁸³

The expression "if in respect of such a person proceedings may be taken under this section" means if in respect of such person a finding has been recorded under S. 479 (1).⁸⁴ Sub-section (6) contemplates exclusion of applications of provisions of S. 476. Hence there must be strict compliance with the requirements of S. 479.⁸⁵

Entire proceedings are not required to be completed before delivery of judgment.^{85a}

480. Procedure in certain cases of contempt.—(1) When any such offence as is described in Section 175, Section 178, Section 179, Section 180, or Section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender, to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. At any time before the rising of the Court on the same day. |
| 2. Legislative Changes. | 6. Taking cognizance. |
| 3. Scope. | 6a. Procedure. |
| 4. In the view or presence. | |

82. *Dr. Pal Choudhury v. State of Assam*, A 1960 SC 133 : (1960) 2 MLJ (SC) 69; 1960 Cr LJ 174: overruling *B. K. Pal Choudhury*, A 1959 Ass 197; *Chimalu Rangayya*, A 1960 AP 233.

83. *Mannalal Sadarmal Jain v. Ram Kishan Jodhraj Maharaj*, A 1959 MP 264. See

Badulla, A 1961 A 97.

84. *State of Bombay v. Premdas*, A 1960 B 483 (484).

85. *State v. Bijli Pathak*, 39 P. 203 : A 1961 P. 387.

85a. *Chowey Lal v. Chiranjit Lal*, A 1960 A 230.

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| 7. Contempt under S. 228 I. P. C. | apology. |
| 8. Form of warrant. | 10. Imprisonment in default of payment. |
| 9. Discharge of offender on submission of | 11. Appeal. |

1. Corresponding sections in former Codes.—This section corresponds to S. 163 of the Code of 1861 and S. 463, paragraph 1 of the Code of 1872. The unamended Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—The words “whether he is a European British subject or not,” after the word “offender”, in sub-sec. (1), which were retained from the earliest Code (Act XXV of 1861, S. 163) down to the unamended Code of 1898, were omitted by S. 29 of the Criminal Law Amendment Act, 1923 (XII of 1923). In sub-sec. (2) the words “S. 29-A or in Chapter XXXIII” were substituted for the words “S. 443 or S. 444” by the said Act.

Sub-section (2) was deleted by the Criminal Law (Removal of Racial Discrimination Act XVII of 1949).

See Act No. XXXII of 1952—“An act to define and limit the powers of certain courts in punishing Contempts of Courts’. Under the said Act, High Courts shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice, in respect of Contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves. A Chief Court shall exercise the same powers and authority in accordance with the same procedure and practice, in respect of a contempt of itself as a High Court. No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code *vide*, S. 3 of Act XXXII of 1952. S. 4 provides for punishment, whereas S. 1 deals with short title, extent and commencement of the Act.

3. Scope.—The High Court has power to punish summarily by imprisonment Contempt of Court committed by the publication of a libel out of Court when the Court is not sitting. Such a case is not a proper one for an appeal to Her Majesty.⁸⁶ Such contempt is not included in the words “offences under the Indian Penal Code”, although the ‘Contempt’ may include ‘defamation’. It is an offence which by the Common Law of England is punishable by the High Court in a summary manner with fine or imprisonment or both.⁸⁶ The summary powers conferred by S. 480 may extend to Contempts committed in the precincts or offices of the Court,⁸⁷ but it does not extend to contempts committed outside the Court.⁸⁸ The High Court has the power of summarily punishing for contempt out of Court in relation to any of its jurisdiction.⁸⁹

The section applies to contempts committed in the presence or in view of any Civil, Criminal or Revenue Courts; other contempts are punishable under contempt of Courts Act (Act 32 of 1952). The provisions of S. 482 can only be employed where cognizance has already been taken under this section.⁹⁰

86. *Surendra Nath Banerjee v. Chief Justice and Judges of the High Court of Bengal*, (1883) 10 IA 171 : 10 C 109.

87. *In re Rasiklal Nag*, 44 C 639 (648) : 24 CLJ 190 : 20 CWN 1284 : 18 Cr LJ 420 : 38 IC 980.

88. *Chogmal Seraogi*, (1919) 23 CWN 389 :

20 Cr LJ 373 : 50 IC 981.

89. *In the matter of “Amrita Bazar Patrika,”* (1917) 45 C 169 : 21 CWN 1161 (FB) ; *Narayandas Bhagwan Das*, A 1959 S C 1118.

90. *Ramlal*, A 1940 L 233 : 41 Cr LJ 760.

4. 'In the view or presence.'—This section only refers to certain offences committed in the view or presence of the Court and taken cognizance of on the same day.⁹¹

If plaintiff who is directed to appear with books fails to appear, S. 480 does not apply as no offence was committed in the view of the Court.^{91a}

5. 'At any time before the rising of the court on the same day.'—The procedure laid down in S. 480 of the Code should be strictly followed. The provisions of the section should be applied then and there at any rate before its rising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under S. 480. *Section 537 covers such an irregularity.*⁹² A Court acting under S. 482 is not bound to take proceedings *on the same day*, as it is when acting under S. 480.⁹³

See Ss. 175, 178, 179, 180 and 228 I. P. C.

6. "Taking cognizance"—means that the Civil, Criminal or Revenue Courts have been given additional powers and it does not lose its identity as a Civil or Revenue Court.⁹⁴ In a trial for an offence of which cognizance has been taken under S. 480 the omission to record proceedings in the manner laid down in S. 481 is fatal to the proceedings.⁹⁵

6a. Procedure.—See S. 481.

7. Contempt under S. 228 I. P. C.—Where the accused was convicted under S. 228 I. P. C. by a Presidency Magistrate, S. 242 was not complied with and there was no evidence of intentional insult or interruption by accused, *held*, the Court had no jurisdiction to proceed under this section.⁹⁶ Insult or interruption to a public servant offered under S. 228 I. P. C. should be while he is sitting in a stage of a judicial proceeding.⁹⁷ Where a subordinate Judge started proceedings against a pleader by serving a notice on him to show cause for contempt under S. 228 I. P. C. and examined a number of witnesses, but had no intention of proceeding either under S. 480 and 482 or S. 476 but intended the evidence to form a part of his report to the District Judge for the purpose of the proceedings under the Legal Practitioner's Act, *held* that the evidence thus recorded could not be the foundation for an order against the accused for contempt.⁹⁸

Other contempts.—Where the Magistrate finds that on such examination the complainant insists on refusing to answer questions touching a subject on which he was bound to state the truth and take proceedings under S. 480 and convict him under S. 179 I. P. C., *held*, the conviction cannot be upheld.⁹⁹ If a person refuses to sign a statement under S. 364, he is punishable under S. 180 I. P. C.¹

8. Form of warrant.—See Sch. V, Form No. XXXIII.

9. Discharge of offender on submission of apology.—See S. 484.

91. *Seshayya*, (1889) 13 M 24 ; See *Bhabesh Chandra*, A 1963 Tripura 80.

91a. *Chagmal*, 23 CWN 389.

92. *Paiambar Baksh*, (1889) 11 A 361.

93. *Bipin Chandra Pal*, (1907) 35 C 161.

94. *Varma*, A 1947 N 35.

95. *Ramnath*, A 1953 A 39 : 1953 Cr LJ 320.

96. I L R (1948) 2 C 50.

97. *Surendra Nath Banerjee v. Chief Justice*

and Judges of the High Court, 10 IA 171; 10 C 109 ; *Debendra*, 52 CWN 336 ; *Abdus Sattar v. Badrinarayan*, A 1962 B 29.

98. *Kamlesh Bahaduri*, A 1948 P. 74 : 48 Cr LJ 27.

99. *Motilal*, 36 Cr LJ 446 ; *Shedilal*, A 1924 oudh 402 (court acted under Section 482 and not under Section 480).

1. *Umar*, 39 A 399.

10. Imprisonment in default of payment.—Imprisonment in default of payment of fine does not absolve the offender from liability to the levy of the fine by distress and sale of movable property. The offender is as a matter of practice sent to jail.^{1a}

11. Appeal.—Lies under S. 486. An appeal lies against a sentence imposed under S. 480 only under S. 486(1) to the Court to which decrees or orders made in such court are ordinarily appealable.² Appeal lies when Court proceeds under this section summarily on the same day and imposes summary fine up to Rs. 200 under S. 228 I. P. C.³ Sentence of fine of Rs. 10 inflicted under this section by a sub-divisional Magistrate is not appealable as S. 413 applies to the appeal in view of S. 486(2).⁴

481. Record in such cases.—(1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(2) If the offence is under Section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | as well as the finding and sentence'. |
| 2. 'The Court shall record the facts constituting the offence'. | 4. Finding and sentence if a judgment. |
| 3. 'With the statement made by the offender | 5. Sub-section (2). |

1. Corresponding sections in former Codes

This section corresponds to paragraphs 2 and 3 of S. 435 of the Code of 1872 and is the same as that of the Code of 1882.

2. 'The Court shall record the facts constituting the offence.'—

The directions contained in S. 481 are mandatory and the omission to record the particulars mentioned in that section in any proceedings taken under S. 480 is fatal to such proceedings⁵. A criminal court inflicting a fine for contempt of Court should specifically record its reasons and the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence. Where this course was not adopted, the High Court set aside the order inflicting a fine⁶. The Judicial Committee laid down as a general rule that in case of contempt of Court the charge should be distinctly stated and opportunity should be given to the accused of being heard before sentence is passed⁷.

1a. 3 WR Cr (L) 21.

2. *D. K. Reddy*, A 1942 M 181 : 43 Cr LJ 397.

3. A 1953 Hyd 285 : 1953 Cr LJ 1850.

4. *Bhawani Mohan Joardar*, A 1944 C 382: 46 Cr LJ 177.

5. *In re Surendra Nath Banerjee*, (1906) 10 CWN 1062 : 4 CLJ 415: 4 Cr LJ 210 : *Krishna Chandra Bhowmick*, A 1923 C 562 ; *Jathu Mal*, A 1928 L 357 : 29 Cr LJ 880 ; *Debendra*, 52 CWN 336 ; *Ram Lal*, A 1931 N 198 : 32 Cr LJ

1221.

6. *Panchanada Tarubiran*, (1869) 4 MHCR 229.

7. *In re Edward Hutchinson Pollard*, (1868) LR 2 PC 106, followed in *Chan Hang Kiu*, (1909) 6 MLT 9 : 11 Cr LJ 277 : 4 IC 539 ; *In re Lal Hing Firm*, 13 CWN 685 (PC) : 19 MLJ 324 ; *In re Surendra Nath Banerjee*, (1900) 10 CWN 1062 and *Krishna Chandra Bhowmick*, (1923) 37 CLJ 535.

3. **'With the statement (if any) made by the offender as well as the finding and sentence.'**—“All that the expression ‘if any’ indicates is that the Court cannot compel the accused to make a statement, but it cannot mean that he should not give him an opportunity to make a statement. We hold that this defect in the procedure was fatal to the conviction, and we must, therefore set it aside”⁸. In a prosecution for contempt of Court against a legal practitioner, he was not called upon to make a statement and no statement was recorded: *Held*, that this defect in the procedure was fatal⁸.

4. **Finding and sentence if a judgment.**—A ‘finding and sentence’ is not a judgment. A full and clear record as contemplated by S. 481 is not only a guarantee of the coolness and judicial temper of the presiding officer but also affords materials for the appellate Court to proceed⁹.

5. **Sub-section (2).**—Uses the language ‘shall’. To guard further more effectively the rights of the subject, S. 486 gives a right of appeal from every sentence under S. 480.

Where a person making a noise in Court is charged with an offence under S. 228 I. P. C., the record convicting him must show the stage of judicial proceeding interrupted and that the interruption was intentional, as such vital irregularities in procedure are not covered by S. 537¹⁰.

In a case under S. 228 I. P. C. the Record should show how accused acted or what he had stated¹¹.

482. Procedure where Court considers that case should not be dealt with under Section 480.—(1) If the Court in any case considers that a person accused of any of the offences referred to in Section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under Section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

8. *Krishna Chandra, Bhowmick*, (1923) 37 CLJ 535 (537) : 24 Cr LJ 798 (799) : 74 IC 542 : AIR (1923) C 562.

9. *Surendra Nath Banarjee*, (1900) 10 GWN 1062 : 4 CLJ 415 : 4 Cr LJ 210.

10. *In re Kukati Narasa Reddi*, (1914) 15 Cr LJ 621 (M) : 25 IC 629 ; *Mal Khan Singh*, A 1936 A 762 : 38 Cr LJ 55.

11. *Ramnath*, A 1953 A 59 : 1953 Cr LJ 320 ; *Dalip*, A 1921 L 102 ; *Debendra*, 52 C W N 336.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | constituting the offence. |
| 2. Scope. | 4. Power to commit. |
| 3. Such Court after recording the facts | 5. Sub-section (2). |

1. Corresponding sections in former Codes

This section corresponds to S. 163 of the Code of 1861, S. 463, paragraphs 1 and 2; S. 206 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Scope.—"The 163rd section provides that in all cases except those dealt with summarily, the Court before which the offence is committed after reconsidering the facts constituting the contempt, and the statements of the accused person, shall forward a case to a Magistrate. It distinctly contemplates that the trial is to be by a judicial officer other than the person before whom the contempt was committed. There is nothing to warrant the inference that an officer before whom, while acting in a particular capacity, a contempt has been committed, punishable under S. 228, can, in another capacity, take up and try the offence—an offence committed against himself. If he could do so, it would be in violation of a fundamental rule in the administration of justice that no man can be a judge in a cause wherein he is interested"¹².

The Court has the option of proceeding under Ss. 480 to 482 or under S. 476, and the existence of S. 482 does not operate so as to take away this option¹³. A Court cannot act under this section unless cognizance has been taken under S. 480 before it has risen for the day. If cognizance is not taken under S. 480 and if the Court still wishes to take proceedings it can do so under S. 476¹⁴. Reasons must be given for proceeding under S. 480¹⁵.

A court acting under Section 482 of the Code is not bound to take proceedings on the same day, as it is when acting under Section 480.¹⁶ Sections 480 to 482 *do not apply* to village Munsifs.¹⁷

3. Such Court after recording the facts constituting the offence and the statement of the accused as hereinafter provided.—If a Court before which the offence of contempt under Section 179 I. P. C. is committed, considers that a sentence of imprisonment is called for, it should record a statement of the facts constituting the contempt and the statement of the accused, and forward the case to the Magistrate.¹⁸ In a case where a subordinate Magistrate was insulted in the course of a trial by him and the Sub-Magistrate proceeded to act under Section 482, but was unable owing to the offender having left the Court house, to record any statement from the latter explanatory of his conduct: *Held*, that the dismissal of the case on the ground of no such explanatory statement being recorded was improper.¹⁹

4. Power to commit.—Sub-section (2) of Section 487 says that a Magistrate, instead of forwarding the case under Section 482 to a Magistrate having jurisdiction to try the same, may commit to the Court of Sessions or High Court.

12. *per* Norman J., in *Chunder Seekar Roy*, (1869) 12 WR (Cr) 18 (21); *Bachai Singh*, A 1959 A 693.

13. *Shankar Krishnaji Gavankar*, A 1942 B 206 (1); 43 Cr LJ 769.

14. *Newandran Vishindas*, A 1948 S 97: 49 Cr LJ 327

15. *Chedilal*, A 1924 Oudh 402: 25 Cr LJ 1127; *In re Kumaran Nair*, A 1954 M

893.

16. *Bepin Chandra Pal*, (1907) 35 C 161 (165).

17. *Venkatasami* (1891) 15 M 131: 2 Weir 605.

18. *Ruttun Sahoo*, (1869) 11 WR (Cr) 49.

19. (1879) 2 Weir 604.

5. Sub-section (2).—*“hear the complainant against the accused person in the manner hereinbefore provided.”*—This clause existed in its present form in the Code of 1882.

“In manner hereinbefore provided.”—i. e. in the manner provided in Section 200 etc. supra. Under Section 200 (aa) introduced by the Amending Act XVIII of 1923 when the Court or a Public servant acting or purporting to act in the discharge of his public functions is exempted from examination on oath. Hence the Magistrate forwarding the case under Section 482 is not to be examined.

483. When Registrar or Sub-Registrar to be deemed a Civil Court within Sections 480 and 482.—When the State Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877, shall be deemed to be a Civil Court within the meaning of Sections 480 and 482.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes

This section was inserted in the Code of 1882 for the first time and has not been further amended.

The Indian Registration Act (XVI of 1908) has repealed the Registration Act III of 1877.

2. Scope.—This section is based on the decision in *Sardharee Lal*.²⁰ A sub-registrar under the Registration Act (III of 1877) is not a Judge, and therefore not a ‘court’ within the meaning of Section 195 of the Code (Act X of 1882).²¹ Having regard to this section, the Registrar, under the Land Registration Act III of 1877, is not a Civil, Criminal or Revenue Court within the meaning of Section 476 Cr. P. C. and the fact that he was also the District Magistrate did not alter the case, inasmuch as he was acting in execution of Act III of 1877.²²

In the absence of direction by the Government, a Sub-Registrar cannot deal with an offence under Section 228 I. P. C. under Sections 480 and 482.²³

484. Discharge of offender on submission or apology.—When any Court has under Section 480 or Section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or committing to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

20. (1874) 13 BLR App. 40 : 22 WR (Cr) 10.

21. *Fulja*, (1887) 12 B 36.

22. *Haridas Bairagi*, (1893) 2 CWN ccxlv.

23. *Probbhat*, 34 CWN 56.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Legislative Changes.

1. Corresponding sections in former Codes

This section corresponds to Section 164 of the Code of 1861, Section 437 of the Code of 1872 and Section 207 of Act IV of 1877. The unamended Code of 1898 was similarly worded as that of the Code of 1882.

2. Legislative Changes (1898)

The words "*or Section 482*" and "*or forwarded him to a Magistrate for trial*" were inserted by Section 2 and first schedule of the Repealing and Amending Act, 1914 (X of 1914).

Litigants are bound to conduct themselves in an orderly manner, but too much notice should not be taken of a sudden lapse, during a moment of excitement, into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously. Where the petitioner is detained and adopts a submissive attitude when brought before the Court later after the excitement has worn off, a due admonition or a petty fine at the most is sufficient for preservation of order.²⁴ The High Court on revision directed the Munsif who tried and punished the petitioner, a *pleader* for contempt for having used certain words in spite of the pleader's assurance that the words in question had no reference to him, to consider whether it was not a case in which the Munsif himself should take action under this section.²⁵ Justification and apology are incompatible.²⁶

485. Imprisonment or committal of person refusing to answer or produce document.—If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court, for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of Section 480 or Section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Form of warrant. |
| 2. Legislative Changes. | 4. Appeal. |
| | 5. Power of Chartered High Court. |

24. *Jit Singh*, (1912) 23 PWR 1912 : 13 Cr LJ 567 : 15 IC 983.

25. *Ram Bali Hai*, (1913) 11 ALJ 985 : 14

Cr LJ 687.
26. *Tarapore*, A 1940 S, (F B). 239,

1. Corresponding sections in former Codes

This section corresponds to Sections 192 and 365 of the Code of 1861, Sections 356 and 364 of the Code of 1872 and Section 141 of Act IV of 1877.

2. Legislative Changes (1898)

The words "*any witness or person called to produce a document or thing*" were substituted for the words "*any witness*," otherwise the section is similarly worded as that of the Code of 1882.

3. **Form of warrant.**—See Sch. V, Form XXXIX.

4. **Appeal.**—See Section 486.

This section applies to witness. But the witness cannot be punished for not answering a question which he was not legally bound to answer.²⁷

Section 480 is the general section for contempts committed in view or in presence of the Court, whereas Section 485 is the particular provision regarding the witness refusing to answer questions as reported under Section 179 I. P. C. that being the relative scope of the two sections, it is only proper for the Court to employ the particular provision under Section 485 in the case of a prosecution witness, in a Sessions trial, who had not replied to certain questions put by the assistant Public Prosecutor, before taking action under Section 480.²⁸

Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement if relevant may be used against him on his trial on a criminal charge. If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled.²⁹

5. **Power of Chartered High Court to commit for contempt.**—See Commentary on Section 480 *supra*.

485A. Summary procedure for punishment for non-attendance by a witness in obedience to summons.—(1) If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such witness should be tried summarily, the Court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished

27. *Hari Lakshman*, 10 B 185 followed in *re Ganesh Narayn Sathi*, (1889) 13 B 600 (621).

28. *Kuber Narayan*, 66 CWN 47.

29. *Gopal Das*, (1881) 3 M 271 (FB)

followed in *Ganu Samba*, 12 B 440; *Moher Sheikh*, (1893) 21 C 392; *Moss*, (1893) 16 A 88—cases under Section 32 Evidence Act.

under this section, sentence him to fine not exceeding one hundred rupees.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials in which an appeal lies.

SYNOPSIS

1. Legislative Changes.
2. Scope.

3. Apparent conflict between Sections 485-A and 487.

1. Legislative Changes (1955).—This section was added by Act 26 of 1955.

2. Scope.—This section prescribes summary procedure for punishment of a witness for non-attendance in obedience to summons, after giving him an opportunity to show cause and sub-section (2) provides that the Court shall follow the procedure prescribed for summary trials in which an appeal lies (See Section 264) and the fine to be awarded shall not exceed Rs. 100/- although under Section 174 I. P. C. the punishment ranges from one month to six months' simple imprisonment and from a fine of Rs. one hundred to one thousand. The Legislature has provided for an appeal as in contempt cases under Section 486. This section is not referred to in Section 487 which enacts that certain Judges and Magistrates are not to try offences mentioned in Section 195, Section 174 I. P. C. being one of the offences referred to in Section 195 (1) (a).

For a prosecution of an offence under Section 174 I. P. C. no Court shall take cognizance except on the complaint of the public servant but for the prosecution of a witness under Section 485-A there is no such bar. The Language as used in this section 'it is expedient in the interests of Justice, and 'after giving the offender an opportunity of showing cause' is almost the same as in Section 476.

3. Apparent conflict between Sections 485-A and 487.—On a reading of Sections 487 and 195 (1), it is manifest that only offences falling under Section 195 (1) are governed by Section 487, Section 485-A, is outside the purview of Section 487 which is a prohibitory provision. That section excludes the jurisdiction of Courts in which the offence is committed before itself or in contempt of its authority. But Section 485-A is an enabling provision conferring jurisdiction on a Court to take cognizance of an offence committed in contempt of its authority. Therefore the latter should be treated as an exception to the former. There is no difficulty in reconciling Section 487 with Section 485-A. They provide for different situation and there is no repugnancy at all between the two. Consequently the question of Section 485-A being a dead letter does not arise. It cannot be said that the legislature omitted Section 485-A in Section 487 by over-sight or that there is a lacuna in Section 487 which has to be filled up by the legislature itself. One of the principles of interpretation of statutes is that in the event of there being an inconsistency between two provisions of law, the last enacted should prevail, in view of the assumption that in the last expression of the legislature will or intent that should prevail. So even if it is thought that these two sections could not be harmonised, effect should be given to Section 485-A having regard to the doctrine indicated above³⁰.

30. *Ananda Reddi*, A 1959 AP 144 : 1959 Cr LJ 350.

486. Appeals from convictions in contempt cases.—(1) Any person sentenced by any Court under Section 480 or Section 485 or Section 485A may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and

an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency-towns, to the High Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. Legislative Changes. | 4. Appeal. |

1. Corresponding sections in former Codes.—This section corresponds to Section 413 of the Code of 1861, Section 268 of the Code of 1872 and is the same as that of the Code of 1862.

2. Legislative Changes.—The addition of the words by Act 26 of 1955 “or Section 485-A” after “Section 485” is a consequential amendment.

3. Scope.—This section provides for appeals from contempt cases against the sentence passed under Section 480 or Section 485 and Section 485-A *supra*.

4. Appeal—lies against sentence imposed under Section 480 only under Section 486(1) to Court to which decrees or orders made in such Court are ordinarily appellate.³¹ Summary fine up to Rs. 200 under Section 228 I. P. C., is appealable,³² but in view of Section 413, a sentence of fine of Rs. 10 inflicted under Section 480 for an offence under Section 228 I. P. C. is not appealable.³³

‘Ordinarily appealable’.—See Section 195 (3) of the Code as amended.

Order refusing application to commit for contempt—Appeal.—An appeal lies from an order refusing an application to commit for Contempt of Court.³⁴

31. *D. K. Reddi*, A 1942 M 181 : 43 Cr LJ 397.

32. *Vijay Rao*, A 1953 Hyd 285 : 1953 Cr LJ 1856.

33. *Bhowani Mohan Joardar*, A 1944 C 382 : 46 Cr LJ 17.

34. *Mohendra Lall Mittar v. Anunda Coomer Mitter*, (1897) 25 C 236.

487. Certain Judges and Magistrates not to try offences referred to in Section 195 when committed before themselves.—(1) Except as provided in Sections 480, 485, and 485A no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in Section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

(2) Nothing in Section 476 or Section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Cases where trial held not valid. |
| 2. Legislative Changes. | 7. Can Magistrate try a case of false evidence or its abetment. |
| 3. State Amendment.
—Madras. | 8. Trial undesirable though not illegal. |
| 4. Applicability of the section. | 9. Sub-section (2). |
| 5. Scope. | |

1. Corresponding sections in former Codes.—This section in the Code of 1898 before it was amended in 1923 was similarly worded as that of the Code of 1882.

The *Corresponding provision* in Act X of 1872 is Section 473 which stood as follows :—

“Except as provided in Section 435 “(new Section 480)” Section 436 (new Section 482)” and Section 472 “(now Section 477) no Court shall try any person for an offence committed in contempt of its own authority.”

2. Legislative Changes.—The figures “Section 477” after the word “sections” in clause (1) were omitted by Section 130 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

The words “and the Record of Rangoon” after the words “High Court” in clause (1) were repealed by the Lower Burma Courts Act, 1900 (VI of 1900) which Act has since been repealed by the Repealing and Amending Act 1923 (XI of 1923).

3. State Amendment—

Madras.—In sub-section (2) the words “or High Court” have been omitted by Madras Act 34 of 1955.

4. Applicability of the section.—It is to be remembered that cases under the Code of 1872 (X of 1872, Section 473) should be cited with caution as the words were “for an offence committed in contempt of its own authority” which were not limited to offences falling under Chapter X of the I. P. C., but extended to all contempts of Courts.³⁵ The Code of 1898 contemplated that the offences referred to in Section 487 are those that are mentioned in Section 195 (1) (a) viz. Sections 172-188 I. P. C. which clearly falls within Chapter X of the I. P. C. The Amending Act of 1923 has deleted Section 477 which has been repealed by the same Act.

^{35.} *Parsappa Mahadevappa*, (1876) 1 B 339.

5. Scope.—The mandatory provisions of Section 487, as amended, clearly prohibit the Sessions Judge from trying any person for any offence referred to in Section 195 of the Code. The word 'try' as used in this section includes the hearing of an appeal.³⁶ Where facts alleged to constitute offences come to the knowledge of a Magistrate in the course of a judicial proceeding, such Magistrate is debarred under Section 487 of the Cr. P. Code from trying the case himself.³⁷ Cognizance of a case under Section 188 I. P. C. cannot be taken except in accordance with the provisions of Section 195 Cr. P. C. and under Section 487 Cr. P. C. and the Magistrate whose order is disobeyed is not competent to try the case.³⁸

A *Presidency Magistrate* has no jurisdiction to try a case under Section 188 I. P. C. when an order which is alleged to have been disobeyed was an order which he had himself passed.³⁹ But a *District Judge* who has, on hearing a civil appeal sanctioned the prosecution of a party for forgery is not debarred by Section 473 of the Code of Criminal Procedure (Act X of 1872) from trying the offence in his capacity of a Sessions Judge.⁴⁰ A full bench of the Calcutta High Court⁴¹ upheld this view of the Bombay High Court⁴² while overruling another Calcutta decision.⁴³

6. Cases where trial held not valid.—A Magistrate was held incompetent to try the case, under Section 188 I. P. C. when he had made the order under Section 144 for the disobedience of which proceedings had been started⁴³ for disobedience of his own order.⁴⁴

There is no prohibition contained in the section such as has the effect of preventing a Magistrate from taking cognizance of an offence so long as he does not actually try the case himself.⁴⁵

7. Can Magistrate try a case of false evidence when committed before itself.—He may himself try and commit the person so offending,⁴⁶ but in a later decision it was held that the Magistrate is bound either to commit or send the case for enquiry to another Court.⁴⁷

'Or of abetment'.—The Magistrate convicted accused of abetting the giving of false evidence in a judicial case proceeding before himself. *Held*, that when the Magistrate could not have tried the person who gave the false evidence, he could not try the abettor.⁴⁸

False evidence—Examination on oath of person for the purpose of obtaining information in order to take proceedings.—A Magistrate in such a case could not examine him on oath.⁴⁹

36. *Krisnappa*, AIR (1924) N 51 following *Madhub v. Novodeep*, (1889) 16 C 121.

37. *Kunwar Bahadur*, (1920) 21 Cr LJ 696 : 57 IC 936 ; *Pahalwan Singh*, 27 Cr LJ 1344.

38. *Mritunjoy Gon v. Shristidhar*, (1919) 23 CWN 520.

39. *Leakat Hossain*, (1907) 12 CWN 246 : 7 CLJ 70 : 7 Cr LJ 103.

40. *Garpar D'Silva*, (1882) 6 B 479.

41. *Sarat Chandra Rakhit*, (1889) 16 C 766 (FB) followed in *Banku Behari Naik*, (1903) 7 CWN 708.

42. *Madhab v. Nabadvira*, (1889) 16 C 121 ; Overruled by *Sarat Chandra Rakhit*, 16 C 766 (F B).

43. *Abdulla Saheb*, (1900) 24 M 262 ;

Ranchnod Dayal, (1873) 10 B HCR 424, see contra *Raiji Daji*, (1893) 18 B 380 (FB).

44. *Satish Chandra v. Lokendra Lal*, 39 CWN 1053 ; 37 Cr LJ 936.

45. *Kamaleswar Banarjee*, 54 CWN (2 DR) 71.

46. *Ram Chun Singh*, (1872) 18 WR (Cr) 15, see *Ramdayal Singh*, (1870) 5 BLR App 89.

47. *Sagatoo Mah*, (1874) 22 WR (Cr) 49, followed in *Kultarin*, (1876) 1 A 129 : Proceedings, (1873) 7 MHCR App 17.

48. *Anon*, 7 MHCR App 28.

49. *Haricharan Singh*, (1900) 27 C 455 : 4 CWN 249.

8. Trial undesirable though not illegal.—A District Judge who has, on hearing a civil appeal, sanctioned the prosecution of a party for forgery, is not debarred by Section 473 of the Code (X of 1872) from trying the offence in his capacity as a Sessions Judge.⁵⁰

9. Sub-section (2).—Only a Magistrate who has the power to commit may commit to the Court of Sessions in contempt proceedings.

CHAPTER XXXVI

OF THE MAINTENANCE OF WIVES AND CHILDREN

Of the Maintenance of wives and children.—This chapter is composed of 3 Sections (Sections 488, 489 and 490). Section 488 provides for an order for maintenance of wives and children. Section 489 contemplates that the Magistrate may alter the allowance on proof of a change in the circumstances of the person receiving such allowance, or under clause (2) he may cancel or vary the order in consequence of any decision of a competent Civil Court and Section 490 provides for the enforcement of such order. Before dealing with Sections 488, 489 and 490 it would be pertinent to deal with a general view of these sections.

General.—Before a Magistrate makes an order under Section 488 (Act X of 1882) he must find that the complainant is the wife of the person from whom she claims maintenance, and it is necessary for the wife to prove that the husband “neglects or refuses to maintain her”.⁵¹ The *English Statutes and Decisions* “which must have been familiar to the Indian Legislature when the Code of Criminal Procedure was passed” are recited in the judgment of West J. in *Shaikh Fakiruddin*.⁵²

Nature of proceedings under this Chapter.—(i) *Proceedings are judicial proceedings.* See Section 4(m). “The proceedings under Chapter XLI of the Code of 1872 (corresponding to present Chapter XXXVI) are judicial proceedings in their nature and must not be conducted as if they were ministerial matters”.⁵³

(ii) *Person proceeded against is not an accused.*—This is now clear in view of the Amending Act XVIII of 1923 having deleted sub-section (7) and amended sub-section (9). Section 343 does not apply to a proceeding under this section.⁵⁴

(iii) *Proceeding in a criminal case for the purpose of transfer.*—A District Magistrate is competent under the general terms of Section 528 (1) of Cr. P. C. to transfer to his own Court the maintenance proceedings under Section 488 of the Code, pending before a Court subordinate to him.⁵⁵ In view of the Amending Act XVIII of 1923 having deleted ‘criminal’ before ‘case’ in Section 526 (i), (ii) and (iii), such cases can be transferred.

50. *Gasper D'Silva*, (1882) 6 B 479.

51. *In re Gubbdas Bhadas*, (1891) 16 B 269 ;
Syed Saib v. Meerain Bee, (1909) 20
MLJ 12 : 10 Cr LJ 502 : 4 IC 140.

52. (1884) 9 B 40.

53. *Laraiti v. Dau Dial*, (1882) 5 A 224 :
(1882) AWN 240 decision under Sec-
tion 536 of Act X of 1872.

54. *In re Bai Manek*, (1928) 30 Bom LR
958 ; see *contra Demello v. Demello*,
(1926) 27 Cr LJ 1000 : 96 IC 856 ;
Sew Kumhar v. M. Kumharin, 63 CWN
341.

55. *Mussammat Ghulam Rukhia*, (1904) 5
PR 1905 : 2 Cr LJ 40.

Personal law if suppressed by statutory provisions in Chapter XXXVI. (i) *of a wife*.—The personal law of the individual is different from the statutory right to maintenance given by Section 536 of Act X of 1882 corresponding to the present section. Under the Mahomedan Law (Shia Law) a *muta* wife is not entitled to maintenance but she is entitled to maintenance under Section 488.⁵⁶ The effect of *Apostacy* of a Mahomedan wife *ipso facto* dissolves the marriage, and the wife is not thereafter entitled to receive maintenance from her husband.⁵⁷

(ii) *of a child*.—The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties.⁵⁸

488. Order for maintenance of wives and children.—(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) **Enforcement of order.**—If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or

56. *Luddun Sahiba*, (1882) 18 C 736, followed in *Din Muhammad*, (1882) 5 A 226.

57. *Sonaulla v. Ma kin*, (1918) 9 LBR 206 : 12 Bur LT 60 : 19 Cr LJ 799 : 46 IC

719.

58. *Kariyaddan Pokker v. Kayat Beeram Kutti*, (1895) 19 M 461.

keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him :

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons cases :

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or as the case may be, the mother of the illegitimate child.

SYNOPSIS

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—Saurashtra.
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5. Effect of 1923 and 1955 Amendments.
6. Scope.
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- (b) Second application.
- (bb) Compromise.
- (c) Burden of proof.
- (d) Ss. 200—203 inapplicable.
- (e) Order cannot be rescinded.
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 30. Sub-section (5).
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 31. Sub-section (6).
 32. Sub-section (7).
 33. Sub-section (8).
 34. Jurisdiction of Court.
 35. Temporary Residence.
 - Casual Visitor.
 - Settled abode of mistress.

1. Legislative Changes.—This section was amended by Section 131 of Act XVIII of 1923. The words 'five hundred' rupees have been substituted for 'one hundred' in sub-section (1), *vide* Act 26 of 1955.

2. State Amendments—

(1) **Bombay.**—In sub-section (1), the words 'the District Magistrate' and the words 'a Sub-divisional Magistrate' shall be deleted, *vide* Bombay Act 23 of 1951.

(2) **Saurashtra.**—Same as in Bombay, *vide* Sau. Act 4 of 1952.

3. Report of the Select Committee.—"We notice that the original Bill proposed to raise from Rs. 50 to Rs. 100 the amount awardable as maintenance under Section 488. This proposal was rejected by the Committee of 1916, but in view of the passing of the Maintenance Orders Enforcement Act, 1921 which enables our Court to enforce summary orders up to an amount of £2 a week, we think the limit in our own land might as well be raised to Rs. 100. This involves a consequential amendment in Section 489.

4. Statement of Objects and Reasons.—(*Vide* Cl. 112 of Bill of 1914).
 "Firstly, the maximum amount payable for maintenance has been raised from rupees fifty to rupees one hundred per mensem. Secondly, in default

of payment of maintenance a Court is authorised to impose a sentence of six months' imprisonment in lieu of the existing limit of one month's imprisonment for each month's allowance unpaid in whole or in part. *Thirdly*, a limit of one year from the date of default has been imposed within which a warrant for the realisation of maintenance due must be applied for. *Fourthly*, the word 'wilfully' which now qualifies the neglect to comply with an order, has been omitted, owing to the difficulties which have arisen in its interpretation. *Fifthly*, the words 'commits adultery' have been substituted for the words 'is living in adultery', and a woman who has been guilty of adultery before the order is obtained is precluded from obtaining an order for maintenance. An order for maintenance may also be cancelled if it is proved that the woman commits adultery after it has been passed. *Finally* for the words 'accused' which is inappropriate in this section, the words 'person against whom proceedings are taken' have been substituted."

In the original Bill Clause 112 in sub-section (3) 'six-months' imprisonment was proposed and in sub-section (4) it was proposed to substitute 'commits adultery' in place of 'living in adultery' and in sub-section (5) for the words 'is living in' before 'adultery' it was proposed to insert 'or at any time commits adultery' beyond the amendments that have passed into law. The Select Committee did not accept the above amendments as referred to in the foregoing paragraph. Unfortunately a salutary provision *viz.* a woman who has been guilty of adultery before the order is obtained and thus would have been precluded from obtaining an order of maintenance has been neglected. The Courts have interpreted the expression 'living in adultery' to mean that a single lapse or an isolated act of adultery will not be sufficient but a continuous act⁵⁹. It has been suggested in 32 C. W. N. cxxxiv that the Legislature should, in sub-section (4), substitute, for the words, "living in adultery," the words, "found guilty of adultery." It seems the suggestion in the proposed Bill which was not accepted by the Select Committee should be accepted by the Legislature.

5. Effect of the 1923 Amendment.—Having regard to Section 489 (2) introduced by the Amending Act XVIII of 1923 it seems that the view taken in the following decisions⁶⁰ that the subsequent decree for restitution of conjugal rights puts an end to the order of maintenance passed under this section has been restored, and the view taken in *Bogyi v. Ma Nyin*⁶¹ *viz.* that such decree does not affect the maintenance of the child, or the views in *Subhudra v. Bardeo Dube* and other cases⁶² which held that such decree does not affect the order under this section seem to be no longer good law. In sub-section (1) *one hundred rupees* has been substituted for 'fifty rupees' and it has recently been held by the Madras High Court that the words, 'in the whole', which follows the said expressions, do not mean that Rs. 100 is the maximum limit for all dependants together but means for all the kinds of expenses of each dependant such as boarding, lodging, medical expenses and school fees *etc.*⁶³. In sub-section (3), a new proviso has been added

59. *Ful Chand v. Maganlal*, (1927) 51 B 160 : 30 Bom LR 79—see cases referred to.

60. *Bai Parvati v. Mansuk Jetha*, 44 B 972 : 22 Bom LR 1097 : 59 IC 361 ; *In re Chandulal Ramchand*, (1919) 43 B 885 : 21 Bom LR 766 : 20 Cr LJ 687. *Nur Mahammad v. Ayesha Bibi*, (1905) 27 A 483 ; *Venkayya v. Maddu Paidma*, (1923 March) 46 M 721 : 45 MLJ 104 : 24

Cr LJ 720 : AIR (1923) M 707.

61. 13 Bur LT 104 : 22 Cr LJ 127 : 59 IC 559 (R).

62. (1895) 18 A 29 followed in *Illath Narayanam Morsad v. Kethil Iliticherry Amma*, (1917) 33 MLJ 449 : (1918) MW. 65 : 18 Cr LJ 971.

63. *Kent v. Kent*, (1925) 49 M 891 (896, 897).

by Section 131 of the Amending Act XVIII of 1923 which has prescribed a limitation of 1 year for recovery of arrears. The Legislature has now enjoined that the power to enforce payment of arrears is limited to arrears due for *one year* only, *vide* "Statement of Objects and Reasons" quoted *supra*. Under the previous Code there was no such bar⁶⁴. Sub-section (7) has been deleted in view of the insertion of Section 340 (2), and the old sub-section (8) has been renumbered as sub-section (7). The amendment in sub-section (8) corresponding to old sub-section (9) is consequential upon the amendment of Section 340 *supra*.

Effect of 1955 Amendment.—The amount that may be awarded as maintenance has been raised from one hundred rupees to five hundred rupees.

6. Scope.—"Section 488 provides a speedy remedy and safe guard a deserted wife or child from starvation but when other issues are raised they should be settled in the Civil Courts, and nothing is to be gained by a protracted litigation in the Criminal Courts. Doubtless it is with that intention that no appeal has been allowed from orders under Section 488"⁶⁵. "With regard to the maintenance of children, it is sufficient under Section 488 (1) if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. *An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order.* The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father should be handed over to him"⁶⁶. Section 488 does not contemplate preliminary enquiry before issuing notice.⁶⁷

7. Procedure—is that of a summons case *vide* sub-section (6). Ordinarily an inquiry must be as full as in a warrant-case.⁶⁸

(a) Recording of evidence.—Proceedings under Ch. XXXVI of Cr. P. Code cannot be conducted as in a summary trial under Ch. XXII but the evidence taken must be recorded as provided by Section 355⁶⁹. An order awarding maintenance made without recording evidence is illegal.⁷⁰

(b) Second application.—On principles of *res judicata* the second application for maintenance is barred⁷¹ but where the previous application had been dismissed for default, *held* that there was no bar to entertaining the second application.⁷² This decision was followed in *Maung Hla Maung v. Ma On King*.⁷³

(bb) Compromise.—"A compromise with the order" based on which has also been declared unenforceable because it contains conditions

64. *Mi Mya v. Nga Padon*, (1909) 11 Cr LJ 79 : 4 IC 900.

65. *In re Kandasami Chetty*, (1925) 50 MLJ 44.

66. *David Sasson*, (1925) 49 B 562 (565) : 27 Bom LR 359.

67. *Nand Lal Misra*, (1960) 3 SCR 431 : A 1960 SC 882 : (1960) 1 MLJ n 53 (SC) ; 1960 Cr LJ 1246.

68. *Lingadu*, (1885) Weir II 629.

69. *Kali Dassi*, (1892) 20 C 351.

70. *Venkata Chala Padiachi*, (1882) 2 Weir 628 ; see *Gonda*, (1870) 13 WR (Cr)

19.

71. *Laraiti*, (1882) 5 A 224 ; *Sadrudin v. Musahille Khanam*, 24 PR (Cr) 1916 : 18 Cr LJ 326 ; *Mulesari v. Nand Kumar Singh*, 17 Cr LJ 106 : 32 IC 842 ; *Mussamat Janoti v. Gadalo*, (1877) 1 CLR 89.

72. *Mon Mohan De v. Surabala Dasi*, (1919) 24 CWN 32 : 30 CLJ 128 : 21 Cr LJ 3 where *Hakimi Jan Bibi v. Mouza Ali*, (1905) 1 CLJ 214 was distinguished.

73. (1927) 5 R 697 : AIR (1927) R 328.

other than for payment of a cash monthly allowance does not oust the jurisdiction of the Magistrate to entertain and decide a second application under Section 488 although a suit is brought on the basis of a compromise and is decreed.⁷⁴

(c) **Burden of proof.**—In maintenance proceedings under the Cr. P. Code the wife must show that she is the accused.^{74a}

(d) **Sections 200 to 203 are inapplicable to such proceedings.**—An application under this section is not a complaint and a Magistrate cannot therefore take action under Section 202.⁷⁵

(e) **Order can not be rescinded.**—Section 369 applies to an order under this section and the order cannot be revised.⁷⁶

(f) **Ex parte proceedings**—may be taken only if the Magistrate is satisfied that the husband is wilfully avoiding service, or wilfully neglects to attend the Court. See *proviso* to sub-section (6).

Proceedings against a person for maintenance on the ground that he is the father of an illegitimate child should not be conducted *ex parte*⁷⁷ and evidence in such proceedings ought to be taken in the presence of such person or his pleader unless he is wilfully avoiding service of summons or neglecting to attend the Court.⁷⁸

Ex parte order how can be set aside.—A Magistrate has under sub-section (6) the power to re-open a case in which the maintenance has been awarded *ex parte* by his predecessor and to revise such an order where the petition is presented within 3 months of the order.⁷⁹

(g) **Court fees.**—An application under this section should not be dismissed for failure to comply with an order for payment of court-fees.⁸⁰

8. Divorce.—As the Magistrate will have to determine under Cl. (1) that the woman or the lady applying for maintenance is the “wife”⁸¹ and the burden is on her to prove marriage⁸², the husband before the order is made can take the plea of ‘divorce’ and prove it. The Magistrate is to decide such questions⁸³ and he is bound to inquire into a plea and if he finds that it is a valid plea he cannot pass an order under this section.⁸⁴

Ever after the passing of the Hindu Marriage Act, 1955, customary rights of divorce were saved and such divorces continued to have the force of law among the communities where the customs prevailed. Where the trial Court finds that the petitioner and the husband were actually divorced by means of a caste panchayat, the High Court will not interfere.⁸⁵

Jurisdiction of criminal court is not excluded by virtue of Sections 4 and 18 of Hindu Adoption and Maintenance Act. Amount of maintenance has

74. *Smt. Jurdial Kaur v. Jang Singh*, A 1959 Punj 185 : 1959 Cr LJ 516.

74a. *Wajoon v. Ma Thein Tin*, (1913) 7 Bur LT 71 : 15 Cr LJ 484.

75. *Sardaran v. Amir Khan*, 29 PR 1905.

76. *Nanda Narain Newar v. Manmaya Kamini*, (1916) 21 CWN 344.

77. *Anon*, 7 MHCR App xlii.

78. *Ajoy Chandra Das v. Duli Bewa*, 1 CLJ 102.

79. *Maung Tun Yin v. Ma Thim Shin*, (1923) 2 Bur LJ 61 : 24 Cr LJ 928 : AIR (1923) R 159.

80. *Ponnamal*, (1892) 16 M 234.

81. *Gulabdas Bhaidas*, (1891) 16 B 269 ; *Shah Abu*, 19 A 50 (FB).

82. *Wajoon v. Ma thien Tin*, 7 Bur LT 71 : 15 Cr LJ 484 : 24 IC 572.

83. *Hasan Chanea v. Mi Sin*, (1915) UBR 1, 53 : 16 Cr LJ 531.

84. *Weir* II 620.

85. *Nallathangal v. Naiman Ambulam*, (1960) 1 MLJ 134 : A 1960 M 179 : 1960 CrLJ 490 ; see *Belarani v. Bhupal Chandra*, 60 CWN 212.

to be fixed having regard to the income of the husband.^{85a} The provisions of Section 488 will have no effect on Section 44 of the Divorce Act⁸⁶. Where the wife during the pendency of the divorce proceeding applies under Section 488 and the husband even though served fails to appear and does not take objection that proceedings are not maintainable and he cannot subsequently be allowed to raise this objection in a revision petition⁸⁷. The Magistrate is bound to decide the question of woman's status as wife, or the question of divorce if raised at the time of making the order or even when the wife seeks to enforce it.⁸⁸

The wife knowing about the divorce prior to her application cannot invoke the provisions of Section 488 against her husband. She can however claim maintenance for the child in her custody.⁸⁹

The plea of 'Divorce' can only be raised by the husband whenever he is called upon to show why he failed to comply with an order under sub-section (3).⁹⁰

Period of Iddat.—A wife is entitled to maintenance even after divorce until after the expiry of the period of Iddat.⁹¹ The period of Iddat should not be deemed to have expired until the expiry of 3 months from the date on which she was made cognisant of the divorce.⁹²

Order does not deprive husband of the right to divorce.—A Magistrate's order under this section does not deprive the husband of his inherent right to divorce his wife and after such divorce the Magistrate's order can no longer be enforced.⁹³

Co-habitation does not put an end to the order under Section 488.⁹⁴

9. Making of the Order.—See sub-section (2) and proviso to sub-section (3).

(i) Conditional order.—The object of maintenance proceedings is not to punish a parent for his past neglect but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to support. If therefore, a father offers to maintain his son on condition that he lives with him the Magistrate should refrain from passing an order against the father, until he has had an opportunity at least of proving that the offer is made in good faith.⁹⁵ But the Punjab Chief Court in an earlier decision held that an order for the maintenance of a wife passed on condition that she resides in her husband's house is illegal.⁹⁶ A Magistrate cannot pass a conditional order under this section by dismissing the wife's

85a. *Ram Singh*, A 1963 A 355.

86. *James Fredrick Rowland v. Mrs. Raynab Rowland*, 62 CWN 221 : A 1959 C 703 : (1959) Cr LJ 1365.

87. *Robin Richard v. Mercy Richard*, A 1959 P. 489 : 1959 Cr LJ 1206.

88. *Janat Bibi v. Md. Abdul Rahman*, A 1955 AP 1.

89. *Abdur Rahman v. Ayivu*, A 1962 Ker 234.

90. *In re Punjalal Chunilal*, (1928) 30 Bom LR 617 : AIR (1928) B 224.

91. *Syed Sahib*, (1909) 20 MLJ 12 : 10 Cr LJ 502 : 4 IC 140 ; *Maung Bashwa v. Ma Nyun*, (1910) 4 Bur LT 13 : 12 Cr LJ 82 : 9 IC 457.

92. *Mahomed Hosain v. Ma Pwa Huit*, (1919) 10 LBR 104 : 56 IC 663.

93. *Kasim Pirbhai*, 19 A 50 (FB) ; *Mahmed Abid Ali Kunwar Kader v. Ludden Sahiba*, (1886) 14 C 276.

94. *Laxman Gajju v. Sitabai Laxman*, A 1958 B 14 : 1958 Cr LJ 23 ; *Kashinath Panda v. Padanbati Debi*, A 1956 Or 193.

95. *Sardar Mahamed v. Nur Mahomed*, (Nov. 1916) 22 PR Cr (1917) : 16 PWR (Cr) 1917 : 18 Cr LJ 811 : 41 IC 331, following *Man Singh v. Mt. Dherma*, 18 PR 1894.

96. *Jowala Devi v. Jamial Singh*, (Sep. 1911) 14 PR (Cr) 1917 : 18 Cr LJ 528 : 39 IC 496.

application on the husband's promise to provide for her and adding that if failed to do so he must pay her a certain monthly allowance. The Lahore High Court set aside such an order holding it to be ultra vires.⁹⁷ The wife can insist upon being kept in the house where the husband himself lives.⁹⁸

(ii) Final order.—Under sub-section (2) the allowance directed shall (a) be payable from the date of the order or, (b) if so ordered, from the date of the application for maintenance.

A. It cannot have a retrospective effect from a certain date.⁹⁹—The Magistrate cannot direct maintenance for the period prior to the date of the order for maintenance, but can direct only *future* maintenance.¹ However an order directing payment in advance from the date of the order has been held to be legal.¹

B. Magistrate cannot direct maintenance exceeding five hundred rupees in the whole—Under the old Code Rs. 50/- was the maximum amount. The Amending Act (XVIII of 1923) increased the same to Rs. 100/-.

The Amending Act 26 of 1955 has raised the amount to Rs. 500/-. It was held under the Code as amended in 1923 that a Magistrate has no jurisdiction to make an order allowing maintenance at a monthly rate exceeding one hundred rupees.² "To contend that when a woman makes an application for herself and for her children she could only be given Rs. 100/- for the maintenance of herself and of her children whatever be the number is opposed to the clear wording of the section".³ Young daughters (aged ten and five years) residing with the wife were held entitled to separate maintenance.⁴

Maintenance of Rs. 30/- per month is not excessive when the annual income is not less than Rs. 1500/-.⁵

C. Payment directed must be a monthly rate and in coin.—See sub-section (1) "monthly allowance" and "such monthly rate".

The law does not allow an order for the payment of *two cloths* annually, the payment must be a monthly payment.⁶ An order for the payment of maintenance in *grain* is not in accordance with the Code.⁷ The section only permits the Court directing a monthly payment of money and an order directing a mixed payment in kind and in cash every year is contrary to the terms of the section.⁸

D. Fixing duration of the period.—An order fixing the duration of the period for which the maintenance ordered is to be paid is cancelled as unauthorised by law.⁹ But under the English law an order for maintenance

97. *Notha Singh v. Mst. Harnam Kaur*, (1926) 7 L 313, following *Phula Khan*, 213 PLR 1915 and *Jowala Devi v. Jamait Singh*, 14 PR (Cr) 1917 and 2 Weir 630.

98. *In re Bai Manek*, (1928) 30 Bom LR 958.

99. (1875) Weir II 635.

1. *Rose Cracker*, (1927) 29 Cr LJ 458 : 108 IC 906 : AIR (1928) M 899.

1a. Rat 189.

2. *Palmerino v. Palmerino*, (1926) 28 Bom LR 1299.

3. *Kent v. Kent*, (1925) 49 M 891 (893);

Mukta v. Datta Mahadev, (1924) 26 Bom LR 186 ; *Govinda Rao v. Channanabai*, A 1955 An WR 407 (b).

4. *In re Bai Manek*, (1928) 30 Bom LR 958.

5. *Karnail Singh v. Bachan Kaur*, A 1955 Punj 26 ; 1955 Cr LJ 334.

6. (1884) Weir II 627.

7. *Selambal*, (1883) Weir II 626 ; *Dilsukh*, (1911) 19 PR 1911 Cr : 13 Cr LJ 188 : 13 IC 1004.

8. *Mukta v. Datta Mahadev*, (1924) 26 Bom LR 186 (187).

9. (1901) 2 Weir 634.

“till the child shall no longer be chargeable on the Parish” was held good.¹⁰ *Progressing by increase of rate is illegal.*¹¹

E. Amount how to be fixed.—In fixing the amount of maintenance, no luxury should be allowed and necessities of life should be considered according to the station in life of the applicant and the means of the respondent.¹² “The sum he should be ordered to pay is fixed according to his means, the status of the parties and the age of the child. No other consideration should come in”.¹³

If a minor is living with the legally constituted guardian other than the father, then an order for maintenance under this section cannot be refused merely on the ground that the offer of the father to maintain the child, if the latter lives with him, is not accepted.¹⁴ If the father wants to have them in custody he must enforce his rights if any, in due Civil Court.¹⁵ The original order will remain in force unless cancelled.¹⁶

F. Principle as to right of maintenance while wife lives separate.—An order under Section 488 for the maintenance of a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered.¹⁷ See in re *Bai Manek*¹⁸ where it has been held that the wife can insist upon living with her husband. Where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband or where the breach between the husband and the wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate with him. The principle applies equally to the case of a Hindu or Mahomedan, whether the question arises under Section 488 of the Code or in a suit for restitution of conjugal rights.¹⁹

10. Enforcement of the order:—See Commentary on sub-section (3). The order may be enforced by any Magistrate in any place where the person against whom the order is made resides, *vide* Section 490.

11. Limitation.—Under the old Code there was no period of limitation for recovery of arrears of maintenance. The Amending Act (XVIII of 1923) by inserting the last proviso to sub-section (3) has enjoined that the arrears of maintenance cannot be recovered for more than a period of one year.

12. Subsequent change in the circumstances of the parties.—The Magistrate may cancel the order under sub-section (5) or alter or vary the same under Section 489 *infra*. Sub-section (2) to Section 489 provides for cancellation or variation of the order in view of an order or decision of a

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| 10. <i>Mathews</i> , 2 Salk 475 E. | 8 Bur LT 134 : 16 Cr LJ 656 : 30 IC 480. |
| 11. <i>Upendra Nath Dhal v. Soudamini Dasi</i> , (1886) 12 C 535 followed in <i>In re Ramayee</i> , (1890) 14 M 398 : 2 Weir 651 : 2 NWP HCR 454. | 16. <i>Pandera Nader</i> , (1926) 50 M 663 : (1927) MWN 111 : 52 MLJ 176. |
| 12. <i>Dragon v. Dragon</i> , 4 Bur LT 269 : 13 Cr LJ 55 : 13 IC 391. | 17. <i>Meenatchi Ammal v. Karuppa Pillai</i> , (1924) 48 M 503. |
| 13. <i>Baran Shanta, v. Ma Chan Tha May</i> , (1924) 2 R 682 (685). | 18. 30 Bom LR 958. |
| 14. <i>Mst. Sarfraz Begum v. Miran Baksh</i> , (1927) 9 L 313 (316) : 29 PLR 401 : AIR (1928) L 543. | 19. <i>Mt. Khurshid Begum v. Abdul Rashid</i> , (1926) 100 IC 169 : AIR (1927) N 139 (civil case) ; <i>Babu Ram v. Kokia</i> , (1923, Dec.) 46 A 210 : 22 ALJ 68 : AIR (1924) A 391. |
| 15. <i>Murgesan Mudaliar v. Godiamma</i> , (1914) | |

competent Civil Court. This was not provided in the old Code but case-law regulated the same and has now been embodied in Section 489.

“Divorce” is not specifically mentioned in the Code but it has been held that the order cannot be enforced after “Divorce”. See Commentary *supra* under the heading “Divorce”.

‘Arrangement between the parties out of Court’ after the order, although not specifically provided for in the Code may come under ‘living separately by mutual consent’ noted under sub-sections (4) and (5).

Sections 488 and 540.—Section 540 applies to a proceeding under this section. Where a Court exceeds the reasonable discretion afforded by Section 540 in examining Court witnesses who could have been included in the list of petitioners’ witnesses *held*, the order is bad.²⁰

13. Cancellation of the order.—See sub-section (5) and Section 489 (2) 1st part.

14. Alteration in allowance.—See Section 489 *infra*.

15. Appeal.—No appeal lies against an order under this section.

An order of maintenance under Section 316 of the Code of 1861 is a “judicial proceeding of a criminal Court” within the meaning of Section 404 of that Code, but no appeal lies against such order under Section 409 of that Code.²¹ The Calcutta High Court in a decision under the same Code of 1861 held by a majority (Markby, J., dissenting) that there was no conviction of an offence and that consequently no appeal lay.²²

Under the amended Code of 1923 a defendant is not an “accused”, *vide Appeal in Goundan v. Kuthi Yammal*.²³ Hence no appeal lies.

No Letters Patent Appeal.—No appeal lies even under Section 15 of the Letters Patent against the order of a single Judge of the High Court.²⁴

16. Revision—lies to the High Court under Section 439 and the party should move either the District Magistrate or the Sessions Judge under Sections 435 and 438 before moving the High Court direct as in other applications for revision to the High Court. Section 435 uses the expression “as to the regularity of any proceedings of such inferior Court” and Section 488 is a proceeding within the meaning of that section.

When a Joint Magistrate has rejected a petition for maintenance, the District Magistrate has no power to take evidence under Section 438 except for the purpose of a recommendation to the High Court.²⁵

Remedy in Civil Court—order unsatisfactory—Interference in revision.—Where the order under this section is considered unsatisfactory the Madras High Court declined to interfere with it in revision because it was obvious from the statute itself that persons aggrieved by these Magisterial orders are expected to take their case to the Civil Courts.²⁶

20. *Manninath Kullapava Vettil v. Bhargava Ammal*, (1926) 52 MLJ 118 : AIR (1927) M 361 : 100 IC 123.

21. *Thakubin Ira*, (1868) 5 Bom HCR 81 (Cr Ca).

22. *Golam Hossein Chowdhury*, (1867) 7 WR (Cr) 10 JB.

23. (1924) 48 M 388.

24. *Rajana Appadu*, (1915) 39 M 427 : 28 MLJ 483 : 17 MLT 330 : 16 Cr LJ 326 : 28 IC 662 following *Thakubin Ira*, (1868) 5 Bom HCR (Cr Ca) 81.

25. *Mt. Mahaginia v. Ramcharan*, (1914) 12 ALJ 461 : 15 Cr LJ 575 : 25 IC 327.

26. *Kandasami Chetty*, (1925) 50 MLJ 44 (45).

17. Further Enquiry.—*Can it be directed?*—The language of Section 436 which corresponded to old Section 437 precludes the High Court or the Session Judge from directing a further enquiry.²⁷

The High Court has power under Section 439 to set aside or modify a Magistrate's order awarding maintenance under Section 488, or to direct a further enquiry on the ground that the rate fixed by the order appears to be beyond the means of the person ordered to pay the allowance.²⁸

18. Sub-section (1)—Who can be ordered to pay maintenance to any person.—It is only the husband who is liable to maintain his wife and the father alone is liable to maintain his child.

Father-in-law not liable.—“The husband's father cannot be made jointly liable for the wife's maintenance²⁹ even though the husband is a minor.³⁰

Son in a Joint Hindu family.—A Hindu not divided from his father can be ordered to maintain his wife under this section.³¹

Minority of the husband is no excuse.—“That the youth is 16 years of age only, and studying at School would not by itself be a sufficient reason for holding him excused”.³²

19. ‘Having sufficient means’.—There must be a consideration and determination upon evidence of ‘sufficient means to maintain’ before the Magistrate can pass an order under this section.³³ The *burden of proof* is on the father or the husband as the case may be, to prove that he has no sufficient means.³⁴

Having regard to the principle that a husband is bound to maintain his wife whatever might be his means or income the amount of maintenance payable to the wife must necessarily depend upon the needs for sustenance in such a case.^{34a}

‘Means’.—The expression ‘means’ in Section 488 does not signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife.³⁵ The fact that the husband may be of slender means does not justify absolute refusal of an order for some maintenance.³⁶

Father having means failing to support child.—The section applies to the case of a father who has sufficient means to maintain his child but neglects to do so.³⁷

*Husband turning out his wife is liable.*³⁸

27. *Mt. Parbati v. Chotey*, (1904) 17 CPLR 127.

28. *Subbanasari v. Karuppai*, (1886) Weir II 575.

29. *Waryam Singh*, (1913) 12 PR (Cr) 1914 : 245 PLR 1914 : 15 Cr LJ 577 : 25 IC 329.

30. *Miran*, 26 PR 1903 : 26 PLR 1904.

31. *Ramasami*, (1889) 13 M 17 : 2 Weir 620.

32. *Roshun Lall*, (1872) 4 NWPHCR 123 (125).

33. *Ibid.*

34. *Ma Tha v. Nga San E.*, (1911) UBR

190 : 13 Cr LJ 162.

34a. *Ganganama v. Subharayndu*, A 1961 AP 510 ; 1961 (2) Cr LJ 760 *see also* *Kundeswari Maopan*, (1961) 1 MLJ 18 ; A 1960 M 348.

35. *In re Kandasami Chetty*, (1925) 50 MLJ 44 (45) ; *Mahammed Ali*, A 1944 L 392.

36. *Chockalingam Pillai*, (1887) 2 Weir 617.

37. *Ma E. Shi v. U. Aditsa*, (1922) 24 Cr LJ 510 : 72 IC 974 : AIR 1922 (R) (UB) 15.

38. *Aishan v. Sher Muhammad*, 22 Cr LJ 149 : 59 IC 853.

20. 'Neglects or refuses to maintain his wife or his legitimate or illegitimate child'.—This expression does not apply where the husband states that he is willing to maintain the wife and the wife states that she is willing to live with her husband but contends that he refuses to maintain.³⁹

*A definite finding on the point is necessary.*⁴⁰

The grounds upon which the order is based should be set out in the order itself.⁴¹

What wife has to prove.—All that she has to prove is that he has sufficient means and that he has neglected or refused to maintain her.⁴² A deliberate attribution to immorality to a wife must be construed as legal cruelty entitling the wife to live separately and claim maintenance.⁴³ Last minute offers to take back the wife are open to scepticism.⁴³

Proof of neglect or refusal to maintain.—The High Court quashed proceedings where there was no evidence that the husband was unwilling to support his infant children, but on the contrary he stated that he was willing to do so provided they resided under his roof and not in his father-in-law's house.⁴⁴

Such neglect may be express or implied.—A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied.⁴⁵

A mere offer to pay maintenance at the time of trial is not a justification to reject an application under this section.⁴⁶

No refusal to maintain after a compromise is entered into.—Once a compromise is entered into to pay a maintenance, *held* there is no refusal to maintain on the part of the husband and Section 488 has no longer any application.⁴⁷

Adjudication of Insolvency of husband completely disproves wilful neglect.—The fact that a husband, who is in arrears of maintenance, has been adjudicated an insolvent, under Section 27 of the Provincial Insolvency Act (V of 1920) is conclusive, so long as the order of adjudication stands, that he is unable to pay his debts, and he is therefore not guilty of wilful neglect within the meaning of Section 488.⁴⁸

Legitimate or illegitimate child unable to maintain itself.—"Child" has not been defined in the Code but a "Child" is a person who has not reached full age. The attainment of puberty cannot be taken as the age when childhood ceases.⁴⁹ "Child" in Section 488 means one who has not

39. *Phula Khan*, 213 PLR 1915 : 16 Cr LJ 86.

40. *Gulabdas Bhaidas*, (1891) 16 B 269 (272).

41. *Anon*, MHC Pro. 28th Nov. 1874.

42. *Ramji Malvia v. Smt. Munni Devi*, A 1959 A 767 : (1959) Cr LJ 1386. See *Balraj Kumar*, A 1962 Punj 266.

43. *Kandaswami Moopan*, A 1960 M 348 (see cases referred to).

44. *Panchoo Dass v. Doodhamayi*, (1871) : 16 WR (Cr) 72 : 8 Beng LR App XIX.

45. *Bhikaiji Maneckji v. Maneckji, Manchaji*, 9 Bom LR 359 : 5 Cr LJ 334, followed in *Mt. Hidyat Khatun v. Mahomed Hayat*, (1912) 6 SLR 208 : 14 Cr LJ 503 : 19

IC 959 ; *Purnashashi v. Nagendra*, A 1950 C 465.

46. *Kembu Ammal v. Ranganatham*, (1923 Aug.) 25 Cr LJ 9 : 76 IC 30.

47. *Budhu Ram v. Khem Devi*, (1926) 27 Cr LJ 779 : 95 IC 315 : AIR (1926) L 469.

48. *Halphida v. Halphida*, (1923) April, 50 C 867 (871) : AIR (1924) C 230.

49. *Krishnaswami Ayyar v. Chandravadan*, (1913) 37 M 565 : 25 MLJ 349 : 14 MLT (HC) 224 : (1913) MWN 695 : 14 Cr LJ 525 : 20 IC 1005 followed in *Baran Santa v. Ma Chan Tha May*, (1924) 2 R 682 and *Gangaramsa v. Vishnusa*, (1922) 5 NLJ 247 : 23 Cr LJ 167.

attained the age of majority. Maintenance is to be allowed until the child can maintain itself.⁵⁰ The rights conferred by this section are very restrictive. The father is bound to maintain a child if he is not able to maintain himself.⁵¹ A child who has attained majority is not entitled to claim maintenance from his father as he is capable of earning his livelihood.⁵²

Even if it is proved that the children were born to a person as a result of illegitimate union, the father is bound to maintain them.⁵³

Illegitimate child—Proof of Paternity.—A woman may be of bad character and yet entitled to an order for maintenance of an illegitimate child if she proves that the man against whom she proceeds is the father of the child. Such father is a competent witness in his own behalf in such proceedings.⁵⁴ In England the positive rule at common law is clear that neither husband nor wife can be examined for the purpose of proving non-access during marriage. That is still the law except as to any proceeding in consequence of adultery. But under Section 120 Evidence Act parties to civil suits are competent witnesses and as proceedings under Section 488 have been held to be of a Civil nature,⁵⁵ a wife can be examined.⁵⁶

The compulsory direction by the Magistrate in a proceeding under this section to the defendant to give him blood for blood-test being made cannot be supported.⁵⁷

A Civil Court decree cannot affect the order of the Magistrate regarding the paternity of an illegitimate child.⁵⁸

Magistrate not to decide lawful guardianship of the illegitimate child.—A Magistrate has no power to enter into any question as to the lawful guardianship of a child.⁵⁹ If the children are illegitimate, the refusal by the mother to surrender them to the father is no ground for refusing maintenance.⁶⁰

Legitimate child.—According to Mahomedan Law a mother is entitled to the custody of children even when she has been divorced by her husband, but that does not relieve the father from the obligation of maintaining them.⁶¹ If the children are legitimate the question of the mother's right to their custody would depend upon the personal law of the parties.⁶² The husband would not be bound to maintain the infant daughter as long as she remained under the guardianship of the mother.⁶³

A child cannot be deprived of maintenance because his mother refuses to give him in the father's custody. The father cannot insist under this section that the children should be given to his custody.⁶⁴

50. *Khedam Rajwarar v. Lagan Singh*, (1920) 2 PLT 109 : 22 Cr LJ 336 : 61 IC 64 ; *Saraswati*, A 1961 Ker 297.

51. *Abdul Rahim v. Ma Shwe May*, (1922) 1 Bur LJ 123 : 24 Cr LJ 590 (1) : 73 IC 334 (1) : AIR (1923) R 45 (1).

52. *Gangaramsa v. Vishnusa*, 5 NLJ 247 : 23 Cr LJ 167 : 65 IC 631 : AIR (1922) N 249.

53. *Narayani Amna v. Namukutty*, A 1958 Ker 216 : 1958 Cr LJ 1024.

54. *Hiralal v. Saheb Jan*, (1895) 18 A 107 : (1895) AWN 242 ; *Mahadeo Rao v. Jashoda* A 1962 M 141.

55. *Sabad Domni v. Katiram Dome*, (1873) 20 WR (Cr) 58 ; *Raghavan Pillay*, A 1960 Ker 119.

56. *Rozairo v. Ingles*, (1893) 18 B 468.

57. *Subhaya Goundan v. Ahourpelu*, A 1959 N 396 : 1959 Cr LJ 1037.

58. *Sabad Domni v. Katiram Dome*, (1873) 20 WR (Cr) 58.

59. *Lal Das v. Nekunjo Bhaisiani*, (1878) 4 C 374.

60. *Kariyadam Pokkar v. Kayat Biran Kutli*, (1895) 19 M 461.

61. *Ayshabai*, (1904) 6 Bom LR 536.

62. *Kariyadam Pokkar v. Kayat Biran Kutli*, (1895) 19 M 461.

63. *Maymuda Bibi v. Nurukhan*, (1910) 15 CWN xxvii see also *contra*, *Copen v. Copen*, (1911) 15 CWN cxxxvi.

64. *Rahimunisa v. Md. Ismail*, A 1958 Hyd 14 : 1958 Cr LJ 47.

Absence of specific provision in Mohamedan Law does not affect the right of a Mohamedan illegitimate child to maintenance against father but the decision of a Civil Court is binding on Criminal Court and cannot be ignored.^{64a}

21. 'Unable to maintain itself'.—These words seem to mean "unable to earn livelihood for itself", *i. e.*, a complete livelihood, such as an adult person might earn, without depending on any other person.⁶⁵

The words "unable to maintain itself" in Section 488 (1) relate to the absence of sufficient maturity in physical and mental development in the child rendering it in consequence unable to earn its livelihood by its own exertions⁶⁶ and do not refer to inability through poverty or absence of means.⁶⁷

These words are not confined to physical inability to earn a livelihood as was held in *Parthi Velappa Moideen*⁶⁷ but include pecuniary inability.⁶⁸

When an application is made under Section 488 by the child it is the duty of the Magistrate to enquire first whether the child is unable to maintain itself; secondly, if the father is in a position to support his child; and thirdly whether the father is neglecting to maintain his child. Past neglect may be a cogent factor in coming to a finding that at the time of the application the father is neglecting or refusing to support his offspring.⁶⁹

22. Pursuit of higher education.—When the son is able to maintain himself but wants to prosecute his studies in order to better his prospects he has no right to force his father to comply with his wishes.⁷⁰

23. What classes of Magistrates have jurisdiction to pass such orders.—A District Magistrate, Presidency Magistrate, a Sub-Divisional Magistrate, or a Magistrate of the first class may pass an order under this section. A Magistrate of the second class cannot pass such an order even upon a transfer by the Magistrate contemplated above, but he can enforce an order of maintenance, *vide* Section 490.

The jurisdiction to take action arises only upon 'proof of such neglect or refusal' to maintain.

"We think that the word 'may' in Section 488 as distinguished from 'shall' shows that the Magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably, not capriciously."⁷¹

24. Sub-section (2)—'from the date of the order'.—The allowance can only be made payable from the date of the order.⁷² A Magistrate has no power to make an order for payment of any sum for the maintenance for any period prior to the date on which the application for maintenance was judged.⁷³

64a. *Nafees Ara v. Asif Sadat Ali Khan*, A 1963 A 143.

65. *Baran Shanta v. Ma Chan Tha May*, (1924) 2 R 682 (684).

66. *Todd*, 5 NWPSCR 237.

67. (1913) MWN 997 : 25 MLJ 355 21 IC 469.

68. *Chanton v. Chakkerpayyan Mathes*, 39 M 957 : (1916) MWN 111 : 17 Cr LJ 16 : 32 IC 144 followed in *Parappati Chinna v. Shankumni Menon*, (1919) 37 MLJ 361 : (1919) MWN 632 : 20 Cr LJ 73.

69. *Sardar Muhammad v. Nur Mohammad*,

(1910) 22 PR Cr (1917) : 16 PWR Cr (1917) : 18 Cr LJ 811: 41 IC 331; *Mst. Dhan Kuer*, A 1960 Punj 595.

70. *Abdul Rahim v. Ma Shwe Me*, (1922) 1 Bur LJ 123 : 24 Cr LJ 590 : 73 IC 334; AIR (1923) R 45 (1).

71. *Ponnayee v. Periya Moopan*, (1908) 31 M 185, following *Gantapalli Appalamma v. Gantapalli Yellayye*, 20 M 470 FB (476).

72. (1875) Weir II 635.

73. *Abdul Rahim v. Mst. Amir Begum*, (1926) 7 L 363.

25. Sub-section (3)—Enforcement of the order.—A new proviso has been added to this sub-section by Section 131 of Act XVIII of 1923 providing for '*limitation of one year*' for the realisation or recovery of arrears of maintenance. The same section of the said Amending Act has substituted for the words "wilfully neglects" the following words "*fails without sufficient cause*" in the beginning of this sub-section after the word "ordered". The following decisions⁷⁴ under the old Code which held that before acting under this sub-section the Magistrate must be satisfied that the default has been due to the wilful neglect on the part of the defendant, in view of the change in the wording of the statute, can no longer be treated as good law. Under the law as amended the Magistrate before issuing warrant and passing the sentence will have to record that the defendant has '*failed without sufficient cause* to comply with the order.'

The failure of the husband to obtain a cancellation of the order for maintenance under sub-section (5) does not preclude the husband from filing an objection under sub-section (3).⁷⁵

The phrase 'has contracted' occurring in the proviso, inserted in sub-section (3) by Act IX of 1949 is sufficiently wide to entitle a second wife to its benefit even in case where the husband has not married for the third time during the lifetime of the second wife.⁷⁶ Sub-clause (3) definitely prescribes a mode of execution of an order passed under Section 488 to be the same as that under Section 386. An undivided interest in movable properties could not be attached, seized and sold under Section 386 (1) (a).⁷⁷

Decree for restitution of conjugal rights—subsequent ill-treatment—wife absolved from condition of living with husband.—A decree for restitution of conjugal rights passed by the Civil Court, in the husband's favour cannot for ever fetter the discretion of the Magistrate in the exercise of his powers under *proviso* to Section 488 (3) of the Code.⁷⁸ It seems that the learned Judges in deciding this case had overlooked the provisions of Section 489 (2) and as such it cannot be treated as good law.

The provision in Section 488 (3) that the Magistrate may issue a warrant notwithstanding the husband's offer to maintain his wife itself contemplates that the offer has been made before the issue of warrant. An order by a Magistrate without issuing a notice and holding an enquiry is illegal.⁷⁹

'Issue a warrant for levying the amount'.—See Sch. V. Form XII.

Only one warrant may be issued for the whole of the arrears.—There is nothing in the amended Section 536 of Act X of 1872 to render levy of accumulated arrears of maintenance by a single warrant illegal.⁸⁰

'For levying fines'.—Under sub-section (3) read with Section 386 (1) (a) it is competent to a Magistrate to issue a warrant for levying the amount of maintenance due by attachment and sale of any movable property belonging to the person ordered to give maintenance even if such property consists

74. *Gyanada Dasi*, (1894) 22 G 291, followed in *Bhikukhan v. Zehiran*, (1897) 25 G 291; *Prabhulal v. Rami*, (1902) 25 A 165.

75. *Kamala Sundari Dassi*, 56 CWN 843.

76. *Kunti Bala Dasi v. Nabin Chandra Das*, 58 CWN 702.

77. *Buchi Ramiah v. Ruk Kana*, A 1961 AP 43.

78. *Rajpatti v. Devli*, (1924) 22 ALJ 806.

79. *Narain*, A 1959 A 556 : 1959 Cr LJ 1039.

80. *Sidheswar Teor v. Syamadasi Dasi*, (1894) 22 G 291 (296).

of a share in a joint Hindu family estate.⁸¹ Madgavakar, J., did not agree in this view of Fawcett, J.⁸¹

The wife can ask for realisation under Section 488 (3) of one month's arrears. She cannot ask for attachment for moneys due to her as maintenance which have not accrued to her up to that date.⁸²

'May sentence.'—*Imprisonment for default of payment of maintenance.*—The maximum sentence is one month.^{82a}

The issue of the warrant is not a condition precedent to the jurisdiction of the Magistrate to sentence the applicant. It is clear that the power to sentence is for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made.⁸³

The imprisonment that is ordered is, in the first place, not a punishment for contempt of the Court's order as was supposed by the Madras High Court in *Biyacha v. Moidin Kuthi*⁸⁴ and in the second place, it is for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant.⁸⁰

Limitation.—*2nd Proviso to Section 488 (3).*—Under this proviso the Court's power extends to the recovery of arrears following due over a period of one year next before the date of application.⁸⁵

The limitation provided in the 2nd proviso should not be so construed as to give a loop-hole for a negligent husband to avoid payment.⁸⁶

Proviso (1) is applicable only when the wife obtains an order for herself and not when the order is made for the children.⁸⁷

The proviso in sub-section (3) is added in the interests of the wife and not the husband. It is to stop a Court from too readily accepting the proposition that as soon as a husband offers to maintain his wife if she lives with him, he ceases to 'neglect' or to 'refuse to maintain'....his wife. Such an offer is to be carefully tested and if the wife gives adequate reason for refusing to live with her husband, she is not to be deprived of her maintenance.⁸⁸ The first part of the proviso which comes after sub-section (3) is available to the husband even under sub-section (1) at the time of the decision of the application for maintenance as well as at the time of the enforcement of the maintenance.⁸⁹

Compromise.—The husband may plead compromise after the order for maintenance which may be construed in the light that the wife may have abandoned the claim for arrears or her temporary stay with the husband may suspend the order but it has not the effect of cancelling it.⁹⁰

81. *Shivlingappa v. Gurlingappa*, (1925) 27 Bom LR 1363.

82. *Baldevi v. Ramnath*, A 1955 Raj 61.

82a. *Zaw Ta*, (1914) 7 LBR 351 : 15 Cr LJ 434 : 24 IC 170, following *Narain*, (1887) 9 A 240 : (1887) AWN 54.

83. *Narain*, A 1959 A 556 : 1959 Cr LJ 1039.

84. 8 M 70.

85. *Kangammal v. Pandera Nadar*, (1926) 50 M 663 (667) : 52 MLJ 176 : (1927)

MWN 111.

86. *Jagat Bandhu Sahu v. Lakshmi Devi*, A 1958 Or 257 : 1958 Cr LJ 1425.

87. *Nan Saw Shwe v. Maung Hpone*, 6 Bur LT 51 : 18 IC 658.

88. *Ram Kishore v. Bimala Devi*, A 1957 A 658 : 1957 Cr LJ 1052.

89. *Smt. Ranjit Kaur*, A 1960 EP 221.

90. *Parul Bala v. Satish Chandra Bhattacharjee*, (1922) 37 CLJ 180 : 24 Cr LJ 945 : 75 IC 529 : AIR (1923) C 456.

26. Offers to maintain.—See *Mussamat Sarfaraz Begum v. Miran Baksh*⁹¹ discussed *ante*.

A husband who turned out his wife cannot avoid liability by simply stating in Court that he will keep her in his house.⁹² The offer must be a *bona fide* offer.⁹³

Offer by husband to maintain the wife, though refusing to cohabit with her.—There is nothing in the Code which compels the criminal Court to award separate maintenance to a wife when the husband agrees to protect and maintain her in a manner suitable to her position in life simply because he refuses to cohabit with her.⁹⁴

The mere fact that the husband has contracted a *second marriage* and therefore his first wife declines to live with him does not justify an order under this section.⁹⁵

If a husband keeps a concubine in his house apart from his wife, it is doubtful whether such an act alone is sufficient, but when the concubine is kept in the same house as his wife lived in, against her wishes or in such a manner as to offend her self-respect, she is entitled to separate maintenance.⁹⁶

27. The order cannot be enforced.—(1) When there has been a subsequent decree or decision of a competent Civil Court. See Commentary on Section 489 (2) *infra*.

(2) When there has been a *divorce*.⁹⁷ See Commentary *supra*.

(3) When the person ordered to pay the maintenance is dead, it cannot be enforced against the estate.⁹⁸

(4) When there has been a compromise and mutual arrangement between the parties.^{98a}

(5) When he is adjudged an insolvent.⁹⁹

(6) On proof that the wife is living in adultery^{99a} or that she refused to live with the husband without any sufficient reason.

'Maintenance' for a 'child' cannot be enforced if the father is prepared to help the child.¹

28. Sub-section (4).—This provision applies only when the wife obtains an order for herself and not when one is made for the children.^{1a}

Sub-section (4) does not govern sub-section (3). The phrase 'fails without sufficient cause' in sub-section (3) does not include the raising of the pleas which are mentioned in sub-section (4). If any of the causes mentioned in sub-section (4) arose after the maintenance order was passed in favour of

91. (1927) 9 L¹313 (316) : 29 PLR 401 : AIR (1928) L 543.

92. *Aishan v. Sher Mahammad*, (1920) 22 Cr LJ 149 : 59 IC 883 (L).

93. *Mi Thein v. Gna Po. Nyan*, (1913) 7 Bur LT 34 : 15 Cr LJ 278 : 23 IC 486 ; *Iqbalunnisa Begum v. Habib*, A 1961 A P 445.

94. *Baswamma v. Seetareddi*, (1922) 42 MLJ 566 ; (1922) MWN 265 : 23 Cr LJ 336 : AIR (1922) M 209.

95. *Waryam Singh*, (1913) 12 PR (Cr) 1914 : 15 Cr LJ 577.

96. *Ganapali Amma v. Ganapalli Yellayya*, (1891) 20 M 470 FB : 7 MLJ 303.

97. *In re Punjabe Chunnial*, (1928) 30 BLR 617 (619) : AIR (1928) B 224 ; *Abdurahiman*, A 1962 Ker 234.

98. *Eda Ali v. Lal Bibi*, (1913) 41 C 88 : 17 CWN 1130 : 14 Cr LJ 378 : 20 IC 138.

98a. *Nirmala*, 37 C W N 638.

99. *Halphida v. Halphida*, (1923) 50 C 867.

99a. *Rukmini Bai v. 'aroj Dham Singh*, A 1963 A P 407.

1. *Ralla v. Mt. Atti*, (1914) 115 PLR 1914 : 15 Cr LJ 529 : 24 IC 841.

1a. *Nan Saw Shwe v. Maung Hpone*, 6 Bur LT 51 : 14 Cr LJ 98 : 18 IC 658.

the wife, then the only course open to the husband is to apply for the cancellation of the maintenance order under sub-section (5). The language of sub-section (4) and sub-section (5) also indicates that sub-section (4) is to be read with sub-section (5) or sub-section (1) but not with sub-section (3).²

The Magistrate has a discretionary power to award maintenance under this section and such discretion is not wrongly exercised when a Magistrate refuses maintenance to a woman who, for adultery with one of a lower caste is expelled from her caste and has thus made it impossible for her husband to live with her.³

In view of sub-section (2) of Section 490 it would appear that the grounds stated in sub-sections (4) and (5) are not exhaustive as 'Divorce' and subsequent decree of a competent Civil Court may be pleaded.

'If she is living in adultery'.—Best, J., held :—"It is very doubtful if the framers of Section 488 intended the word 'adultery' as used therein to have the limited meaning given to it in defining the offence of adultery in the Penal Code.....But so far as a wife seeking an order of maintenance under Chapter XXXVI of the Code is concerned, the wrong done to her is in no way affected by the circumstance of her husband's concubine being married or unmarried, or in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage.....However any other than the limited interpretation of the word as defined in the Indian Penal Code is impossible in the face of the concluding clause of Section 4 of the Code of Criminal Procedure."⁴

The opening words of Section 4 "unless a different intention appears from the subject and context" seem to have been overlooked by Best, J., in *Mannatha Achari's* case⁴ as pointed out in a full bench decision of the same High Court in 20 M. 470 by Benson J., where this view was overruled and Shephurd, J., held at p. 473 that the words 'living in adultery' point to a continuous course of conduct, not to isolated acts of immorality. This view of Shephurd, J., has been followed in *Kallu v. Kaimsalla* and other cases.⁵

It may be pointed out that in 26 A 326 as well as in 29 C.W.N. 647 the wife gave birth to an illegitimate child, still she was held entitled to maintenance.

It is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband but it is a course of continuous conduct on her part by which it can be called that she is living in adulterous life that takes away her right to claim the said maintenance.^{5a}

See Commentary *supra* under this heading.

'Or if without any sufficient reason she refuses to live with her husband'.—See Commentary on sub-section (3) under the heading 'offers to maintain'.

2. *Ram Kishore v. Bimla Devi*, A 1957 A 658 : 1957 Cr LJ 1052.

3. *Ponnayee v. Periya Moopan*, (1908) 31 M 185.

4. *Mannatha Achari*, (1893) 17 M 260 (261, 262) overruled by *Gantapalli Appalamma v. Gantapalli Yellayya*, (1896) 20 M 470 (FB).

5. (1904) 26 A 326 followed in *Patala*

Atchamma v. Petala Muhalaksim, (1907) 30 M 332 ; *Jatindra Mohan Banerjee v. Surbala Debi*, (1924) 29 CWN 647 ; see *Fulchand v. Maganlal*, (1927) 52 B 160.

5a. *M. P. Subramaniam v. T. P. Pannakshinunal*, A 1958 Mys 41 : 1958 Cr LJ 397.

29. Cruelty—in Section 488 is not limited to personal violence causing danger to life, limb or health, bodily or mental so as to give rise to a reasonable apprehension of such danger. A systematic cause of ill-treatment and oppression is a good ground for the wife's refusal.⁶

A deliberate attribution of immorality to wife must be construed as legal cruelty entitling the wife to live separately and claim maintenance.⁷

'Or if they are living separately by mutual consent'.—To come within sub-section (4) the husband and the wife must have lived apart by a definite contract.

The words "if they are living separately by mutual consent" mean in effect that the separate living must be the result of a deliberate and express agreement between the parties. A hasty rejoinder to a husband, who in the course of a quarrel, was manoeuvring for a consent from the wife cannot be considered to be such consent, especially when she was willing to return to him.⁸

If the wife is living separately from her husband and without any sufficient reason refuses to live with him, the right to claim maintenance from him is barred by sub-section (4).⁹

When the separation is not by mutual consent the Magistrate has jurisdiction to order maintenance even though the differences between the husband and the wife were referred to the arbitrament of a *Panchayet* and the panchayets had awarded the wife a certain stipend as maintenance.¹⁰

If a husband has contracted marriage with another wife and the wife who is seeking maintenance chooses to live apart, such separate living would not be deemed to be the result of mutual consent¹¹. In spite of an agreement if it is found that it was not being acted upon or there is actual neglect or refusal at the time of application the Magistrate is not debarred from making any order under Section 488¹².

The provisions of Section 488 can legitimately be taken into account to determine whether or not the existence of another wife is a reasonable cause for the first wife to refuse to live with her husband as his consort. The provisions of Sections 10, 13, 14, 23, 24 and 25 of the Hindu Marriage Act and of Section 488 constitutes a system of law. Mere refusal of matrimonial bed by wife is no desertion nor is it desertion to neglect opportunity of consorting with the husband¹³.

The mere fact that the husband has contracted a second marriage in the absence of neglect and refusal to maintain does not entitle the wife to live apart and claim maintenance¹⁴.

6. *Mr. Richard v. Mrs. Richard*, A 1955 M 461 : 1955 Cr LJ 1192 ; *Pancho v. Ram Prasad*, A 1956 A 41 ; 1956 Cr LJ 11.
7. *Kandaswami Marpan*, A 1960 M 348 —see cases referred to.
8. *Ma Pwa Kyin v. Maung Ba Thin*, (1922) 1 Bur LJ 124 : AIR (1923) R 100.
9. *Ranji Malviya v. Smt. Munni Devi*, A 1959 A 767 : 1959 Cr LJ 1386.
10. *Nathun Sonar v. Mathura Kuer*, (1918) 4 PLJ 109 (114) : 20 Cr LJ 154 : 49 IC 346.

11. *Smt. Gurdiyal Kaur v. Jang Singh*, A 1959 Punj 185 : 1959 Cr LJ 516.
12. *Mukund Lal v. Smt. Jyotishmati*, A 1958 Punj 390 : 1958 Cr LJ 1340.
13. *Bhagwati v. Sadhu Ram*, A 1961 Punj 181.
14. *Bela Rani Chatterjee*, 60 CWN 212 where *Panchu Gopal*, 59 CWN 717 ; overruled *Deobati* A 1960 MP 245 : 1960 Cr LJ 1090 ; *Mst. Dhan Kaur v. Niranjan Singh*, A 1960 Punj 595 ; *Contra Kandasami Gounden*, A 1963 Mad 282.

A husband is relieved from the obligation to maintain his wife so long as she voluntarily remains absent or misconducts herself by committing adultery^{14a}.

If after order of maintenance parties reunite it puts an end to the order. If the wife separates again she has to file a fresh petition and obtain an order only if she satisfies the Court that she had sufficient ground for the husband who had neglected to maintain her¹⁵. If a husband decides to marry another wife and has actually married one, the first wife can legitimately claim to live separately, and if the husband and the wife mutually agree that she should do so, it cannot mean that the wife is living separately by mutual consent¹⁶. The wife is not debarred from claiming maintenance provided she succeeds in proving neglect and refusal to maintain and that the husband has failed to comply with the agreement by which the husband undertook to pay a certain amount to the wife as maintenance for living separately by mutual consent¹⁷. Where the husband and wife had been living apart for two years, the wife had been turned out. The husband's offer to take back the wife has to be *bona fide* otherwise the wife is entitled to maintenance¹⁸.

It is now settled law in England, America and India, that a wife is entitled to insist that she should not be exposed to the unpleasantness of the relatives of her husband¹⁹. Tyranny of the mother-in-law over daughter-in-law is a ground for the wife claiming maintenance.¹⁹

The provisions of Section 488 can legitimately be taken into account to determine whether or not the existence of another wife is a reasonable cause for the first wife to refuse to live with her husband as his consort. Mere refusal of matrimonial bed by wife is not desertion within the meaning of Hindu Marriage Act (1955), Sections 10 (1) (a) Expt. 23 (1) (c)²⁰.

Sections 488 (1) and (6), 244, 355 and 537.—The combined effect of the provisions of Section 488 (6), Sections 244 and 355 is that a Magistrate holding an inquiry under Section 388 must make a memorandum of the substance of the evidence of each witness examined by each of the parties to the proceeding. Contravention of this provision for recording evidence under Section 488 (6) is not merely an error or irregularity which can be cured under Section 537^{20a}.

30. Sub-section (5).—It appears on a comparison of the two sub-sections (4) and (5) that the latter is a *verbatim* copy of the former and the Legislature could have avoided repetition. But that is not so. *The distinction between the two sub-sections* appears to be that sub-section (4) applies to the circumstances stated therein being found *before* the order is passed and sub-section (5) applies *after* the order is passed. That this is so is patent from the fact that sub-section (4) opens with the words "No wife shall be entitled to receive an allowance from her husband" and the closing words of sub-section (5) *viz.*, "the Magistrate shall cancel the order" on proof of that is stated therein. See Commentary on sub-section (4).

14a. *Ishar v. Mst. Sona Devi*, A 1959 Punj 295 : 1959 Cr LJ 767.

15. *Natesa Pillai v. Joymangal*, (1960) 1 MLJ 10 : A 1960 M 515 following *Saib v. Meran Bai*, A 1942 M 1 and *Venkayya v. Raghmma*, A 1947 M 423 : 48 Cr LJ 302.

16. *Dr. Mukund Lal v. Smt. Jyotshnamati*, A 1958 Punj 390 : 1958 Cr LJ 1340.

17. *Rao Saheb v. Prayag Bai*, A 1956 Hyd

189 : 1956 Cr LJ 1325.

18. *Bir Singh Jiwan Singh v. Mt. Sibo*, 1957 Cr LJ 402 (2) : 58 Punj LR 421.

19. *Punchelam v. Saraswati*, A 1957 M 693 : 1957 Cr LJ 1252 (2).

20. *Bhagwant v. Sadhu Ram*, A 1961 Punj 181.

20a. *Naraanappa v. Puttama*, A 1963 Mysore 174.

'*The Magistrate*'—contemplated here is the Magistrate who passed the order or his successor.²¹ A second Magistrate cannot call in question an order duly given upon proof. A Magistrate while enforcing the order under Section 490 cannot take into consideration anything further than the identity of parties and the non-payment of the allowance.²¹ It seems this decision is no longer good law. The Magistrate has to look into the change of circumstances and may cancel the order under Section 490 (2) *added* by the Amending Act XVIII of 1923.

An order passed under Section 488 remains in force till it is cancelled on the grounds set out in Section 488 (5) though on temporary reunion the operation of the order would remain suspended.^{21a}

Although under Section 489 'any Magistrate' may enforce the order in any place where the defendant may then reside the Magistrate who can cancel the order under Sections 488 (5) and 489 (2) is the Magistrate who passed the order or his successor in office.

In cases contemplated under Cl. (5) it will be for the counter-petitioner to obtain either the cancellation or the modification of the original order, and until he does that, the original order must be deemed to be still in force. The mere fact, for instance, that a wife is living in adultery, *will not bring the order to an end automatically*. If it did so there would be no need for the Court to cancel it. And similarly the mere fact that a wife has returned to live with her husband will not have this effect, although it is true that the Code makes no provision for its cancellation upon such an event occurring.²²

The plea of unchastity of the wife subsequent to the order for maintenance can be raised by the husband at the time of enforcement of the order for maintenance under Section 488 and it is not necessary for the husband to file a separate petition for getting the order cancelled.^{22a}

But so *far as the child is concerned* the order is not affected by a decree for restitution of conjugal rights.²³ The order will however be cancelled if the father obtains an order for the guardianship of the child.²³

Civil Court's decision for maintenance supersedes the order of the Criminal Court and the Magistrate shall either cancel or vary the order.—This is not a ground stated in sub-section (5). Section 489 (2) introduced by Section 132 of the Amending Act XVIII of 1923 sets at rest the conflicting decisions under the unamended Code, which we need not consider, in detail.

It was held that the jurisdiction of the Criminal Court under this section being only auxiliary to that of the Civil Courts, a Magistrate should not enforce an order for maintenance of a child, if a Civil Court subsequently holds that the respondent is not the father of the child.²⁴

21. *Prabhu Lal v. Rami*, (1902) 25 A 165.
 21a. *Parul Bala v. Satish Chandra Bhattacharya*, A 1923 C 456; *Peary*, A 1935 A 977.
 22. *Kangammal v. Pandera Nedar*, (1926) 50 M 663 (665); (1927) MWN 111 : 52 MLJ 176.
 22a. *Rukmini Bai v. Suraj Bhan Singh*, A 1963 A P 407 : (1963) 1 And LT

339.
 23. *Nan Saw Shwe v. Maung Hpone*, 6 Bur LJ 51 : 14 Cr LJ 98 : 18 IC 658.
 24. *Bo Gyi v. Ma Nyein*, (1919) 13 Bur LT 104 : 22 Cr LJ 127 : 59 IC 559; *Nur Mahammed v. Ayesha Bibi*, (1905) 27 A 483; see *Raghubar*, (1915) 2 OLJ 251 : 16 Cr LJ 609 : 30 IC 433.

Section 489 (2) as amended has superseded in the view in *Ramdheyam Ram v. Mt. Rang Dularia*²⁵ which held that a Civil Court decree is no answer to an application for enforcement of an order obtained by the wife under Section 488, but restored the view in *Chandulal Ranchod*.²⁶ Now it is not only open to give effect to a decision of a Civil Court declaring relationship not to exist as was held in *Maddu Venkayya v. Maddu Paidanna*^{26a} but the Magistrate shall under Section 489 (2) either cancel or vary the order in accordance with such decision.

31. Sub-section (6).—Prescribes the procedure and states that the evidence shall be recorded in the manner prescribed in the Summons case.

Where there is a failure to comply with the provisions of sub-section (6), it is an illegality which vitiates the proceedings.²⁷ Where although the husband was absent on the date of hearing the evidence of the witness of the wife was recorded in the presence of the husband's pleader, the irregularity did not cause prejudice to the applicant.²⁸

Application by child against putative father.—Where on an application by a child through her mother as guardian for maintenance against the respondent on the allegation that he is the putative father, the Magistrate before issuing notice to the respondent holds a preliminary inquiry and finds that he is not satisfied that the respondent is the father and rejects the application without sending notice to the respondent, *held* the procedure adopted is illegal.²⁹

Section 488 (6) Proviso—Ex parte order.—Subjective satisfaction of the Magistrate as to wilful negligence of the husband in attending court is necessary.^{29a}

See Commentary *supra* under the heading "Procedure" and see also "Ex parte orders" as stated in Proviso to this sub-section.

32. Sub-Section (7).—Of the Code of 1898 has been deleted by Section 131 of Act XVIII of 1923.

The language of present sub-section (7) which is old sub-section (8) seems to suggest that the order as to costs should be passed at the date of the making of the order.

High Court may award costs in revision.³⁰

33. Sub-section (8).—Old sub-section (9) was new in the Code of 1898 and has been renumbered as Section 488 (8), because old sub-section (7) has been omitted by the Amending Act XVIII of 1923, and for the word "accused" the following has been substituted "*proceedings under this section may be taken against any person.*"

This amendment is consequential upon the deletion of sub-section (7) and

25. (1921) 3 PLT 51 : 23 Cr LJ 144 : 65 IC 576 : AIR (1923) P. 153 (1).

26. (1919) 43 B 885 : 21 Bom LR 766 : 20 Cr LJ 687.

26a. (1923) 46 M 721 : 45 MLJ 104 : 1923 MWN 401 : 24 Cr LJ 720 ; *Nafees Ara v. Asif Sadat Ali Khan*, A 1963 A 143.

27. *Anil Ranjan Sen v. Anupama Sen*, A 1959 Tripura 26 ; 1959 Cr LJ 776.

28. *Bechu Lal Murmi v. Shanti Bai*, A 1956 VP 37 : 1956 Cr LJ 1252 ; *Revappa*, A 1960 Mys 196.

29. *Nandlal Misra v. Kanhaiyalal Misra*, A 1960 SC 882.

29a. *Bhimrow*, A 1963 Mysore 238.

30. *Keni v. Keni*, 49 M 891 ; *Ma Tin Tin v. Maung Aya*, A 1941 R 135.

upon the view that such person is not an accused person as it follows from an amendment of Section 340 (2) *ante*.

Scope.—The crucial words of Section 488 (8) are “resides”, “is” and “where he last resided with his wife.” Under the Code of 1882 the Magistrate of the district where the husband or father, as the case may be, resided only had jurisdiction. Now the jurisdiction is wider. It gives three alternative forums. This has been designedly done by the Legislature to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of three forums convenient to them. The proceedings under this section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy is originally a helpless person.^{30a}

34. Jurisdiction of Court.—Under the old Code prior to the Code of 1898 which for the first time introduced sub-section (9) which has been retained in the Code as amended in 1923 with the modification noted above it was held in *Dularia* and other cases³¹ that the claim must be tried in a place where the husband resides or as in *Malcolm De Castro*³² where the wife resides and this conflict of decisions was settled by the amendment of the Code in 1898.

35. Temporary residence.—Where the wife put in her application during the temporary residence of her husband it was held that it was sufficient to give the Court jurisdiction.³³ The expression ‘resided’ in cl. (8) will include a temporary residence and is not to be confined to permanent residence.³⁴

“Last resided with wife”.—To attract sub-section (8) it is not necessary that residence should have been permanent or for any length of time. All that the sub-section requires is that the husband and the wife must have been residing in the place contemplated by the sub-section, *i. e.*, the same must have been their last residence prior to the violation of the proceedings.³⁵

Section 488 (8) and 531—Although the idea of permanent residence, and a casual or temporary residence is implicit in the expression “where he resides or is” in Section 488 (8) the next expression “where he last resided with his wife” in the sub-section does not recognise the distinction between the permanent residence and casual residence. In view of the provisions of Section 531 and the decision in *Ramchandra Prosad v. State of Bihar*, A 1961 SC 162 the mere fact that proceedings were taken in a Court would not vitiate the order under Section 488.^{35a}

*The mere fact of the Marriage taking place with in Magistrate jurisdiction does not give him jurisdiction under this clause.*³⁶

30a. *Jagir Kaur v. Jaswant Singh*, A 1963 SC 1521.

31. *Dularia v. Ramcharan*, (1894) A WN 153 ; *Benbow v. Benbow*, (1897) 24 C 638.

32. (1891) 13 A 348.

33. *Jolly v. Jolly*, (1917) 21 CWN 872 : 18 Cr LJ 706 : 40 IC 706.

34. *Sher Singh v. Mt. Amir Kuer*, 49 A 479 (1927) : 25 ALJ 435 : AIR (1927) A 291 distinguishing *Flowers v. Flowers*,

32 A 203 FB where Section 3 of the Divorce Act was held not to apply to a case of temporary residence ; *Mohd. Rasool v. Mst. Rahim*, A 1955 A 693 : 1955 Cr LJ 1550.

35. *P. V. Isac v. Mrs. Susan Isac*, A 1957 Ker 61 : 1957 Cr LJ 639.

35a. *Ambalal v. Dhiben Dhellya*, A 1963 Guj 91.

36. *Ghulam Hossein v. Mt. Hakim Bibi*, (1926) 96 IC 865 : AIR (1926) L 663.

Casual Visitor.—Such residence does not include casual visits by a person to the house of his mother-in-law where his wife happens to be at the time.³⁷

Settled abode of mistress.—In considering the case of a kept mistress it cannot be reasonably demanded that the nature of residence on the part of the man should be more permanent than is required in the case of a lawful husband.³⁸

489. Alteration in allowance.—(1) On proof of a change in the circumstances of any person receiving under Section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit: Provided that if he increases the allowance the monthly rate of five hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | tances. |
| 2. Legislative Changes. | 6. Party seeking an alteration of the order |
| 3. Effect of Amendment. | —alteration. |
| 4. Scope. | 7. Sub-section (2). |
| 5. On proof of a change in the circum- | 8. Notice. |

1. Corresponding sections in former Codes.—This section corresponds to Section 317 of the Code of 1861, Section 587 of the Code of 1872.

2. Legislative Changes (1898).—The words, ‘*that if he increases the allowance*’, after the word, ‘provided and the words ‘*in the whole*’ were inserted for the first time in the Code of 1898.

Legislative Changes (1923).—Sub-section (2) is new and was added by Section 132 of Act XVIII of 1923. The words “*one hundred rupees*” have been substituted in sub-section (1) for “*fifty rupees*” by the said Act and the amendment is consequential upon the amendment of Section 488 (1) *supra*.

Legislative Changes (1955).—The words ‘*five hundred*’ in sub-section (1) have been substituted as in Section 488 by Act 26 of 1955.

3. Effect of the Amendment.—Under the old Code the Magistrate could only alter the allowance in view of the change of circumstances but he could not cancel the order. Now he may cancel the order not in view of the change of circumstances but in consequence of any decision of a competent Civil Court. The Legislature has given effect to the decisions of the Courts on the effect of Civil Court decree noted *supra* under the commentary to the last section. It seems that the decisions in *Din Mohammad* and other cases³⁹

37. *Ramkumar v. Rukmini*, (1921) 22 Cr LJ 710 : 63 IC 870 (Oudh).

38. *Hidayat Khatun v. Mohammed Hayat*, (1911) 5 SLR 220 : 13 Cr LJ 522 : 15 IC 794, where *Bright v. Bright*, 36 C

964 : 4 IC 419 ; *Fernandez v. Wray*, 25 B 176 ; *Anarthia Narayana v. Periyana Kona*, 5 MHCR 101, were referred to.

39. (1882) 5 A 226 (1882) AWN 237 ; *Shah Abu Ilyas v. Ulfat Bibi*, 5 C 558.

which held that the alteration in the allowance contemplated by the section only refers to a power to alter the amount and not to a total discontinuance thereof has not been overruled but modified in view of the provisions of Section 489 (2), but the view of the full bench of the Allahabad High Court in *Shah Abu Ilyas v. Ulfat Bibi*⁴⁰ which held that the section applies to a change in the pecuniary or other circumstance, but has no application to a change in the *status* of parties (due to divorce, *etc.*) which would entail a stoppage of the allowance seems to be unaffected. But the better view seems to be that the change of circumstances refers to a change of *status* such as 'divorce' which entitles the Magistrate to cancel the order as was held in *Shaikh Daud*,⁴¹ although it may be argued that in such cases application to the Magistrate under Section 488 (5) is the proper remedy.

4. Scope.—This section empowers a Magistrate to altogether cancel his order awarding maintenance and does not restrict him to merely reducing the amount.⁴²

Where there was a consolidated order under Section 488 in favour of wife and three children and one of the child died, it is open to the Court to modify the order under Section 490.⁴³ This section was not intended to encourage applicants to resort to Criminal Courts up to the very time an order is passed by a competent Civil Court.⁴⁴

If the husband is able to pay a little more and keep the wife going on in an even keel, it cannot be said that he is thereby obliged to pamper a wife who seeks to live apart from him. The consideration of an easy allowance however no doubt is in the discretion of the Court, is not outside the scope of Section 488 or Section 489.⁴⁵

The expression 'change in circumstances' is wide enough to cover a case in which the husband persistently refuses to cultivate the field which was given to the wife in lieu of her maintenance; the Court can fix a cash maintenance.⁴⁶ The advance in age of the child is a change of the child's circumstance.⁴⁷ If circumstances already existed at the date of the order, order passed is not to be changed on subsequent proof of such circumstances.⁴⁸

5. 'On proof of a change in the circumstances'.—For meaning of "change in the circumstances", see *Din Mohammed*³⁹ and *Shah Abu Ilyas v. Ulfat Bibi*.⁴⁰

6. Party seeking an alteration of the order must move the Court.—If a person against whom an order for maintenance has been made considers that such an order should no longer be in force against him, it is for him to apply under this section and get the order altered.⁴⁹

40. *Shah Abu Ilyas v. Ulfat Bibi*, (1896) 19 A 50 (FB) overruling *Mahbubani v. Fakir Baksh*, 15 A 143.

41. (1921) 17 NLR 92 : 22 Cr LJ 633 : 63 IC 329, following *Nepoor Aurat v. Jurai*, (1873) 19 WR (Cr) 773 : 10 BLR App xxxiii and *Mussammatt Biji v. Navat Khan*, 21 PR (1894) Cr; *Janki*, A 1955 AP 11; *Rahimatulla*, A 1947 M 961 : 48 Cr LJ 395.

42. *Menatchi Ammal v. Muthuswami Pillai*, (1924) 48 M 503; *Md. Rahimatulla*, A 1947 M 961.

43. *Tetri*, A 1950 C 168; 35 Cr LJ 473; *Kalwant Bai*, A 1953 B 366 : 1953

Cr LJ 1461.

44. *W. Ross v. Elemour Agnes Ross*, A 1932 S 210 : 34 Cr LJ 548.

45. *Gangamma v. Subbarayudu*, A 1961 AP 510 : 1961 (2) Cr LJ 760.

46. *Pun Deb v. Mt. Bishnuli*, A 1950 A 454 : 51 Cr LJ 961.

47. *Ma Thetu Nya*, A 1939 R 95.

48. *A. S. Govindam v. Mrs. Margaret Jayammal*, A 1950 M 153 : 51 Cr LJ 455.

49. *Parbhu Lal*, 25 A 165 (167) (1902) A W N 224; *Shanoo Devi v. Daya Ram*, A 1933 L 1026 : 35 Cr LJ 473.

If a minor daughter has been married to a person and is living with the husband who is maintaining her the father may apply under this section for cancellation of the order.

“Alteration”.—It is not correct to say that once the power under Section 489 (1) to alter the allowance is exercised it exhausts itself; the Court has always power to adjust the allowance to the resources of the husband or the father as often the occasion may require or justify.⁵⁰ A Magistrate has power to direct that the increased rate of maintenance ordered by him be paid from the date of the application asking for the increase. But ordinarily an order of this type should be effective only from the date of the order. In order to give retrospective effect to it there must be special circumstances.⁵¹ A contrary view has been held in⁵² to the effect that the order for increase or decrease of allowance takes effect from the date of the order and cannot be given retrospective effect.

Application to increase the allowance of maintenance is not maintainable where the father privately makes an arrangement for maintenance of his child by setting apart a portion of his property.⁵³ The application for reduction of maintenance cannot be disallowed on the ground that as the petitioner was not prepared to pay more maintenance when the prices have gone up, he cannot now claim any reduction in the maintenance allowance when the prices have gone down. The argument would have held good if the respondent had filed an application under this section for enhancement.⁵⁴

7. Sub-section (2)—is new.—See Commentary *supra* under the heading “Legislative Changes”.

For purposes of this sub-section the Criminal Court should take the decision of the Civil Court as it stands. It should not consider whether the decision of the Civil Court has altered the circumstances of the case as the Magistrate has found.⁵⁵ Refusal by the Magistrate in an application under sub-section (2) to consider *ex parte* decree for restitution of conjugal rights passed after written statement is filed is an error of law.⁵⁶ Party can ask Magistrate to cancel or modify order under Section 488 to make it accord with the decision of Civil Court.⁵⁷ The Magistrate is not bound to cancel the maintenance order in favour of the wife under Section 488 because a Civil Court has made an order for restitution of conjugal rights in favour of the husband. The Magistrate is entitled to decline to revoke the order under Section 488 when there is no evidence before him as to what home the husband is prepared to offer the wife.⁵⁸ A Civil Court decree that the applicant is not the father of the child would appear to be a proper ground for cancellation of the order of maintenance.⁵⁹

50. *P. Thigaraja Pillai, In re*; (1954) 2 M L J 608 : 1955 Cr LJ 175.

51. *Dr. T. K. Mayumannar v. Asananbul Ammal*, A 1958 Mys 190 : 1958 Cr LJ 1522.

52. *Amroom*, 53 CWN 465 ; A 1949 C 584; *Lillasanti v. Madan Gopal*, A 1935 L 24 : 37 Cr LJ 68 ; *Taribala v. Kibul Ram*, 42 CWN 64 : A 1938 C 144 ; *Mt. Bhagsultan v. Md. Akbar Khan*, A 1930 L 99.

53. *Kesheo Rao v. Kumari Maltibai*, 1941 NLJ 622.

54. *Raj Reddy v. Shantamma*, A 1958 AP 532 : 1958 Cr LJ 1006.

55. *Mrs. G. Titos v. Mr. W. Titos*, 1947 MWN 604 : A 1947 M 425.

56. *Tarak Nath Dhar*, 52 CWN 166 : A 1949 C 87 not followed in *Kuntibala*, 58 CWN 702.

57. *Durghata v. Ayodhya Prasad*, A 1953 VP 28 : 1953 Cr LJ 1214.

58. *Fakruddin Shamsuddin Saiyad v. Bai Jenah*, A 1944 B 11 : 45 Cr LJ 271.

59. *U. Arzima*, A 1940 R 298.

8. Notice.—An order for maintenance should not be modified under Section 489 without first giving a reasonable notice to the opposite party.⁶⁰

490. Enforcement of order of maintenance.—A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

SYNOPSIS

1. Scope.

2. No provision as to costs.

1. Scope.—“.....it was not the intention of the Legislature that the Magistrate to whom the application is made to enforce an order of maintenance, should take into consideration anything further than the identity of the parties and the non-payment of the allowance”.⁶¹ Notwithstanding the provisions of Section 538 of the Code of 1872, the Magistrate who has made an order for maintenance under Section 536 may issue a warrant for collection of arrears of maintenance when the husband is out of his jurisdiction.⁶² “In the case of a woman producing under Section 490 an order for her maintenance, the Magistrate has to satisfy himself whether the allowance asked for is not due under the order”.⁶³ A Magistrate should not refuse to enforce payment from the time of the new application, as the order of maintenance deserves to be enforced as long as it holds good.⁶⁴

This section gives an alternative remedy by an application for execution to be made direct to the Magistrate within whose jurisdiction the person against whom the order is passed may be as well as to the Magistrate who passed the original order, or his successor.⁶⁵ The Magistrate who passed the original order can issue a warrant for collection of arrears of maintenance.⁶⁶

Section 488 (4) governs the whole section including sub-section (1). Where wife refuses to live with husband due to his remarriage, sub-section (4) does not bar her claim for separate maintenance.^{66a}

2. No provision as to costs.—Section 490 does not contain provision as to costs such as that contained in Section 488 (7).⁶⁷

CHAPTER XXXVII

DIRECTIONS OF THE NATURE OF A *Habeas Corpus*

491. Power to issue directions of the nature of a

60. *Janni*, A 1955, AP 1: 1955 Cr LJ 149 ; *Zinabhai*, A 1937 B 454.

61. *Parbhu Lal v. Rami*, (1902) 25 A 165 ; *Maung Tun Jan v. Ma Myaing*, A 1941 R 247 : 43 Cr LJ 30 ; *Pearey*, A 1935 A 977.

62. *Karri Papayamma*, (1881) 4 M 23.

63. *Shah Abu Ilyas v. Ulfat Bibi*, (1896) 19 A 50.

64. *Mi Thaing v. Nga Po Min*, (1909) 11

Cr LJ 79 : 4 I C 899.

65. *Maung Tun Jan v. Mc. Myaing*, A 1941 B 247.

66. *Gnanambalammal*, 52 M 77.

66a. *Kundaswami Gounder*, A 1963 M 283 not following *Bela Rani Chatterjee v. Bhupal Chatterjee*, 60 CWN 212 : A 1956 C 136.

67. *Ma E Shi v. U San Kai*, A 1939 R 67 : 40 Cr LJ 241.

habeas corpus.—(1) Any High Court may, whenever it thinks fit, direct—

- (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law ;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty ;
- (c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court ;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively ;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial ; and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

SYNOPSIS

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|---|------------------------------|
| 1. Report of the Select Committee. | 10. Cl. (c). |
| 2. Earlier Law. | 11. Cl. (d). |
| 3. Legislative Changes. | 12. Cl. (e). |
| 4. Scope. | 13. Cl. (f). |
| 5. Habeas Corpus under Art. 226 of the Constitution. | 14. Who can move. |
| 6. "May Direct". | 15. Successive Applications. |
| 7. Cl. (a)—A Person within jurisdiction to be brought up for being dealt with according to law. | 16. Sub-section (2)—Rules. |
| 8. Cl. (b)—Illegal or Improper Detention. | 17. Procedure. |
| 9. Custody of minor Children. | —Affidavit. |
| | —Supreme Court Rules. |
| | 18. Costs. |
| | 19. Appeal. |

1. Report of the Select Committee.—"We do not consider that the addition made by this clause to Section 491 is particularly necessary or desirable. It is true that in respect of extradition proceedings an alternative procedure is laid down in Section 3 of The Indian Extradition Act, 1903 but having regard to the view taken by the Calcutta High Court in *Rudolf Stallman's case* (39 Cal. 104) as to the scope of its functions under the section, we think that clause might well be deleted."

2. Earlier Law.—It was held in *Amir Khan*,⁶⁸ a decision under the Code of 1861 that the High Court as inheritor of the Supreme Court had jurisdiction to issue writs of *habeas corpus* outside its original jurisdiction. Section 81 of 1872 gave the right to an European British subject whether within the original jurisdiction of the High Court or outside those limits to apply for an order in the nature of a *habeas corpus* but Section 82 enjoined that such writ shall not be issued beyond the Presidency Towns. In 1875 (Section 148 of the High Court Criminal Procedure Act) the power of the High Court to issue such writs was confined to the persons within the limits of their original jurisdictions and Section 148 set out various purposes for which an order in the nature of *habeas corpus* might be made.⁶⁹

The Calcutta High Court made rules under Section 148 (*vide* Belchamber Rules and Orders Ed. 1880, P. 253). In 1882 in Section 491 the words “and neither the High Court nor any Judge thereof shall transfer issue any writ of *habeas corpus* for any of the above purposes” were omitted and Section 148 was re-entered as Section 491 with some modifications. Section 498 of the Code of 1898 was similarly worded as Section 491 of the Code of 1882 with this difference that the Acts of 1818, 1819, Act of 1850 or No. III of 1858 have been designated in the former by names of these Acts.

3. Legislative Changes.—The Amending Act (XII of 1923) by Section 30 in sub-section (1) substituted the expression “Any High Court” for “Any of the High Courts of Judicature at Fort William Madras and Bombay,” and in sub-section (1) (a) “*appellate Criminal jurisdiction*” for the words “ordinary original civil jurisdiction,” and the expression “The High Court” in sub-section (2) for the expression “Each of the said High Courts.”

It also introduced Section 491-A thus making it clear that every person whether within original jurisdiction of the Presidency towns or living in mofussil within the appellate jurisdiction of the High Court has a right to apply Section 491 under the present Criminal Procedure Code as has been held in *Girindra Nath Banerjee v. Birendra Nath Pal*.⁷⁰ After the amendment it is not profitable to discuss the earlier cases.

The words in sub-section (1) (d) “acting under the authority of any commission from the Governor-General in Council were repealed by A-O 1937. Sub-section (3) was omitted by the Repealing and Amending Act 36 of 1957 (17-9-57).

4. Scope.—Section 491 is not the same as the prerogative writs of *habeas corpus* under the English law⁷¹, although the clauses in Section 491 correspond to English law. It is a direction in the nature of a *habeas corpus*. See the history of the section in *Girindra Nath Banerjee v. Birendra Nath Pal*.⁷⁰

See cases reviewed by Rankin, C. J., particularly regarding the power of the High Court to issue common law writ independently of Section 491. Prior to the Constitution which now under Article 226 gives the power to the High Court to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* or any of them for the enforcement of any of the rights conferred by Part III or for any other purpose, and the power of the

68. (1890) 6 Beng LR 392 (438-444).

69. *In the matter of Ganesh Sundari Debi*, 5 Beng LR 418 and *In the matter of Khetija Bibi*, 5 Beng LR 557.

70. (1927) 54 C 727 : 31 CWN 593—see cases reviewed by Rankin C J, parti-

cularly regarding the power of the High Court to issue writ at Common Law independently of S. 491.

71. *Halsbury*, 2nd ed., Vol. IX, paragraph 1203.

Supreme Court under Article 32 (2) to issue such directions, it was held in⁷² that the power of the Courts in India to issue the writ of *habeas corpus* are controlled and circumscribed by Section 491 and they have no longer the jurisdiction to issue the common law writ of *habeas corpus* and to exercise the powers which the Courts in England exercise. After the Constitution the applicant has the same remedy as under Art. 226.

Habeas corpus jurisdiction comes under Article 226 of the Constitution. Petition described as under Criminal Miscellaneous jurisdiction, *held*, the description is a misnomer.^{72a}

The powers of the High Court under Section 491 are not as wide as those under the Habeas Corpus Act of England. But one matter is common, namely the right of any person detained within the limits of the Court's appellate jurisdiction, whether by Government or by any one else to apply to the High Court and demand that either that he be 'dealt with according to law or that he be set at liberty'.⁷³ Prior to the commencement of the Constitution the power to issue a writ in the nature of a *habeas corpus* could be passed only under Section 491 which after Art. 226 of the Constitution is redundant. But since Section 491 stands unrepealed the remedy offered by Section 491 can be availed of.⁷⁴ The considerations which the High Court has to keep in view for the application for issue of a writ in the nature of a *habeas corpus* or other directions are entirely different from those which a committing Magistrate or a Sessions Judge had to consider in a bail application by a person accused of the commission of non-bailable offence. The High Court will be failing in its duty if it were to decline to examine the validity of a detention on the ground that the persons concerned can seek relief by way of bail application.⁷⁵

5. Habeas Corpus under Art. 226 of the Constitution—Preventive Detention Act, 1950.—The High Court is however entitled for the purpose of testing whether the detenu is illegally or improperly detained, to examine the grounds to see if they pertain to the object of the Act. The question whether the activities of the detenu which are made the grounds for detention would in fact affect the public order or not cannot again be gone into the proceedings under Section 491. The question whether the vagueness or indefiniteness of the statement furnished to the detained person is such as to deprive or preclude him of the earliest opportunity to make a representation to the authority is however a matter within the jurisdiction of the High Court. The test whether a ground given is vague or indefinite is whether, given a ground, the petitioner will be able to make an effective representation or not.⁷⁶ The Preventive Detention Act, 1955 is *intra vires*. The detention in such cases is effected with a view to prevent the person concerned from

72. *C. P. Mathen v. Dt. Magt. Trivendrum*, 66 IA 222; 40 CrLJ 675 (PC); *Haridas Donaji*, A 1949 N 201 : 50 Cr LJ 492; *Ramjilal*, A 1949 FP 67 : 50 Cr LJ 271 (FB) *Narayanaswami Naidu*, A 1949 M 307 *Sitao Jholia*, A 1943 N 36; *Vimalbai Deshpande*, A 1945 N 8 PC; *Kishori Lal*, ILR (1945) L 573.

72a. *Ranjit Kumar v. Secretary T. P. A. Society*, 67 CWN 297 : A 1963 C 261.

73. *Prabhakar*, A 1943 N 26 : 44 Cr LJ 345.

74. *Rama Krishna v. Rhaghavayalu*, A 1962 M 354; *Ram Lal*, A 1952 C 26; *Jardan Singh*, A 1952 MB 80 : 1952 Cr LJ 795;

In re Venkatoraman, A 1951 M 267; *Kulomani*, A 1951 or 20.

75. *In re Kunjan Nadar*, A 1955 TC 74 : 1955 Cr LJ 740; *Kedarnath v. Jagannath Agarwal*, A 1960 Punj 122.

76. *Dharma Das v. District Magistrate*, A 1960 Guj 43 : 1960 Cr LJ 1588 where *Machinder Shivaji*, A 1950 FC 129 : 51 Cr LJ 1480; *B. N. Mukherjee*, A 1951 N 1 (FB), *R. V. Halliday*, 1917 AC 260, *Mohd. Atar Rizvi*, A 1951 A 456; *State of Bombay v. Atma Ram*, A 1951 SC 157 : 52 Cr LJ 373 followed; *T. C. Basappa*, A 1954 SC, 440.

acting prejudicially to certain objects which the legislation providing for such detention has in view.⁷⁷ "Public safety" ordinarily means security of the public or their freedom from danger to public health may also be regarded as securing public safety. The meaning of the expression must, however, vary according to the context⁷⁸.

Where grounds of detention are vague, the order of detention is bad. High Court cannot inquire into truth or otherwise of facts mentioned in the grounds. Opinion of the Advisory Board under Section 11 of the Preventive Detention Act, 1950 is not subject to revision under Art. 227 of the Constitution⁷⁹. Unreasonable delay in supplying grounds⁸⁰ has been held to be a good ground for interference. Where a person who has been detained under the Preventive Detention Act applies under Section 491, all that can be seen in the proceedings is whether the grounds communicated or connected with the order of preventive detention and whether the order made by the District Magistrate was made *bona fide* or *mala fide*.⁸¹ Once it is found that the legislation relating to preventive detention is within the competence of the Legislature the Court has nothing to do with the reasonableness or unreasonableness of the legislation.⁸²

An 'irrelevant' ground is a ground which has no connection at all with the satisfaction of the authority, while a 'vague' ground is one which is not sufficient to enable the detenu to make an effective representation.⁸³

The satisfaction of the authority making the order of detention as to the matter specified in the Preventive Detention Act is the only condition for the exercise of his powers and the Court cannot substitute its own satisfaction for that of the authority. It is however open to the detenu to show abuse of process.⁸⁴

The question whether the grounds given for detention are sufficient or not is not for the Court.⁸⁵

In *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the proceedings.⁸⁶

When a detention order gives two grounds, and one was found to be non-existent, the order of detention cannot be upheld on the other ground.⁸⁷ Where one or more of the number of grounds communicated to the person detained are found to be vague, the provisions of clause (5) of Article 22 of the Constitution cannot be said to have been complied with.⁸⁸

77. *A. K. Gopalan v. State of Madras*, A 1950 SC 27; *Zahir v. Ganga*; A 1963 A 4 overruling *Moolchand*, A 1948 A 281.

78. *Ramesh Thapar v. The State of Madras*, A 1950 SC 124.

79. *Madan Shaw*, A 1962 C 119 : (1962) 1 Cr LJ 279 following *Srinibas Nandi*, A 1962 C 162 : 1962 (1) Cr LJ 311; *Kulamani Mohanty*, A 1951 or 20 : 52 Cr LJ 104; *Nowatmal*, A 1951 Ajmer 87 : 52 Cr LJ 1475 (Detention under Punjab Safety Act 2 of 1947).

80. *Harnam Singh*, A 1952 Punj 359 : 1952 Cr LJ 1529; *Inder Singh*, A 1952 Pepsu 61 : 1952 Cr LJ 591.

81. *Md. Athar Rizvi*, A 1951 A 456.

82. *Lakshminarayan*, A 1950 FC 59;

Sushil, 53 CWN 545; *B. N. Mukerjee*, A 1951 N 1 (F B).

83. *Tarapada v. State of West Bengal*, (1951) SCR 212 (218) : A 1951 SC 481.

84. *Ashutosh Lahiry*, 1950 SCR 433; *Maganlal Jivanbhai*, A 1953 B 59.

85. *Bhim*, A 1951 SC 174.

86. *Safatulla*, 55 CWN 27; *Ramnarayan*, A 1953 SC 277 see *Ansumali*, 56 CWN 711.

87. *Sohanlal Saxena*, (1954) SCA 53; following *Talpada*, 47 CWN 13 (FR).

88. *Niren Basu v. State of West Bengal*, 60 CWN 464 : A 1955 C 370; *Baktwar Singh v. State of Pepsu*, A 1953 Pepsu 207 : 1953 Cr LJ 1828.

The order of detention to be served upon the person detained would usually consist of two parts (1) the preamble and (2) the grounds. The preamble cannot be treated as the grounds contemplated by Section 7 of the Preventive Detention Act. Vagueness of the grounds is a relative term. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague.⁸⁹ An order directing detention of any person without giving the period for which the person is to be detained is not capable of being properly carried out, hence the detention is illegal.⁹⁰ Where order under Section 3 of Foreigners' Act is served on the detenu in jail, it is legal.⁹¹

The fact that a sufficiently long time lapsed indicates that the petition was made not because the detention of the children was illegal.⁹²

6. "May direct".—The Court is not bound to act. The power to grant relief under Section 491 is discretionary.⁹³

7. Cl. (a)—"A Person within Jurisdiction to be brought up for being dealt with according to Law" (*Habeas Corpus ad Subjicendum*).—Unlike other writs, writ of habeas corpus is a prerogative writ, that is to say, which is issued in cases where the ordinary legal remedies are inapplicable or inadequate.⁹⁴ It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison or in private custody.⁹⁵

The right of personal freedom is now guaranteed under the Fundamental Rights by the Constitution. Article 21 guarantees protection of personal liberty. Punitive detention and preventive detention come under Article 21 and in *habeas corpus* proceedings, the legality or otherwise of the detention is to be determined by the Court with reference to the time of the return and not that of institution of the proceedings⁹⁶, and for preventive detention application lies.⁹⁷ Article 22 of the Constitution safeguards against arrest and detention in certain cases. A person may apply for bail or move an application in *habeas corpus*.⁹⁸ Merely to inform the person that he has been arrested under Section 7 of the Criminal Law Amendment Act, 1932 without giving any particulars of the alleged acts for which such action has been taken against him is not sufficient compliance with Article 22 (1) of the Constitution.⁹⁹ In such cases the applicant will have to apply under Art. 226 of the Constitution.

To attract the application of this section the person must be within the limits of the appellate jurisdiction of the High Court at the time of hearing

89. *Naresh Chandra Ganguly*, A 1959 SC 1335 ; (1959) Cr LJ 1501.

90. *M. W. Beshitt*, A 1951 A 357 : 52 Cr LJ 115.

91. *Lakshminarayana*, A 1951 C 474 ; 52 Cr LJ 811.

92. *Gopalji v. Sreechand*, A 1955 A 28 ; 1955 Cr LJ 24 following *Sultan Singh v. Maya Ram*, A 1930 A 260.

93. *Gopalji v. Sreechand*, A 1955 A 28; 1955 Cr LJ 24 following *Sultan Singh v. Maya Ram*, A 1930 A 260 ; *Bholanath Bishan Dass*, A 1959 Punj 236 : 1959 Cr

LJ 653.

94. *Halsbury*, 2nd Edition, Vol. IX, Paragraph 1203.

95. *Halsbury*, 2nd Ed. Vol. IX, Paragraph 1200.

96. *Ramnarayan v. State of Delhi*, (1953) SCA 399 : A 1953 SC 277.

97. *Shibanlal v. State of H. P.*, (1954) SCR 418.

98. *Vimal Kishore*, A 1956 A 56 (59).

99. *Tarapada v. State of West Bengal*, (1951) SCJ 208 (215) A 1951 SC 481.

of the application.¹ The High Court can order that a person detained shall be 'dealt with according to law' and release him altogether in case he is 'improperly detained' and enquire into the good faith of any detention.^{1a} The powers conferred by this section are not as wide as those under the Habeas Corpus Act.² Where the petitioner in his affidavit alleges want of good faith, counter affidavit should be filed on behalf of the State.³

In an application for the issue of a writ of *habeas corpus* on behalf of a detenu, the Court can only investigate into the question whether the acts of the detenu are such as are vague or irrelevant and can form the basis of the subjective satisfaction of the detaining authority.⁴

8. Cl. (b)—Illegal or Improper Detention.—The object of Section 151 is to prevent the commission of an offence which a person designs or intends to commit. It is the subjective satisfaction of the officer concerned that is envisaged in Section 151 and it is not for the High Court in proceedings under this section to go into the question whether the officer was indeed justified in coming to his conclusion. In *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time the Court has to decide whether the person has to be released or not.⁵ What the Court is concerned with is not whether the arrest of the applicant is legal or illegal but whether his detention under the order passed is legal or illegal.⁶ Release obtained under a bogus order before the accused had served the full term of imprisonment and rearrest of the accused for serving the sentence cannot be said to be illegal.⁷ The analogy of Civil Proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the proceedings cannot be invoked in proceedings under Section 491. If at any time before the Court directs release of the detenu, a valid order directing his detention is produced the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention.⁶ In *Basanta Chandra's case*⁸ it was further held that it is open to the detenu to show that the order was in fact not made or it was made in fraudulent exercise of the power. In such cases it is the clear duty of the Court to step in and to order that the person detained should be set at liberty.⁹

The condition of the law of *habeas corpus* in India and the purpose and express words of Section 205 of the Government of India Act afford a contrast to the conditions of the English law and the object and general terms of Section 19 of the Judicature Act, 1873.¹⁰

1. *Dayal Tripathi*, A 1945 Oudh 117 ; 46 Cr LJ 419 ; A 1946 N 20 and *Leo Zepartia*, A 1944 C 76 followed in *Bismilla Shah*, A 1950 Pesh 20 : 51 Cr LJ 1285.

1a. *Suraj Prasad v. Yeshwanta*, A 1944 N 221 ; 47 Cr LJ 33 ; see *Ranjan Kumar Ghosh*, 67 CWN 297 (Lunatic detained in a Mental Hospital).

2. *Prabhakar*, A 1943 N 26.

3. *Faiz Ahmed*, A 1948 L 87 : 49 Cr LJ 161.

4. *Gour Gopal*, 56 CWN 427.

5. *A. K. Gopalan v. State of Kerala*, ILR (1962) 1 Ker 566 : A 1962 Ker 215.

6. *In re Jayantilal Nathubhai Parekh*, A 1949 B 319 : 51 Cr LJ 184.

7. *Gian Singh*, A 1948 N 83 ; 49 Cr LJ

127 ; *Bhabani Prasad Chandra*, A 1949 P. 41 ; 49 Cr LJ 668 ; *Perry*, ILR (1946) 1 C 95.

8. *Basanta Chandra*, (1943) FCR 81 : 49 CWN (FB) 56 ; FC 18 followed in *Indu Bhusan Deb v. Dt. Magt Allahabad*, A 1949 A 82 : 49 Cr LJ 663 following *Moolchand*, A 1948 A 281 : 49 Cr LJ 352 ; *Prahlad Panda*, A 1950 or 107 : 51 Cr LJ 890 ; *Md. Sahbaz Khan*, A 1950 Pesh 1 ; *Tamizuddin Ahmed v. Province of East Bengal*, A 1949 Dacca 33 : 51 Cr LJ 65.

9. *Harish Chandra*, A 1943 A 277 (FB) ; 44 Cr LJ 722.

10. *Shibnath Banerjee*, 50 CWN 25 PC ; A 1945 PC 156.

The Court cannot investigate the sufficiency of the material or the reasonableness of the grounds upon which the authority ordering detention has been satisfied.¹¹

The expression 'improperly' in Section 491 cannot include any consideration of the question whether the legislation in question is proper for it is beyond the province of a Court to consider any such matter. The word 'improperly' therefore can only refer to cases in which although the forms of law have been observed there has been a fraud on an act or an abuse of the powers given by the Legislature.¹² High Court can inquire whether the detention under Defence of India Act or Rules is legal.¹³

A detenu cannot more the High Court or the Supreme Court under Section 491 or Art. 226 of the Constitution or under Art. 32.^{13a}

In the absence of any order of Government, the continued detention of the applicant was held to be an illegal or improper detention within the meaning of Clause (b).^{13b}

9. Custody of minor children.—Ordinarily no doubt the basis of the issuance of the writ of *habeas corpus* is an illegal detention but in the case of the writ issued in respect of the wife or the child, the law is not so much concerned about the illegality of the detention as the welfare of the person detained. The Courts will supersede the natural rights of the parent and will not restore the child to him, where on account of his misconduct or ineptitude, the moral welfare of the child is endangered.¹⁴ The fact that a sufficiently long time lapsed or was permitted to lapse between the period of the removal of the children and that there was no danger to the lives of the children are grounds for refusing to interfere.¹⁵ Where a minor is illegally or improperly detained the High Court would interfere by way of *habeas corpus* provided that it is not a case where the remedy under the Guardian and Wards Act is more suitable in the interests of justice.¹⁶

A guardian can apply under this section for the custody of the minor child when the minor of 13 years is detained against the wishes of the lawful guardian. The fact that the father of the minor ill-treated the minor's deceased mother is no valid ground for refusing custody to the father of the minor child.¹⁷ The Court of Wards can be invested with authority to assume superintendence of the person of a minor in spite of the existence of a guardian appointed by will or other instrument.¹⁸ The power has to be exercised with caution and not in a case where there is a dispute merely as to who should be the guardian of a particular minor.¹⁹

11. *Gauri Nandan*, A 1948 A 414.

12. *Jitendra*, 36 CWN 1088 : A 1932 C 253 and *Wasudu Anant Sohani*, ILR 1948 N 488 : 50 Cr LJ 165 followed in *K. Suryanarayan Rao*, 29 Mys LJ 28 ; *Harish Chandra*, A 1943 A 27 (FB) : 44 Cr LJ 722 ; *Dr. Ram Babu Saxena*, A 1950 A 342 : 51 Cr LJ 947.

13. *Vimlabai*, A 1945 N 8.

13a. *Makhan Singh Tarkikka v. State of Punjab*, SCA Cr App no. 80 of 63 decided on 2-9-63.

13b. *In re Jagardeo Ram Sumar Tewari*, (1924) 26 Bom LR 1252.

14. *Bholanath Bisan Das v. Dt. Magistrate, Jullundar*, A 1959 Punj 238 : 1959 Cr LJ 653 (case under Art. 226 of the Constitution) ; *Zairabibi*, 12 Bom LR

891 : 11 Cr LJ 687 ; *Jashy*, 29 C 290 ; *Saraswati Ammal v. Danakoti Ammal*, A 1924 MP 73 : 26 Cr LJ 6.

15. *Gopalji v. Sreechand*, A 1955, A 26 : 1955 Cr LJ 28.

16. *Mohd. Amir Abbasi v. Nasiruddin*, A 1952 MB 54 : 1952 Cr LJ 578 ; *Haidari Begum v. Jawad Ali*, A 1935 A 55 : 36 Cr LJ 554.

17. *S. Rama Iyer v. K. V. Nataraja Iyer*, A 1948 M 294 : 49 Cr LJ 369 ; *Subbaswami*, 53 M 72.

18. *Deputy Commissioner Gonda v. Md. Sheikh*, A 1934 Oudh 392.

19. *Sultan Singh v. Mayram Radhaswami*, A 1930 A 260 : 31 Cr LJ 719 ; *Gopalji v. Shre Chand*, A 1955 A 28 : 1955 Cr LJ 24.

Father a motor driver, applying for a writ for custody of minor son.—The Madras High Court by a full bench has held that in applications for '*habeas corpus*' the Court should look to the interest of the child as being paramount. It further held that the proper course for the father would be to set the Court in motion locally under Section 25 of the Guardian and Wards Act.²⁰

10. Clause (c).—This clause corresponds to the writ which is known as *Habeas Corpus ad Testificandum*. "The object of the writ is to enable a person who is in legal custody in prison to be brought up before a Court for the purpose of giving evidence as a witness".²¹ Under the Indian Law the detenu may be brought up before the High Court.

11. Clause (d).—This clause corresponds to the writ known as *Habeas Corpus ad Respondendum*. "The object of this writ is to bring up prisoners who are detained in custody under civil or criminal process before Magistrates or Courts of record for trial or examination or any other charge".²²

Criminal Proceedings contemplated in Section 270, Government of India Act lie in the ordinary Criminal Courts and not in special Courts which are the creation of Military Law,²³ can be interfered with.

Martial law, as has often been said, is no law at all, the ordinary Courts *ex-hypothesi* are not functioning except under military protections and the effect of the martial law, Section 491 does not apply to such cases.²⁴

12. Clause (e).—This is known as *Habeas Corpus ad Deliberandum and Recipias*. "The object of these writs is to enable the removal of prisoners from one custody to another for the purpose of their trial".²⁵ "Two writs must be applied for, the writ *ad deliberandum* to the gaoler to deliver the prisoner, and the writ *recipias* to the other gaoler to receive him."²⁶

13. Clause (f).—When the Sheriff has taken the body of the defendant in custody in execution of a writ of attachment he returns the writ with an endorsement of the fact, that he has taken the defendant in custody. "The appropriate mode of enforcing obedience to a writ of *habeas corpus* is by attachment".²⁷

14. Who can move.—A third party can move for a *habeas corpus* writ to release a person in custody, under the rules framed by the High Court, only when the person in detention is unable owing to the restraint to make the applications himself.

The affidavit of the third party shall state the reason why the person restrained is unable to make the affidavit.²⁸ To allow irresponsible persons to move petitions under this section on behalf of persons about whom they have really no knowledge merely on political or other affinity is prejudicial to the proper and efficient administration of justice.²⁹ The language of

20. *Shaikh Moidin v. Kunhadevi*, A 1929 M 33 (FB).

21. *Halsbury*, 2nd Ed. Vol. IX, para 1266.

22. *Halsbury*, 2nd Ed. Vol. IX, para 1267.

23. *Kartar Singh*, A 1946 L 103 ; 47 Cr LJ 1022 (JB).

24. *Chanappa Shantrappa*, 55 B 263 (under Sholapur Martial Law Ordinance).

25. *Halsbury*, 2nd Edition, Vol IX, Paragraph 1268.

26. *Halsbury*, 2nd Ed., Vol. IX, Paragraph 1269.

27. *Halsbury*, 2nd Ed. Vol. IX, Paragraph 1260.

28. *In re Kunjan Nadar*, 1955 Cr LJ 740 ; A 1955 TC 74 ; *Kunjama*, A 1951 TC 123 ; 52 Cr LJ 641 ; *Raj Bahadur*, 57 CWN 517.

29. *In re Hardial Singh*, A 1949 EP 130 ; 50 Cr LJ 370.

Section 491 places no limit to the class of person or persons who can move a High Court with relation to a person in custody. Such a petition at the instance of a complainant is competent.³⁰

15. Successive applications.—"The applicant has a right to apply successively to every Court competent to issue a writ of *habeas corpus* and each tribunal must determine such an application upon its merits unfettered by decision of any other tribunal of co-ordinate jurisdiction even though the grounds urged are exactly the same.³¹

The Bombay High Court has held that successive applications under Article 226 of the Constitution do not lie.³² The Patna High Court has held that in India it is not open to a detenu to ask for a review of an order already made under Section 491. Entertaining of a second application on the same facts would amount to a review of the earlier judgment and would be clearly barred by Section 369.³³ Orissa High Court is of the same view.³⁴

16. Sub-section (2)—Rules.—See the Calcutta High Court Rules.

The following are some of the rules :—

1. All applications for orders under clauses (a), (b), (c), (e) and (f) Section 491 of the Code shall be made before the Division Bench taking criminal business of the Appellate Side of the High Court.

2. Such applications shall be made by Advocates and Attorneys may instruct such Advocates. They shall be made on petition duly verified by affidavit setting forth the circumstances under which the order is sought.

3. Where the application is made for an order under clause (e) of that section for the examination of a prisoner as a witness it must state the place where he is detained and for what purpose his evidence is required.

4. Where the application is made for an order under clause (e) to remove a prisoner from one custody to another for the purpose of trial notice of the application must be served on the prisoner and it shall be stated in the affidavit where the prisoner is detained in custody, to what other custody it is proposed to remove him and the reason for such change of custody.

5. Where the application is for an order under clause (f) that the body of a defendant should be brought in on the Sheriff's return of '*cepi corpus*' to a writ of attachment the return must be produced before the Court on requisition.

6. In any case in which the Court shall order a person in custody to be brought either before it, or before a court martial before Commissioners acting under the authority of a commission from the Governor-General-in-Council, or to be removed from one custody to another, a warrant shall be prepared and signed by the Registrar of the Appellate Side and sealed with the seal of the Court. Such warrant where issued under rule 34 shall be forwarded by the Registrar of the Appellate Side to the officer in charge of the jail in which the prisoner is confined. In every other case it shall be served personally upon the person to whom it is directed.

30. *Alam Khan*, A 1948 L 33 : 48 Cr LJ 984.

31. *Halsbury*, 2nd Ed., Vol. IX, Paragraph 1239 ; *Ramjilal*, A 1949 EP 67 : 50 Cr LJ 271 (FB) : A 1928 PC 300.

32. *Prahlad*, A 1951 B 25 FB.

33. *Raghunandan Yadav*, 1948 P 262 : 50 Cr LJ 528.

34. *Bruj Kishore Patnaik*, A 1950 Or 144 : 51 Cr LJ 826 (FB).

7. Where the Court is of opinion that a *prima facie* case for granting the application is made out, a rule *nisi* may be issued calling upon the person against whom the order is sought to appear on a day to be named therein to show cause why such order should not be made and at the same time to produce in Court the body of the person alleged to be illegally or improperly detained then and there to be dealt with according to law.

8. On the return day of such rule or on any day to which the hearing thereof may be adjourned, where no cause is shown, or where cause is shown and disallowed, the Court shall pass an order that the person improperly detained shall be set at liberty or delivered to the person entitled to his custody. Where cause is allowed the rule shall be discharged.

9. In disposing of any such rule the Court may in its discretion make an order for the payment by one side or the other of the costs of the rule.

For *Form of Warrant* see Chapter XI, Rule 43 *vide*, Calcutta Gazette, 1929, dated 25th July, pp, 1510—1511.

17. Procedure.—Under the English practice, on an application for a writ of *habeas corpus* the respondent might state his reasons in justification of the detention either when showing cause on the order *nisi* or when making a return to the writ of *habeas corpus*. When the justification depends upon the validity of a regulation, the question of its validity may be allowed to be discussed at the hearing of the rule *nisi* itself.³⁵ It would be improper for the Criminal Bench acting under Section 491 to retry for itself³⁶ the question which has already been determined by the High Court in its ordinary Criminal jurisdiction or to pass an order overriding an order already made by the High Court.³⁶ Ranking J., observed in that “This Bench is in no way a Court of appeal from the learned Judge exercising the ordinary original Criminal jurisdiction”. This view is now not tenable as appeals from the Sessions Judge (Single Judge of the High Court) lie under Section 411A to the Division Bench.

A single Judge of the High Court of Mysore cannot deal with an application under Section 491. It should be heard by a Division Bench.³⁷ Madras High Court Rules 2 and 24 have been held *intra vires* and it has been held that order given by a single Judge of the High Court in matters contemplated by Section 491 is not within jurisdictions.³⁸

It was held under the unamended section that the application should be made to the High Court in its original Criminal Jurisdiction.^{38a} The Calcutta High Court under sub-section (2) has framed certain rules which came into force from August 1, 1929 and it has negatived this view.

Rules 62 and 63 framed by the Bombay High Court under Section 491 suggest that all matters of defence or justification with regard to the detention of the applicant for the writ of *habeas corpus* are to be considered at the time cause is shown by the respondent against the rule *nisi* issued on a *prima facie* case being made out by the applicant for the writ of *habeas corpus*.³⁹ An

35. *Keshav Talpade*, (1945) FCR 88 : 48 CWN FC 32 : 44 Cr LJ 719 (FC).

36. *Rameshwar Khiroriwala*, 56 C 32 (35) : 32 CWN 889 (894).

37. *N. D. Shankar*, 53 Mys HCR 365 where *Subodh*, 52 C 319 and *Rameswar Khiroriwala*, 56 C 32 referred to.

38. *Dt. Magte. Trivendrum v. K. C. Mannen*, A 1939 M 120 : 40 Cr LJ 320 (FB).

38a. *Charu Chandra Majumdar*, (1916) 20 CWN 1233 decision by Chowdhury J ; *Horace Lyall*, 29 C 256.

39. *Keshav Talpade*, A 1943 FC 72 : 44 Cr LJ 719 (FC).

application for a writ of *habeas corpus* which has been disposed of on merits by the Court cannot be reheard, even though the party or the Counsel was not present at the time the petition was heard.⁴⁰

Under Rules framed by the East Punjab High Court under Section 491 (2) it is permissible to present the petition under Section 491 direct to a Judge in his Chambers or in open Court or even at his residence. But the Judge must be a Judge who is dealing with criminal matters in Single Bench at the time.⁴¹

By virtue of the provisions of Section 151 C. P. C. the High Court has the power to revise an order passed by the Court of Small Causes on appeal against the decision of the Authority appointed by the Payment of Wages Act.⁴²

Affidavit.—When no issue of fact requiring an answer is raised it is not necessary to file an affidavit but if an issue of fact is raised in the application then a counter affidavit on behalf of the State refuting the facts is necessary otherwise the truth of the facts alleged will normally be accepted.⁴³

In *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings.⁴⁴

Supreme Court Rules.

See Order XXXV of Supreme Court Rules.—(Article 32 of the Constitution, Rule 3) *Habeas Corpus*.—A petition for writ of *habeas corpus* shall be accompanied by an affidavit of the person restrained stating that the petition is made at his instance and setting out the nature and circumstances of the case :

Provided that where the person restrained is unable owing to the restraint to make the affidavit the petition shall be accompanied by an affidavit to the like effect made by some other person acquainted with the facts, which shall state the reason why the person restrained is unable to make the affidavit. The petitioner shall state whether the petitioner has moved the High Court concerned for similar relief and if so with what result.

Article 32 of the Constitution does not confer in the Supreme Court as Article 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by Part III. Article 32 provides a 'guaranteed' remedy for the enforcement of these rights and this remedial right is itself made a fundamental right by being included in Part III.⁴⁵

18. Costs.—See Calcutta High Court Rules framed in 1929 under which the High Court can award costs. It was held that the Madras High Court could not issue writs under the Common law whether the application was under Section 491 or Article 226 of the Constitution such application being of criminal nature the High Court could not direct payment of costs.⁴⁶ There is no specific provisions for awarding costs in Section 491. In the absence of rules under Section 491 (2) of the Allahabad High Court, costs cannot be awarded.⁴⁷

See the Bombay High Court Rules referred to in.⁴⁸

40. *In re Taren Kateswar Rao*, A 1951 M 611 : 52 Cr LJ 252.

41. *Ramjilal*, A 1949 EP 67 : 50 Cr LJ 271 FB.

42. *Khudu*, 55 CWN 49 : A 1952 C 798.

43. *Bisheshar Dayal*, A 1946 L 38 : 47 Cr LJ 212.

44. *Ram Narayan*, A 1953 SC 277.

45. *Ramesh Thapar*, A 1950 SC 124 (126).

46. *In re Venkataraman*, A 1951 M 267 ; *Ramasami*, 55 M 1049.

47. *Basudeo*, A 1949 A 513 : 50 Cr LJ 798 (FB) ; *Basanta Chandra Ghose*, 23 P 968 (FB) : A 1945 P 44.

48. *Keshav Talpade*, (1945) FCR 88 : 48 CWN 32 : 44 Cr LJ 719 (FC).

19. Appeal.—Prior to the Constitution it was held that under Section 215 of the Government of India Act which related both to the Civil and Criminal Jurisdiction of the High Court an appeal lay to the Federal Court and Privy Council.⁴⁹

After the Constitution appeal lies to the Supreme Court under Article 132 of the Constitution,⁵⁰ but no leave of the High Court is necessary as Supreme Court can be moved directly.⁵¹

491A. [*Powers of High Court outside the limits of appellate jurisdiction*] Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), S. 3.

PART IX

SUPPLEMENTARY PROVISIONS

CHAPTER XXXVIII

OF THE PUBLIC PROSECUTOR

492. Power to appoint Public Prosecutors.—(1) The State Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the State Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | |
| 2. Legislative Changes. | 7. public prosecutor. |
| 3. Report of Select Committee. | 7. Function of Legal Remembrancer. |
| 4. Report of the Joint Committee (1922). | 8. Case conducted by a private prosecutor, may be withdrawn by Public Prosecutor. |
| 5. 'Any Case'. | 9. Any Local area. |
| 6. Public Prosecutor. | 10. Sub-section (2). |
| —Duty of a Public Prosecutor. | 11. No Court-fees for documents required by Public Prosecutors. |
| —Duty of Public Prosecutor to call witnesses. | |
| —Court Inspector or Sub-inspector as a | |

1. Corresponding sections in former Codes.—This section corresponds to Sections 57, 58 and 202 of the Code of 1872 and the Code before its amendment in 1923 was similarly worded as that of the Code of 1882.

2. Legislative Changes.—In sub-section (2) the opening words 'In any case committed for trial to the Court of Session' were omitted and the

49. *Shibnath Banarji*, 72 IA 241 : 50 CWN 25 ; A 1945 PC 156 ; *Haridas Danaji*, A 1949 N 20.

50. *Tarapada v. State of West Bengal*, A 1951 SC 481.

51. *Ramesh Thappar*, A 1950 SC 124 (126).

words 'such rank as the State Government may prescribe in this behalf' were substituted for the words 'the rank of Assistant District Superintendent', and the words 'any case' were substituted for the words "such case" by Section 133 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923).

3. Report of the Select Committee.—"We are doubtful whether the second amendment made by the Bill in Section 492 really effects what was intended. In some places there are special Police Acts and they do not invariably give the Local Government power to delegate to Assistant Superintendents the powers of a District Superintendent. Moreover there is a variety of nomenclature and we think it better to leave to the Local Governments to prescribe the rank of police officers who may be appointed Public Prosecutors for the purposes of a particular case".

4. Report of the Joint Committee, (1922).—"The words 'In any case committed for trial to the Court of Session' in the beginning of sub-section (2) have been omitted because the necessity of appointing a Public Prosecutor in the absence of that officer may arise not only in Sessions Courts but in all other instances. The words 'such rank as the State Government may prescribe in this behalf' have been substituted in the place of the words 'the rank of Assistant District Superintendent', because, as there is a variety of nomenclature of the Police Officers, we think it better to leave it to the Local Governments to prescribe the rank of police officers who may be appointed Public Prosecutors for the purposes of a particular case".

5. 'Any case'.—The substitution of the word 'any' for 'such' case seems to be a consequential amendment since sub-section (2) is no longer confined to the case of appointment of a Public Prosecutor in Sessions Courts only.

6. Public Prosecutor.—See definition Section 4 (t) *supra*.

The Advocate General, Standing Counsel, the Government Solicitor mentioned in Section 495 are not Public Prosecutor.⁵²

Where by a notification the Governor appoints the Advocate General of the Province, to be a Public Prosecutor generally for the Province, Advocate General is entitled to sign and file an appeal before the High Court.⁵⁴

Duty of a Public Prosecutor.—"The Counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as Counsel for any particular person or party".⁵⁵ He should not by statement aggravate the case against the prisoners, or keep back a witness because his evidence may weaken the case for the prosecution. His only object should be to aid the Court at discovering truth. A public prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side.⁵⁶ "The duty of a Public Prosecutor is to represent not the Police, but the Crown, and his duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused

52-53. *Brindaban*, A 1952 MB 13 : 1952 Cr LJ 153.

54. *Bhagwan Das*, A 1949 PC 263 ; 50 Cr LJ 886 ; *Rambahadur Singh*, A 1957 A 278 (Prosecuting Inspectors and Deputy Superintendents, CID in UP

are Special Public Prosecutors).

55. *Reg. v. Holden*, (1838) 8 C and P 269.

56. *Kashinath Dinkar*, (1871) 8 Bom HCR Cr Ca 126 (153) following 8 C and P 269.

is to be determined by the tribunals appointed by law and not according to the tastes of anyone else".⁵⁷

Duty of Public Prosecutor to call witnesses.—"It is the duty of the Public Prosecutor to call and examine all such (material) witnesses, and the Judge is bound to hear all the evidence upon the charge. It is true that the Public Prosecutor is not bound to examine persons who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for the cross-examination of the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses".⁵⁸ See in this connexion the case of *Dhanum Kazi* and other cases.⁵⁹ Of course the view is sometimes expressed that the language in Section 114 ill. (g) of the Indian Evidence Act being 'may', the accused person cannot complain if the prosecution has not called material witnesses.

It is the clear duty of the Public Prosecutor to produce all persons, who lay claim to a first hand knowledge of the incidents under trial, and if the prosecution do not choose to place them in the witness box, it must at least tender them to the defence for cross-examination.⁶⁰ See also commentary on Section 286 *ante*.

Court Inspector or Sub-Inspector as a Public Prosecutor.—By Notification No. 2507-P., dated 6th July, 1907, and published in the Calcutta Gazette of 10th July, 1907, Part I., p. 1162, every Inspector or Sub-Inspector of Police appointed to prosecute cases before Magistrates is a public prosecutor generally for all such cases.⁶¹

The Amending Act XVIII of 1923 by substituting in sub-section (2) "such rank as the State Government may prescribe in this behalf" in place of "not being an officer of Police below the rank of Assistant District Superintendent of Police" gives the Local Government discretion to appoint any Police officer. The said Notification referred to in *Sital Singh*⁶¹ is modified by the amendment.

7. Function of Legal Remembrancer in the Calcutta High Court.—"In exercise of the power conferred by Section 492 of Act X of 1882 (the Code of Criminal Procedure), the Lieutenant Governor appoints the Legal Remembrancer to be *ex-officio* Public Prosecutor in all cases before the High Court on its Appellate Side with the exception of such cases as come before it from Presidency or other Magistrates in Calcutta"—24th June, 1886, Notification No. 2122A.⁶²

By Notification dated 1st April, 1912 the Legal Remembrancer of Bihar and Orissa became *ex-officio* Public Prosecutor for that Province, hence the

57. *Ram Ranjan Roy*, (1914) 42 C 422 (428); 19 CWN 28 followed in *Amrita Lal Hazra*, 42 C 957 (1004); *Major Wanchope*, 38 CWN 187.

58. *Tula*, (1885) 7 A 904; (1885) AWN 284; *Durga*, (1893) 16 A 84 (FB); See *Sardar Singh v. State of Bombay*, A 1957 SC 747; 1957 Cr LJ 1325; *Staphin Cenerestine*, A 1936 PC 289; *Habeeb Md.* A 1954 SC 150; *Bakshish Singh*, A 1957 SC 904.

59. *Dhanum Kazi*, (1881) 8 C 121; 10 CLR 151; *Sagal Samba Sajao*, (1893) 21 C 642 (653); *Ram Runjun Roy*, 42 C 422; 19 CWN 28; *Tenaram Mandal*, (1920) 25 CWN 142.

60. *Jumo*, (1909) 3 SLR 200; 11 Cr LJ 410; 6 IC 847.

61. *Sital Singh*, (1918) 46 C 700 (703).

62. Calcutta Gazette, 30th June, 1886, P 783.

appeal filed on 2nd May, 1913, on behalf of the Local Government by Mr. Orr, Deputy Legal Remembrancer for Bengal against an order of acquittal from Bihar was held to be incompetent.⁶³

8. Case pending before a Sub-divisional Magistrate—being conducted by a private prosecutor—withdrawn by the Court Inspector under orders of the District Magistrate.—When a private complaint is filed and then the complainant is given permission to conduct the prosecution and is to be responsible for its conclusion, it is highly improper that after he has closed his evidence and the charge has been framed, the prosecuting Inspector should turn up and suddenly drop the prosecution without even consulting him.⁶⁴

9. 'Any Local Area'.—The words "in any local area" in Section 492 (1) qualify not only the words "for any specified class of cases" but also the preceding words "generally or in any other case".⁶⁵

10. Sub-section (2).—The amendment does not confine the sub-section in its operation to Sessions trial and the District Magistrate or the Sub-divisional Magistrate may under this sub-section appoint any Police officer not being below such rank as the State Government might prescribe for conducting a particular case. See Commentary under the heading 'Legislative Changes'.

11. No Court-fees for documents required by Public Prosecutors.—Copies of all documents which a Public Prosecutor may require have been exempted from Court-fees.⁶⁶

493 Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction.—The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal; and, if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein under his directions.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | secution. |
| 2. 'In which any case of which he has charge'. | 5. Complainant's pleader should act under his direction. |
| 3. "Or appeal". | |
| 4. Public Prosecutor should conduct pro- | |

1. Corresponding sections in former Codes.—This section corresponds to Section 60 of the Code of 1872 and is similarly worded as that of the Code of 1882.

2. 'In which any case of which he has charge'.—This expression has reference to the appointment of a Public Prosecutor under Section 492 (1).

3. 'Or appeal'.—The Public Prosecutor appointed under Section 492 may appear and plead at the Appellate Court in a case of which he had charge at inquiry or trial.

63. *Deputy Legal Remembrancer, Bengal v. Gya Prasad*, (1913) 41 C 425.

64. *Ram Gobind Singh v. Lalu Singh*, (1923) 46 A 88; 21 ALJ 1855; AIR (1924) A 203.

65. *Karu Mian*, A 1949 P 344.

66. Govt. of India Notification, 21st January, 1868; *Md. Ebrahim*, 45 CWN 768; 43 Cr LJ 539.

4. The Public Prosecutor shall conduct the prosecution.—“The Public Prosecutor may properly delegate the conduct of the case so far as to take the aid of an advocate exercising his proper function, provided he retains general management to himself”.⁶⁷

Where the Public Prosecutor is in charge of the prosecution the pleader or the agent appointed by the Railway under Section 145 (2) of the Railways Act will act under the direction of the Public Prosecutor.⁶⁸

5. The pleader appointed by the complainant shall act therein under his direction.—“The Public Prosecutor may avail himself of the assistance of a Counsel retained by a private individual. In so availing himself of the Counsel’s services, the Public Prosecutor by no means deprives himself of the management of the case. The two together may work in harmony, if they do not, the Counsel may retire, or the Prosecutor may claim to keep the further conduct of the case solely to himself”.⁶⁹

The word “act” in this section does not mean something other than examining, cross-examining witnesses or addressing the Court. The word is not used in a technical sense in distinction from “appear and plead” in the opening words of the section⁷⁰ where the State is not before the Court and whether as complainant’s counsel or *amicus curia* the Court can hear him.⁷¹

494. Effect of withdrawal from prosecution.—Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

SYNOPSIS

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|---|--|
| 1. Corresponding sections in former Codes. | of verdict, and in other cases before Judgment is pronounced, withdraw from the prosecution. |
| 2. Legislative Changes. | |
| 3. Effect of Amendment. | 10. Officer entitled to withdraw from prosecution. |
| 4. Scope. | 11. Sub-section (a). |
| 5. Any Public Prosecutor—withdrawal by Public Prosecutor. | —Sub-section (b). |
| 6. Duty of Court to give reasons. | —Order of acquittal bars further proceedings under Section 403. |
| 7. Accused a Competent Witness. | 12. Effect of withdrawal. |
| 8. Withdrawal at Committal stage. | 13. Revision. |
| 9. ‘In case triable by jury before return | |

67. *Narayan M. Pendshi*, (1874) 11 Bom HCR 102 (104)—decision under Section 253 of the Code of 1872.

68. *B. N. Roy Co. v. Sheikh Mokbul*, A 1925 P 755; 27 Cr LJ 313.

69. *In re Narayan M. Pendshi*, (1874) 11

Bom HCR 102; *Budrinarayan Peralal*, A 1951 MB 84; 52 Cr LJ 509; *Bhupali Mathah* A 1959 AP 477.

70. *Vaz.*, 1930 MWN 768.

71. *Ghulam Mohammad*, A 1942 L 296; 41 Cr LJ 14 (FB).

1. Corresponding sections in former Codes.—This section corresponds to Section 61 of the Code of 1872, and excepting the words introduced by the amendment of 1923, is similar to that of the Code of 1882.

2. Legislative Changes.—The words “appointed by the Governor General in Council or the Local Government” after the words “Any public Prosecutor” were omitted and the words “either generally or in respect of any one or more of the offences for which he is tried” were inserted by Section 134 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

3. Effect of the Amendment.—Under the Code the effect of withdrawal from prosecution under cl. (a) was ‘discharge’ in respect of all the charges and that under cl. (b) was wholesale acquittal. Under the amending Act XVIII of 1923 the Public Prosecutor may withdraw either generally or in respect of any one or more of the offences for which the accused is tried.

The amendment has in effect overruled the case of *Affiluddin*.⁷²

4. Scope.—The analogy of the English practice would be misleading as an aid to the construction on Section 494.⁷³ The proceedings under Section 337 are different in character from those under Section 494. The former deals with the actions of judicial, the latter with that of an executive officer. Section 494 says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which, no doubt, is that the person in respect of whom the charge is withdrawn may be willing to give evidence.⁷⁴ Even when Section 337 can be applied, it is not contrary to law to discharge the approver under Section 494 (a).⁷⁵ This section is an enabling one and vests in the Public Prosecutor the discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed up by his discharge or acquittal as the case may be.⁷⁶

5. Any Public Prosecutor.—The qualifying words, “appointed by the Governor General in Council” having been deleted by the Amending Act (XVIII of 1923) any Public Prosecutor may apply for withdrawal.

Withdrawal by Public Prosecutor.—The Public Prosecutor who has taken charge of the case instituted on a private complaint can withdraw the prosecution,⁷⁷ unless he is in charge the Public Prosecutor cannot interpose.⁷⁸

Although private party strictly speaking has no *locus standi* to object to the withdrawal of the case but it does not mean that the private party can not be heard.^{78a}

6. Duty of Court to give reasons for allowing withdrawal.—An order by which the Court acting under Section 494 of the Code accords

72. 2 CLJ 18 (n).

73. *State of Bihar v. Ram Naresh Panday*, 1957 SCR 336 : A 1957 SC 389 ; 1957 Cr LJ 567.

74. *Bawa Faquir, Singh*, 65 IA 388 ; A 1938 PC 286 ; 40 Cr LJ 360 ; *Ramsaran*, A 1945 N 72 ; *Ousaph Yakob v. Jose*, A 1959 Ker 309 ; 1959 Cr LJ 1170.

75. *Harihar Sinha*, 40 CWN 876 ; A 1936 C 356 ; 37 Cr LJ 758 (FB).

76. *State of Bihar v. Ram Naresh Panday*,

1957 SCR 336 : A 1957 SC 389 : 1957 Cr LJ 1182 ; *Giri Bala Dasi v. Nadar Gasi*, A 1952 C 699.

77. *Pratap Chand v. L. Beharilal*, A 1955 J & K 12.

78. *Ratanshah*, A 1945 B 147 ; 46 Cr LJ 434.

78a. *S. B. Sherof v. K. P. Singh*, A 1964 P 33 following *State of Bihar v. Ram Naresh*, A 1957 SC 389.

consent to the withdrawal from a prosecution is a judicial order; and for every such order reasons should be given so that the High Court, acting in its revisional jurisdiction, may be in a position to examine into the matter and determine whether the discretion vested in the Court has been properly exercised.⁷⁹ Suhrawardy, J. in the case of *G. V. Raman*⁸⁰ although agreed with Mitter, J., in discharging the Rule because reasons were given in that case, observed that no reasons need be assigned and the cases relied on by Mitter, J., needed reconsideration. In this case the Crown referred to the case of *Gulli v. Narain*⁸¹ which held that failure to give reasons does not vitiate withdrawal, as Section 494 does not expressly require the Court to state reasons.

An order allowing a case to be withdrawn under Section 494, is open to revision but the High Court will not interfere if sufficient reasons are recorded by the Court allowing the withdrawal.⁸²

This section gives no indication as to the grounds on which the Public Prosecutor may make the application or the considerations on which the Court therefore in granting its consent may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion. In understanding and applying the section two main features thereof have to be kept in mind. The initiative is that of the Public Prosecutor. The Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. It cannot be taken to place on the Court the responsibility for a *prima facie* determination of a triable issue. For instance, the discharge that results therefore need not always conform to the standard of 'no *prima facie*' under Section 209 (2) and Section 253 (1) or of 'groundlessness' under Section 209 (2) and Section 253 (2). It is not correct to say that where the application is on the ground of inadequacy of evidence regarding judicial considerations, it would be manifestly improper for the Court to consent to withdrawal before recording the evidence and taking it into consideration. To hold so would be engrafting on the wide terms of Section 494 an exception or a proviso limited to such a case.⁸³ The reasons for the withdrawal must be such as to satisfy the judicial conscience of the Court. Consent is not to be lightly given merely because the Public Prosecutor has asked for it without a careful and proper scrutiny of the grounds on which it is sought,⁸⁴ or for confidential reasons of State.⁸⁵ A Magistrate need not consider evidence as is done at the time of giving consent to the withdrawal.⁸⁶

In order to grant permission to withdraw prosecution the Magistrate is not to consider the evidence as is done in trial of cases. Further the appli-

79. *Umesh Chandra Roy v. Satish Chandra Roy*, (1917) 22 CWN 69 : 26 CLJ 208: 18 Cr LJ 886 : 41 IC 998, followed in *Jagat Chandra Roy v. Kalimuddin Sardar*, (1921) 26 CWN 880 ; *Rajani Kanta v. Idris Thakur*, (1921) 48 C 1105 : 25 CWN 615 : 22 Cr LJ 760 : 64 IC 280, followed in *Suganchand v. Chuni Lal*, 6 NLJ 177 : 72 IC 361 : 24 Cr LJ 361 AIR (1923) N 260 ; *Sagan Chand v. Chunilal*, A 1923 N 260.
80. 33 CWN 468 : AIR (1929) C 319 ; *Kashivishwanathan*, A 1948 M 422 ; *Pratap Chand v. L. Behari Lal*, A 1955, J & K 12 : 1955 Cr LJ 1182 ; *Lakshmi*

Narayan, A 1932 L 368.
81. 2 P 708 ; *Mul Singh*, (1922) 24 Cr LJ 433 : AIR (1923) L 163 ; *In re Sadyan*, (1908) 5 MLT 215.
82. *Bepin Behary Ghose v. Haripada Ghose*, (1922) 24 Cr LJ 5 : 71 IC 53.
83. *State of Bihar v. Ram Naresh Pandey*, 1957 SCR 336 ; A 1957 SC 389 : 1957 Cr LJ 567.
84. *Onseph Yakub v. Jose*, A 1959 Ker 309: 1959 Cr LJ 1170.
85. *Amar Narain v. Mathur*, A 1952 Raj 42; 1952 Cr LJ 375.
86. *Rames Jha*, A 1959 P 380 : (1959) Cr LJ 1616.

cation for consent may legitimately be made by the Public Prosecutor for reasons not confined to the judicial prospects of the prosecution (v5).⁸⁷

In case of an approver who has been granted pardon under Section 337, the moment the pardon was tendered to the accused, he must be presumed to have been discharged.

7. Accused a Competent Witness.—After the discharge of an approver under Section 494 he is a competent witness.⁸⁸ An accomplice, if he is not an accused under trial in the same case, is a competent witness and may be examined on oath. The prosecution must be withdrawn and the accused discharged under Section 494 before he would become a competent witness. But if the Court, purporting to act under Section 494, sanctions the withdrawal of the prosecution, but omits to record an order of discharge and the accused continues to be kept in custody his position is in no way changed from that of an accused.⁸⁹ This case⁸⁹ was distinguished by the same High Court in *Sherati Singh*⁹⁰ where the accomplice in fact ceased to be on trial although there was an omission to record the formal order of discharge under the section. The Allahabad High Court accepted the decisions of the Bombay High Court in *Mona Punja* and another case⁹¹ relied on in *Banu Singh*⁸⁹ with the reservation that the value though not the admissibility of the evidence of an accomplice might be seriously affected by considerations arising out of the position in which the witness himself stood (with reference to his possible prosecution for the same offence) at the time when his evidence was taken and distinguished *Banu's* case⁸⁹ mainly on the ground that there had been wholly irregular and invalid tender of pardon as also on the ground that the evidence of the accomplice was not affirmatively held to be inadmissible.⁹²

8. Withdrawal at Committal Stage—Validity.—It cannot be said that in a case triable by a Court of Sessions, an application by the Public Prosecutor for withdrawal with the consent of the Court does not lie in the committal stage.⁹³

9. 'In cases tried by Jury before the return of the verdict, and in other cases before the Judgment is pronounced, withdraw from the prosecution'.—The Public Prosecutor has no right *after* the conviction of the accused by the first Court and in the *appellate stage* of the case to present any petition for withdrawal under Section 494 (b) though the petition is inspired by the District Magistrate, nor the Sessions Judge is entitled to proceed to acquit the accused before he even attempted to judicially determine the appeal by the accused.⁹⁴

'Either generally or in respect of any one or more of the offences for which he is tried'.—These words were inserted by Section 134 of Act XVIII of 1923, the intention of the Legislature being to make it clear that a Public Prosecutor may withdraw one only of several charges—*vide* Statements of Objects and Reasons. These words have in effect superseded *Affiluddi's* case.⁹⁵

87. *Peris*, A 1954 SC 616.

88. *Kasem Ali*, (1919) 47 C 154 : 31 CLJ 192 : 21 Cr LJ 386 : 55 IC 994 ; *Hussein Haji*, (1900) 25 B 422 : 2 Bom LR 1095 ; *G. V. Raman*, (1929) 33 CWN 468.

89. *Banu Singh*, (1906) 33 C 1253 : 10 CWN 962 : 4 Cr LJ 145 ; *Durant*, (1898) 23B 213 (215, 216).

90. 15 Cr LJ 693.

91. *Mona Punja*, (1892) 16 B 661 and

Durant, 23 B 213.

92. *Muhammad Nur*, (1909) 7 ALJ 86 : 11 Cr LJ 21 : 5 IC 21.

93. *State of Bihar v. Ram Naresh Panday*, 1957 SCR 336 ; A 1957 SC 389 : 1957 Cr LJ 567.

94. *Ananta Lal Sinha v. Jahiruddin Biswas*, (1927) 46 CLJ 121 : 104 IC 449 : AIR (1927) C 816.

95. *Affiluddi*, 2 CLJ 18 (n).

10. Officer entitled to withdraw from prosecution.—The Officer, who has the power of withdrawing from the prosecution of a case under Section 494 is the officer referred to in Section 495 clause (1).⁹⁶ Where a case has been started upon a Police report, and the Court Sub-Inspector wants to withdraw the case, the Court acts without jurisdiction in rejecting the prayer for withdrawal, simply because the complainant wants to proceed with the case. In such a case the complainant has no *locus standi* to control the proceedings.⁹⁷ A Public Prosecutor who is appointed under the orders of the Local Government is appointed under Section 495 as a Prosecutor for the whole case and it is competent for him to withdraw from the prosecution of an accused subsequent to his appointment.⁹⁸ The Amending Act XVIII of 1923 has deleted the words “appointed by the Governor-General or by the State Government” which occurred after the expression ‘Any Public Prosecutor’ but that has not affected this decision. It has been held however by the Allahabad High Court that it is improper on the part of the Court Inspector to suddenly withdraw from the prosecution in a case where a private complaint is filed and the complainant is given permission to conduct the prosecution without consulting the pleader engaged by the complainant.⁹⁹

11. Sub-section (a).—This sub-section contemplates an order of discharge if the application for withdrawal is made before the charge is framed. If the Magistrate accords his consent to the withdrawal of a charge under this sub-section and discharges the accused, the order is a judicial order.¹ If the order of discharge passed against an accused under Section 494 (a) was not shown to be an improper order at the time it was passed, it could not be set aside while he was being tried on a different charge before the Sessions Judge.^{1a}

Sub-section (b).—The words ‘*in respect of such offence or offences*’ were inserted by Section 134 of Act XVIII of 1923 and are consequential upon the amendment of the section itself, and limit the acquittal in respect of the offence withdrawn. This sub-section contemplates that the effect of withdrawal after a charge is framed or when no charge is required, *e. g.* in a summons-case, is acquittal.

Withdrawal from the prosecution contemplated by Section 494 implies a definite statement by the Public Prosecutor that he does not want to prosecute the particular case against the accused. It cannot be said that even when a Public Prosecutor asks for a removal of the case by transferring it there is a withdrawal under Section 494.^{1b}

Order of acquittal under this section bars further proceedings under Section 403.—Where a certain number of persons have been as a matter of fact charged with robbery before a Magistrate, who consents to the withdrawal of the charge, the only course left to him is to make an

96. *Lakshmana Chetty v. Kulan Peria Karuppan*, (1911) MWN 106 : 11 Cr LJ 722 : 8 IC 867.

97. *Gopi Bari*, (1920) 1 PLT 400 : 21 Cr LJ 641 : 57 IC 657, following *Karuna Kantha Jha v. Rudra Kumar Jha*, (1919) 4 PLJ 656 ; see *Sital Singh*, (1918) 46 C 700 : 30 CLJ 255 : 54 IC 53.

98. *Govind Balvant Laghate*, (1916) 18 Bom LR 266 : 17 Cr LJ 256 : 34 IC 976.

99. *Ram Gobind Singh v. Lalu Singh*, 46 A 88 : 21 ALJ 855 : AIR (1924) A 203. See *contra*—*Sital Singh*, (1918) 46 C

700.

1. *Umesh Chandra Roy v. Satish Chandra Roy*, (1917) 22 CWN 69, followed in *Jagat Chandra Roy v. Kali Muddi Sardar*, 26 CWN 880, and *Rajanikanta Saha v. Idris Thakur*, (1921) 48 C 1105 ; *Saganchand v. Chunlal*, (1922) 6 NLJ 177 : AIR (1923) N 260.

1a. *In re Seetheramu*, (1911) MWN 74 : 12 Cr LJ 440 : 11 IC 624 ; *Variath Bappai*, A 1963 Ker 346 following *Akhil Bandhu Roy*, A 1938 C 258.

1b. *Rama Rao*, 1957 MLJ (Cr) 399.

order of acquittal under Section 494 (b).² An acquittal under Section 494 (b) operates as a bar under Section 403.³

12. Effect of withdrawal.—Withdrawal under cl. (a) before the framing of charge amounts to a discharge, and under cl. (b) amounts to acquittal. The words “one or more of the offences for which he is to be tried” in Section 494 are general in character and they may be “distinct offence or offences of the same kind or offences arising out of the same transaction.”⁴

An order of discharge being a judicial order the Government has no power to direct the prosecution of the accused on the same facts on the same charge.⁵ The accused becomes a competent witness against the co-accused.⁶ Discharge of accused on withdrawal of complaint is no bar to fresh complaint.⁷

13. Revision.—Where the Public Prosecutor has acted under the directions or with the approval of the Government in applying under this section for withdrawal and where consent has been improperly given, the order of discharge or acquittal consequent thereto is open to correction by the High Court in exercise of its powers of appeal or revision as the case may be.⁸ A private party has got no *locus standi* to apply in revision where the Court consents to the withdrawal of the prosecution and discharges the accused.⁹

495. Permission to conduct prosecution.—(1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below a rank to be prescribed by the State Government in this behalf, but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the State Government in this behalf shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by Section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

2. *Sheobaran Das v. Shibli*, (1904) 2 ALJ 30 : 2 Cr LJ 21 : (1904) AWN 277.

3. *Re Dudekula Lal Sahib*, (1917) 40 M 976 dissenting from *Re Cotaya*, (1917) 40 M 977 (footnote).

4. *In re Billa, Masthan*, A 1955 A P 33.

5. *K. N. Ghachan*, A 1949 P 449 : 50 Cr LJ 992 ; *Harihar Sinha*, 40 CWN 876 ; 37 Cr LJ 758 (F B).

6. *Banu*, 33 C 1353 : *Harihar Sinha*, 40 CWN 876 (F B) ; *G. V. Raman*, 33 CWN 488 : 31 Cr LJ 215.

7. *Nasir v. Abdul Karim* A 1934 L 169 ;

Lori Chand, 34 CWN 196.

8. *Onseph Yakub*, A 1959 Ker 309 : 1959 Cr LJ 1170 ; *Jagat Chandra Roy v. Kalimuddi*, 26 CWN 880 : A 1924 C 382 ; *Rajani Kanto v. Idris Thakur* 40 C 1106 ; 22 Cr LJ 760 ; *Rajendra*, A 1944 C 411 ; *Anurupa*, 55 CWN 160 ; *Maula Bux*, A 1949 P 233 ; 50 Cr LJ 488 (F B) ; *Bepin Behary Ghose v. Haripada Ghose*, A 1924 C 538.

9. *Amar Narain Mathur*, A 1952 Raj 42 : 1952 Cr LJ 375 ; *Gulli Bhagat v. Narain Singh*, 2 P 708 : 25 Cr LJ 446.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Permission when can be granted. |
| 2. Legislative Changes. | 5. Sub-section (2). |
| 3. Application of section to security proceedings. | 6. Sub-section (3). |
| 4. Magistrate may grant permission to any person to conduct prosecution. | 7. Sub-section (4).
—“Excise officers are not Police officers within sub-section (4)”. |

1. Corresponding sections in former Codes.—This section corresponds to Section 59 of the Code of 1872. Sub-section (2) was inserted in the Code of 1898 for the first time, otherwise it was similarly worded as that of 1882 as amended by Act X of 1886.

2. Legislative Changes.—The words, ‘with the previous sanction of the Governor General in Council,’ which occurred in sub-section (1) after the words, ‘Local Government in this behalf,’ were omitted by Section 2 and Sch. I of the Devolution Act, 1920 (XXXVIII of 1920).

3. Application of section to Security proceedings.—Section 495 is not applicable to security proceedings.¹⁰

4. Any Magistrate inquiring into or trying the case may permit the prosecution to be conducted by any person.—The trying Magistrate has to decide for himself whether he should grant or withhold permission to the complainant to conduct the prosecution and should not be guided by the District Magistrate’s opinion on a reference.¹¹ Rafiq, J., held: “It is doubtful whether the words ‘any person’ in Section 495 of the Code would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution was based on a personal grudge only”.¹²

Permission to conduct prosecution, when can be granted.—The provisions of sub-section (1) are no doubt wide enough to empower a trying Magistrate to permit ‘any person’ to conduct the prosecution but that does not mean that the trying Magistrate should grant the permission indiscriminately.¹³ Where the complainant engaged a counsel after the examination of witnesses and the Public Prosecutor desired him to address the Court, the permission of the Court under this section should not be refused.¹⁴ A special Public Prosecutor may be appointed in a murder case to conduct prosecution.¹⁵ Ordinarily in murder cases counsel or advocate engaged by the complainant should have no other place than that of one strictly subordinate to the Public Prosecutor.¹⁶

‘other than an officer of police.’—As to conduct of prosecutions by police officers in Upper Burma notwithstanding anything in Section 495, see the Upper Burma Criminal Justice Regulation, 1892 (V of 1892) Schedule, Art. XIV, Bur. Code; in British Beluchistan, see the British Beluchistan, Criminal Justice Regulation, 1896 (VIII of 1896) Schedule, Art. 17, Bel. Code.

10. *In re Muthia Moopan*, (1911) 36 M 315 (317) : 14 Cr LJ 559 : 21 IC 159 ; *Manik Hote*, A 1943 S. 54 ; *Anandya Sambhya*, A 1940 B 416 ; 42 Cr LJ 150.
11. *Maung Po*, (1916) 10 Bur LT 213 : 17 Cr LJ 486 : 36 IC 166.
12. *Darshan Das v. Atma Ram*, (1913) 11

ALJ 313 (314) : 14 Cr LJ 389.
13. *Kabul*, A 1933 S 345 : 35 Cr LJ 320.
14. *Vas*, 1930 MWN 769.
15. *Anurupa Devi v. Ramlal Rajghoria*, 55 CWN 160 ; A 1952 C 395.
16. *Md. Ismail*, A 1940 S. 220 : 42 Cr LJ 158.

'below the rank'.—The rank of a sub-inspector in Ajmere Marwara, *see* Aj. R. and O., and in Burma, *see* Bur R. M.; that of first class head constable in charge of a police station in Madras, *see* Mad. R. and O. to be prescribed by the State Government.

'but no person such permission'.—With the exception of the Advocate General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the State Government in that behalf, no person whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.¹⁷

Notification.—Commercial Tax Inspectors in the State of Mysore are empowered to conduct prosecution pertaining to the Commercial Taxes Department in cases within their respective jurisdictions.^{17a}

5. Sub-section (2).—A Police Circle-Inspector who is permitted to conduct a prosecution can withdraw it as well with the permission of the trying Magistrate under Section 494 read with Section 495 (2).¹⁸ Criminal Courts have no jurisdiction to acquit accused persons on a motion for withdrawal of the case by a Police Inspector who is not specifically permitted to conduct the prosecution under Section 495.¹⁹

If a pleader conducting the prosecution on behalf on the complainant is satisfied that there are good grounds for withdrawing from the prosecution it is open to him to ask the Public Prosecutor to appear and apply for withdrawal.²⁰ What sub-section (2) speaks of "any such officer" it contemplates the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other Officer when generally or specially empowered by the Government in that behalf when these officers are appearing in their official capacity. Sub-section (2) does not give the power of withdrawal to the officer named when they appear as private prosecutor.²¹ In Nagpur, a Court Jamadar²² and in Bombay a Circle Inspector²³ can withdraw the prosecution. In U. P. a Court Inspector is not a Public Prosecutor.²⁴

6. Sub-section (3).—The Public Prosecutor may properly delegate the conduct of the case so far as to take the aid of an advocate exercising his proper function, provided he retains general management to himself.²⁵

7. Sub-section (4).—A Police Inspector, who has taken part in the investigation into an offence, is not qualified to conduct the prosecution of the persons charged with that offence, but it is a mere irregularity curable under Section 537.²⁶

Excise Officers are not 'Officers of Police' as mentioned in this sub-section.²⁷ If the Investigating Officer himself conducts the prosecution, the entire pro-

17. *Butlokristo Das*, (1880) 6 C 59 : 6 CLR 374—decision under S. 129 of Presidency Magistrate's Act (IV of 1877); *Thedi Narayana*; A 1960 AP 1 (F B) : 1960 Cr LJ 33.

17a. Mys. Gaz. dated 1.8.1963, Part IV, S. 1—c (ii), p. 2411.

18. *Anantharama Vadhiar v. Muthia Thevan*, (1914) MWN 776 : 15 Cr LJ 641 : 25 IC 841; *see* *Sital Singh*, (1918) 46 C 700.

19. *Chockanada Gounden v. Salambura Gounden*, (1909) 10 Cr LJ 501 (N) : 4 IC 132.

20. *Karu Main v. Kedar Lal*, 28 P 70 : A

1949 P 344.

21. *Krishna Mohan Basak v. Lakshi Narayan Das*, ILR (1946) 2 C 123.

22. *Dattaraya*, A 1938 or 76 ; 39 Cr LJ 65.

23. *Janki Gopal*, A 1936 B 35 ; 37 Cr LJ 333.

24. *Ram Gobind*, 46A 88.

25. *In re Narayan M. Pendshe*, (1874) 11 Bom HC 102.

26. *Tribhovandas Brij Bhukandas*, (1902) 26 B 533 : 4 Bom LR 271.

27. *Gopal*, 57 B 441 ; 34 Cr LJ 905.

ceedings before the Court becomes null and void.²⁸ It has been held that non-compliance with the provisions of sub-section (4) is a curable irregularity.²⁹

CHAPTER XXXIX

OF BAIL

496. In what cases bail to be taken.—When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided, further, that nothing in this section shall be deemed to affect the provisions of Section 107, sub-section (4), or Section 117, sub-section (3).

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 7. Release on bail in bailable offence. |
| 2. Legislative Changes. | 8. Sufficiency of Bail. |
| 3. Effect of Amendment. | 9. Proviso. |
| 4. Scope. | 10. Bail pending Appeal to Supreme Court be granted by High Court. |
| 5. Anticipatory Bail. | 11. Cancellation of Bail. |
| 6. 'When any person other than a person accused of a non-bailable offence'. | |

1. Corresponding sections in former Codes.—This section corresponds to Sections 216 and 258 of the Code of 1861; Section 128, paragraph 2; Section 194, paragraph 2; Section 204, paragraph 1; Section 388 and 393 of the Code of 1872. The Code before its amendment, was similarly worded as that of 1882.

2. Legislative Changes.—The Proviso is new and was added by Section 135 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

3. Effect of the Amendment.—The section as amended does not affect the provision of Section 107 (4) whereby the Magistrate before whom a person is sent under Section 107 (3) may order detention of such person in custody pending further action by him under Chapter VIII, nor does it effect the provision of the amended Section 117 (3). The amendment gives effect to the ruling in *re Narayanasami Naicker*,³⁰ and supersedes in effect the ruling in *Mewalal Thakur's case*³¹ which held that bail cannot be demanded from a person against whom proceedings under Section 107 are contemplated but no proceedings have been actually drawn up or issued.

28. *Kadikachalam*, (1955) 2 MLJ 576, *Syed Madar Sahib*, 1956 An WR 206; *Manik Hote*, A 1943 S. 54; *Sellamuthur A* 1954 M 513 followed in *Dusari, Joseph A* 1959 AP 29; 1959 Cr LJ 25.
29. A 1961 Ker 129, following *William Stanly*, A 1956 SC 116, *Narayan Row*, A

1957 SC 737.
30. (1912) MWN 169 : 22 MLJ 357 13 Cr LJ 447.
31. (1906) 11 CWN 415; *Karbalani Husain Ali*, A 1940 N 75 : 41 Cr LJ 155; *Maung Saw Hlaing*, A 1933 R 165.

4. Scope.—There is no inherent power under Section 561A to grant bail. Sections 496 and 497 provide bail to accuse persons accused of bailable or non-bailable offence and Section 426 for bail to convicted persons.³² The Supreme Court has held that the inherent powers of the High Court under Section 561A are not in any way affected by Section 496. They have to be exercised sparingly, carefully and with caution.³³ In this section the words “proceedings before a court” are used in a wider sense and not in the restricted sense of judicial proceedings.³⁴ Bail cannot be withheld as a punishment.³⁵ Where the offence is bailable, mere seriousness of the offence is not sufficient to refuse bail.³⁶ In bailable offence there is no question of discretion in granting bail as the words of the section are imperative.³⁷ Bail with conditions where a person is charged with a bailable offence is illegal.³⁸ The law does not authorise a Magistrate to demand *cash deposit* as a condition to the release of the accused on bail.³⁹ Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence and the character, means, and standing of the accused.⁴⁰

5. “Appears or is brought before a Court” (Anticipatory Bail).—The word “appears” occurring in Sections 496 and 497 admits of appearing through counsel. An anticipatory bail can therefore be granted.⁴¹ Persons anticipating arrest in cognizable offence can be granted bail.⁴²

6. ‘When any person other than a person accused of a non-bailable offence’.—The marginal note to this section is “In what cases bail to be taken” substituted for “Bail to be taken in case of bailable offence” which occurred in the Code of 1882. Hence it follows that the section applies to persons arrested or detained without warrant although they may be arrested or detained for a matter which is not an offence, *e. g.*, when arrested under Chapter VIII. But in this connexion we should look to the Proviso to Section 496 added by the Amending Act XVIII of 1923.

7. ‘such person shall be released on bail’.—It follows from these words that a person ‘other than a person accused of a non-bailable offence’ can claim bail as a matter of right.⁴³ A Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal.⁴⁴

Applications for bail are not to be summarily or perfunctorily dismissed.⁴⁵

32. *Jairam Das*, 72 IA 120 ; 49 CWN 477 ; A 1945 P C 94 ; distinguished in *Talab Haji Hussain*, (1958) SCA 321 ; A 1958 SC 376 ; *Rasul Bux*, A 1942 S. 132.

33. *Talab Hussain* (1959) SCA 321 ; A 1958 SC 376 ; 1958 Cr LJ 701 where *Jairam Das*, 49 CWN 477 (P C) distinguished.

34. *Satyahari Choudhury*, 57 CWN 581 ; 1953 Cr LJ 1548.

35. *Allahrakha Umed Ali*, A 1933 S 367 ; *Nagendranath Chakravorty*, 51 C 402 ; *Jamini Mullick*, 36 C 174.

36. *Abdul Habib Khan*, A 1928 A 211 ; 29 Cr LJ 450.

37. *In re District Magistrate Vizagapattam*, A 1949 M 77 ; 49 Cr LJ 640.

38. *In re Appah Kuda*, A 1942 M 740 : 44 Cr LJ 202 ; MR *Radha*, (1955) 2 MLJ 471.

39. *Rajballam Singh*, A 1948 P 375 : 45 Cr LJ 340.

40. *Nagendra Nath Chakravorty*, 51 C 402 ; A 1924 C 476 followed in *Ram Chand*, A 1929 L 284 : 30 Cr LJ 1128.

41. *Mangilal*, A 1952 MB 161 ; 1952 Cr LJ 1125.

42. *Jagan Singh*, A 1952 VP 87 : 1952 Cr LJ 74 ; contra, *Kailash*, A 1955 A 98. Contra *Narayan Prasad*, A 1963 MP 276.

43. *Mahendra Singh*, (1910) 14 CWN cxxxviii ; *Re Narayansami Naicker*, (1912) 36 M 474 ; *Mir Hashmali*, (1917) 20 Bom LR 121—case under Chapter VIII.

44. *Kokoori Singh*, (1877) 1 CLR 130 (132).

45. *Ratan Singh v. Nihal Singh*, A 1959 MP 216 : 1959 Cr LJ 723.

8. Sufficiency of bail.—The *practice* of leaving to the Police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself and not with the Police.⁴⁶

9. Proviso—was added by Section 135 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). See Commentary under the heading 'Legislative Changes.'

The substantive portion of Section 496 applies to all persons except those accused of non-bailable offences. Furthermore, the provisions of this section are applicable not only to persons who are arrested or detained by an officer-in-charge of a police-station, but also to persons who appear or are otherwise brought before a Court. The proviso to this section makes it clear that the substantive portion of the section applies also to the proceedings.^{46a}

10. Bail Pending Appeal to Supreme Court.—High Court has no jurisdiction to grant bail to a person convicted of non-bailable offence during the pendency of his appeal before the Supreme Court on a certificate granted to him under Article 134 (1) (c). It is only the Supreme Court who can grant him bail.⁴⁷

11. Cancellation of bail.—Bail cannot be cancelled by the Sessions Judge when the offence alleged is bailable and the bail is granted under Section 496 and the bail amount is reduced by Sessions Judge under Section 498, Section 561A cannot be invoked in such a case as it relates to the power of the High Court.⁴⁸ The High Court will exercise the inherent powers under Section 561A where it cannot get the proper evidence before it and it cannot come to a proper conclusion whether the offence has been committed. It can cancel the bail in the interests of justice in a proper case.⁴⁹

497. When bail may be taken in case of non-bailable offence.—(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life :

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has com-

46. *Gayitri Prosanna Ghosal*, (1888) 15 C 455.

46a. *Santuk Singh*, A 1960 Punj 31 : 1960 Cr LJ 115.

47. *Gorey Lal*, A 1959 A 558 : 1959 Cr LJ 1043 (1).

48. *Bananji Mookerji*, A 1955 Mys 96 ; 1955 Cr LJ 973.

49. *Talib Haji Hussain v. Madhu Kar Pureshattam Mandkar*, A 1956 SC 376 : 1958 Cr LJ 701.

mitted a non-bailable offence, but that these are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing.

(3A) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 8. Anticipatory Bail. |
| 2. Legislative Changes (1923) and (1955). | 9. Proviso to sub-section (1). |
| 3. Report of Select Committee—1923. | 10. Sub-section (2). |
| 4. Effect of 1923 and 1955 Amendments. | 11. Sub-section (3). |
| 5. Principles governing bail in non-bailable offences. | 12. Sub-section (3A). |
| 6. What are reasonable grounds for granting bail. | 13. Sub-section (4). |
| 7. Bail if can be granted in non-bailable offences punishable with death or imprisonment for life. | 14. Sub-section (5). |
| | —Cancellation of bail. |
| | 15. Bail pending appeal. |
| | 16. Bail during pendency of Appeal to Supreme Court. |

See Chapter V-B for 'arrest without warrant'; Section 170 for 'appearance before the Court', Section 167 for 'a power to ask for a remand' and Section 344 *supra* for remanding the accused to custody.

1. Corresponding sections in former Codes.—This section corresponds to Sections 156 and 212 of the Code of 1861; Sections 128, paragraph 1, 194, paragraph 2 and 389 of the Code of 1872. The Code before its amendment was similarly worded as that of 1882.

2. Legislative Changes (1923).—The words ‘*an offence punishable with death or transportation for life*’ in sub-section (1) were substituted for the words ‘the offence of which he is accused’ by Section 136 of the Criminal Procedure (Amendment) Act (XVIII of 1923). Proviso to sub-section (1) was added by the said Act. In sub-section (2) the words ‘a non-bailable offence’ were substituted for the words ‘such offence’. Sub-sections (3) and (4) were inserted and sub-section (5) was substituted by the said Amending Act for sub-section (3) which stood as follows :—

“Any Court may, at any subsequent stage of any proceeding under this Code, cause any person who has been released under this section to be arrested, and may commit him to custody”.

Legislative Changes (1955).—In sub-section (1), the words “or suspected of the Commission of” have been inserted after the words “accused of” and the word “imprisonment” has been substituted for “Transportation” and sub-section (3A) have been added by Act 26 of 1955.

3. Report of the Select Committee (1923).—“It was pressed upon us that the provisions as to bail in non-bailable cases are much too straight. One suggestion made to us was that in Section 497 we should delete all words after ‘may be released on bail’ in sub-section (2). The result would have been to give all Courts full discretion in the matter of allowing bail in non-bailable cases and we felt generally that it was going too far. What we have done is to allow the Court or police-officer to release on bail in a non-bailable case unless there appear to be reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation and as some safeguard against this we have provided for a review by the Sessions Court or the High Court of any order admitting to bail in a non-bailable case. Some of us—including all the official members of the Joint Committee—are of opinion that this decision goes too far and that in the end it will not tend to the administration of justice”.

4. Effect of the 1923 Amendment.—(1) Under the unamended Code bail was not to be taken in non-bailable offences except in special circumstances⁵⁰ and the general rule was that bail was refused in non-bailable offences unless there were reasonable grounds for believing that a person was guilty of the offence of which he was accused.⁵¹ These views seem to have been modified by the amendment. Under the amended section the general rule in non-bailable cases is that the Court or Police-officer will release on bail a person accused of a non-bailable offence *except* in cases where there are reasonable grounds for believing that such person is guilty of an *offence punishable with death or imprisonment for life*. The amendment further provides for the grant of bail in non-bailable offences to a minor under the age of sixteen years, female or sick or infirm person and the Court may exercise its discretion in favour of such persons although there may be grounds for believing that they are guilty of an offence punishable with death or transportation for life. (2) The words “a non-bailable offence” in sub-section (2) substituted for the words ‘such offence’ are a mere consequential amendment. (3) Sub-section (3) is new and requires reasons to be recorded in any case. *This is a mandatory provision.* (4) Sub-section (4) is new and enacts a salutary pro-

50. *Nensi Hansraj*, (1906) 8 Bom LR 420 ; 3 Cr LJ 499 ; (1886) 2 Weir 657 (FB); *Harchand Jhamat Mal*, (1916) 10 SLR 205 ; 18 Cr LJ 642 ; 40 IC 290 ; *Mt. Bashiram*, AIR (1923) A 1079

(1).
51. *Narendra Lal Khan*, (1908) 36 C 166 ; *G. W. Henderson*, (1912) 6 LBR 172 ; 19 IC 171 ; *Jaward Hossein*, (1919) 21 Cr LJ 161 ; 54 IC 769 (A).

vision. It often happens that the judgment of the trial Court is not pronounced immediately and in such cases if the Court is of opinion that the accused is not guilty, he may be released on his executing a bond without sureties for his appearance to hear judgment. (5) Sub-section (5) authorises review by the High Court or the Sessions Judge of any order for bail in a non-bailable case.

'An offence punishable with death or imprisonment for life.'—Mookherjee, J., held :—"We may also recall that Section 497 has been materially altered by Section 136 of Act XVIII of 1923 which substitutes the words "an offence punishable with death or transportation for life" for the words 'the offence of which he is accused'. This cannot but be regarded as the result of liberalising influence on the policy of the Legislature, and the discretion of the Courts will henceforth be less fettered than before".⁵² The phrase "death or transportation for life" in Section 497 does not extend to offences punishable with transportation for life only and means only those offences for which death and transportation for life are alternative sentences.⁵³

Effect of the 1955 Amendment.—The substitution of the word 'imprisonment' for 'Transportation' is a consequential amendment after the abolition of the sentence of transportation. The words "or suspected of the commission of" any non-bailable offence makes the application of the section wider. As the object of the amendment of the Code in 1955 is to provide for a speedier trial, sub-section (3A) provides that the trial should be concluded within sixty days from the first date fixed for evidence and if not finished, bail will have to be granted to the accused, who is in custody during the entire period unless the Magistrate for reasons otherwise directs.

5. Principles governing bail in non-bailable offences.—The probability or improbability of the prosecution terminating in conviction is not a conclusive consideration for the grant or refusal of bail, particularly in a case in which evidence has not so far been led. For their guidance the Courts also look to other circumstances which may be determinative, as for example the courts consider (a) the enormity of the charge, (b) the nature of the accusation, (c) the severity of the punishment which the conviction will entail, (d) the nature of the evidence in support of the accusation, (e) the danger of the applicant's absconding if he be released on bail, (f) the danger of witnesses being tampered with, (g) the protracted nature of the trial, (h) opportunity to the appellant for preparation of his defence and access to the counsel and (i) the health, age, sex of the accused. There are also other considerations and the above is by no means an exhaustive catalogue of the factors which should weigh with the Courts.⁵⁴ In an application for bail, the magistrate should make serious effort to analyse the evidence which is available at the time he deals with the matter. He should take into consideration the ground urged by the prosecution that as a result to the granting of bail to the accused persons whether the prosecution witnesses are likely to be terrorised and would experience considerable difficulty in stepping into the witness-box at the time of the trial.⁵⁵ Where

52. *Nagendra Nath Chakarvarti*, (1923) 51 C 402 (417); 38 CLJ 388 (396, 397), following *Re Juhar Mull*, (1906) 10 CWN 1093 and *Jamini Mullick*, (1908) 36 C 174.

53. *Mohammed Eusoof*, (1925) 3 R 538, where *H. M. Bondville*, (1924) 2 R 546 was distinguished.

54. *Rao Harnarain Singh, Sherji Singh*, A 1958 Punj 123; 1958 Cr LJ 563; *Nagendra Mohan Chakrabarty*, 51 C 402 *Janglekar*, 54 A 115 FB 33 Cr LJ 96; *Nawab Jung*, A 1952 Hyd 30; 1952 Cr LJ 873; *Md. Panjah*, A 1934 S 121.

55. *Mahboob Ali Khan*, A 1956 B 548; 1956 Cr LJ 983.

the accused are men of importance in their respective walks of life, possessing considerable wealth and wielding great influence and the witnesses who are to be produced by the prosecution comparatively occupying a very humble status in life, the apprehension that the accused on being released on bail will in all likelihood avail themselves of the opportunities to corrupt the prosecution witnesses by tampering with their testimony cannot be dismissed as chimerical.⁵⁶ The object of the detention of the accused is to secure his appearance to abide by the sentence of law. It is an error to suppose that consideration such as the nature of the charge, the nature of the evidence, the severity of the punishment awardable are by themselves material in deciding whether an accused person should or should not be released on bail. They are relevant because they affect the likelihood of the accused person failing to appear for his trial. The fact that there is also a possibility of the accused tampering or attempting to tamper with witnesses is also a relevant factor to the grant of bail.⁵⁷ A vague allegation that the accused is likely to tamper with evidence is not a justification for not releasing him on bail.⁵⁸

6. What are reasonable grounds.—“Whether there are reasonable grounds or not is a question which must be decided judicially. That is to say, there should be some tangible evidence on which the Court might come to the conclusion that, if unrebutted, the accused might be convicted.”⁵⁹

Where there was cause for further inquiry and there had not been undue delay in the proceedings, the High Court declined to grant bail.⁶⁰

Delay in holding trial is a good ground.—“It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay, and such delay will certainly dispose this Court to grant bail.”⁶¹

Likelihood of the offender absconding is a good ground.—The requirements as to bail are to secure the attendance of the accused at the trial. The proper test to be applied in the solution of the question, whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial.⁶²

‘Or suspected of the Commission of.’—These words were inserted by Act 26 of 1955. The object was to provide anticipatory bail.

7. Does it follow that under the amended section bail cannot be granted in non-bailable offences where the sentence is death or imprisonment for life.—The language being “shall”, on a strict interpretation of the section, it seems, bail cannot be granted in such cases. But the other qualifying clause *viz.* “if there appear reasonable grounds for believing that he has been guilty” is very important to bear in mind in this connection. The mere fact that the accused is arrested or being tried on a charge for a non-bailable offence where the sentence provided for is ‘death or imprisonment

56. *Rao Harnarain Singh Sherji Singh*, A 1958 Punj 123 : 1958 Cr LJ 563 ; *Mohammad Muzaffer*, A 1963 A 127 where *Jagjit Singh*, A 1962 SC 253 explained.

57. *Ram Chandra*, A 1952 MB 203: 1953 Cr LJ 17.

58. *Nathmal*, A 1952 Raj 156 : 1952 Cr LJ 1259 ; *S. V. Jungley*, A 1944 N 149 : 46 Cr LJ 247 ; *Md. Eysoof*, 3 R 538 : 27 Cr LJ 491 ; *Kamales*, 53 CWN 699.

59. *Per Mitra, J. in Jamini Mullick*, 36 C

174 (178): 13 CWN 51 : 9 Cr LJ 409 : 1 IC 910.

60. *Sourindra Mohan Chakravarty*, (1910) 37 C 412 : 14 CWN 516 : 11 Cr LJ 217 : 6 IC 8.

61. *Narendra Lal Khan*, (1908) 36 C 166 (171) ; *Rao Har Narain Singh Sherji Singh*, A 1958 Punj 123.

62. *Nagendranath Chakravarty*, (1923) 51 C 402 (415) : 38 CLJ (395, 396).

for life' does not fetter the High Court's discretion in granting bail in such cases as the language used in Section 498 is 'any case'. Undoubtedly the High Court has powers under Section 498 to grant bail in such cases.

"Death or imprisonment for life".—The words should be read disjunctively, so as to mean offence punishable with death or imprisonment for life.⁶³

8. Anticipatory Bail.—Persons anticipating arrest in cognizable offences can be granted bail.⁶⁴ A contrary view has been held in⁶⁵ that bail cannot be granted in anticipation to persons not yet arrested, detained by the police, nor to persons who have not yet appeared in Court.

Under Sections 496, 497 and 498 bail cannot be granted to a person who has not yet been arrested for any actual charge of any offence or even on suspicion of his complicity in any offence and who is not required to surrender to any custody under any order of arrest but who apprehends that he may some time be arrested by the Police as a person accused of or suspected at the commission of an offence.⁶⁶ \

9. Proviso to sub-section (1).—This Proviso is new and was added by Section 136 of the Code of Criminal Procedure (Amendment) Act (XVIII of 1923).

See Commentary *supra* under the heading 'Legislative Changes', and 'Effect of Amendment'.

10. Sub-section (2).—Contemplates that the officer-in-charge of a police station or the Court may at any stage of the investigation or trial release the accused on *bail* if there are no reasonable grounds for believing that the accused has committed a non-bailable offence but that there are grounds for further enquiry.

The Madras High Court in *Manikam Mudalia*⁶⁷ condemned the practice where the Magistrate remanded the prisoners in the expectation that evidence might turn up.

Application for bail should not be dealt with in an arbitrary manner.⁶⁸

There is nothing in the Code which debars a Magistrate before whom the enquiry is pending from granting bail even though bail had been refused by the Sessions Judge at an earlier stage of the enquiry. Sub-section (2) of this section itself contemplates of power in the committing Magistrate to grant bail at a subsequent stage.⁶⁹

Where a Police-officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of

63. *Rao Harnarain Singh Sherji Singh*, A 1958 Punj 123; *Nga San Hatwa*, 5 R 270; A 1927 R 206; *Tuaram*, A 1927 N 51.

64. *Jagan Singh*, A 1952 VP 87; 1952 Cr LJ 74; *Hidayatullah*, A 1948 L 77 FB relying on *Johar Mull*, 10 CWN 1093.

65. *Kailash*, A 1955 A 98; *Amirchand*, A 1950 EP 53 (FB), *Sajjan Singh*, A 1953 Pepsu 146; 1953 Cr LJ 1523; *Shyamlal*, A 1953 MP 3; 1953 Cr LJ 102; *Hasan Mohammad*, A 1951 N 471; 52 Cr LJ

1335; *Abubakar Mohammad*, A 1941 Section 83.

66. *State v. Narayan Prasad*, A 1963 MP 276. Overruling *Abdul Karim Khan*, A 1960 MP 54.

67. (1882) 6 M 63 approved *per* Mitra J., in *Jamini Mullick*, (1908) 36 C 174 (178).

68. *Kashiram*, A 1960 MP 312; *Shantilal*, A 1955 Raj 141; 1955 Cr LJ 1205.

69. *Bohra Singh*, A 1956 A 671; 1956 Cr LJ 1275.

the first information, which alleged association of the accused in certain places and stated that the police had in their possession incriminating correspondence between the accused and a secret society in Calcutta, it was held that there was sufficient evidence for remand under Section 344.⁷⁰

11. Sub-section (3)—is altogether new and was inserted by section 136 of Act XVIII of 1923. Since the amendment makes it clear that bail in non-bailable offences will be ordinarily given except in offences provided for in sub-section (1), reasons in writing must be recorded when the case comes under sub-section (1) or sub-section (2).

12. Sub-section (3A)—was added by Act 26 of 1955, *see* notes to this section under “Effect of Amendment”. *see*⁷² Case of *Taleb Haji*, A 1958 SC 376.

13. Sub-section (4)—was also added by the Amending Act of 1923. *See* Commentary *supra* under the heading ‘Legislative Changes’.

14. Sub-section (5)—was substituted for sub-section (3) of the old Code by the said Act XVIII of 1923.

See Commentary *supra* under the heading ‘Legislative Changes’.

Cancellation of bail.—It is the duty of the Court to cancel bail in proper circumstances under Section 497 (5). No application is required by any party.⁷¹ The power to grant bail by the High Court or by the Court of Session under Section 498 are wide, uncontrolled by any of the restrictions mentioned in Section 497. It is true there is under Section 498 no power to cancel bail as there is in Section 497. But if bail is granted by the Sessions Judge, the High Court can as a Court of revision cancel the bail. So also where the bail is granted by the High Court under Section 498, the High Court can in the exercise of its inherent power reserved under Section 561A cancel the bail.⁷²

15. Bail pending Appeal.—The Court of appeal should not release the accused convicted of a non-bailable offence unless there is an error of law or mistake of fact or any other reasons mentioned in Section 497.⁷³ In actual practice such petitions are moved and granted or rejected only when the High Court considers that there are reasonable grounds for believing that the accused is not guilty of any such offence.

16. Bail during pendency of appeal to Supreme Court.—The High Court has no jurisdiction to grant bail to a person convicted of non-bailable offence during the pendency of an appeal before the Supreme Court on a certificate granted to him under Article 134 (1) (c) of the Constitution and the Supreme Court can grant him bail.⁷⁴

498. Power to direct admission to bail or reduction of bail.—(1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of

70. *Narendra Lal Khan*, (1908) 36 C 166 : 13 CWN 43 : 9 Cr LJ 375 : 1 IC 738.

71. *Bohre Singh*, A 1956 A 671 ; 1956 Cr LJ 1275 ; *George Williams*, A 1951 M 1042 *Seoti*, A 1948 ; A 366 (F B).

72. *Champalal*, A 1956 MB 103 (FB) : 1956, Cr LJ 404 *see Taleb Haji Hussain v.*

Mondhkhhar ; 1958 Cr LJ 721 : A 1958 SC 376 ; (1959) SCA 321 (case of a bailable offence) *Amjad Sheikh*, A 1955 C 141 : 1955 Cr LJ 446.

73. *Gul*, A 1928 S 142 ; 29 Cr LJ 470 ; *Sk. Karim*, A 1926 N 279.

74. *Gorey Lal*, A 1959 A 558 : 1959 Cr LJ 1043.

the case, and shall not be excessive ; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

(2) A High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 10. Scope. |
| —Earlier Law. | 11. Amount of the Bond. |
| 2. Legislative Changes (1955). | 12. Principles guiding Courts in the matter of granting or refusing Bail. |
| 3. State Amendment. | 13. "In any case". |
| —Uttar Pradesh. | 14. Bail pending appeal to Supreme Court. |
| 4. Report of Joint Committee. | 15. 'Whether there be any appeal from conviction or not'. |
| 5. Effect of Amendment. | 16. Bail after conviction. |
| 6. Applicability of section. | 17. Sub-section (2). |
| 7. Anticipatory Bail. | —Cancellation of Bail. |
| 8. Grant of Bail to Women. | |
| 9. Bail with conditions. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 436 of the Code of 1861, Sections 390 and 598 of the Code of 1872 and is similarly worded as that of the Code of 1882.

Earlier law.—The word 'any person' was substituted in the Code of 1882 for the words 'an accused person' in Section 39 of Act X of 1872 which again occurred in a part of the Code headed, "Procedure incidental to Inquiry and Trial", but this section was transferred in the Code of 1882 under the heading "Supplementary Provisions". In view of the amendment introduced in 1882 the following decisions⁷⁵ under Section 43 of the Code of 1861 which used the expression 'accused person' and held that the Court of Session had no power to admit convicted person to bail, and⁷⁶ which also held that bail could not be granted in the case of a *convicted person*, who could not be treated as an 'accused person' within the meaning of the section, have been superseded.

The Code of 1898 heads the chapter as 'of Bail' and the amendment in 1923 leaves it unaltered.

2. Legislative Changes (1955).—Sub-section (2) has been added by Act 26 of 1955.

3. State Amendment—

Uttar Pradesh.—Sub-section (1) of the original Section 498 was renumbered as Section 498 (1) and the following sub-section (2) was added by U. P. Act 28 of 1951 "(2) The power conferred by sub-section (1) on a Court of Session shall, in respect of such cases or class of cases as may be notified, be exercisable by an Additional Sessions Judge, Assistant Sessions Judge authorised in that behalf by notification in the official Gazette by the State Government".

75. *Mahendra Narayan Bagabhushan*, 1 BLR App. Cr 7.

76. *Thakuri Prasad*, (1876) 1 A 151 FB, followed in *Ghulam*, (1882) AWN 234

FB ; see to the same effect *Ram Ruttan Mookerjee*, (1875) 24 WR (Cr) 8 and *Kaneai Sahu*, (1875) 23 WR (Cr) 40 (42).

4. Report of the Joint Committee—

“Under the existing law doubts have been expressed whether a person who has been admitted to bail under Section 498 of the Code can be caused to be rearrested except in exercise of the inherent powers of the High Court. In order to remove these doubts a new sub-section (2) has been added to Section 498. The Committee approve the suggestion to provide for the cancellation of bail by the authority empowered to grant it. A suitable amendment in Section 498 has been made”.⁷⁷

5. Effect of amendment.—The following decisions⁷⁸ which held that under Section 498 the High Court could not cancel bail, it could cancel bail under Section 561A by exercising inherent powers, in view of sub-section (2) are no longer good law.

6. Applicability of the section.—The Judge of the City Sessions Court being a Sessions Judge for all purposes except for appeals, reference or revision is competent to deal with an application for bail.⁷⁹ Section 498 does not apply to the case of approvers when they are subsequently tried, sub-section (3) of Section 337 controls this section.⁸⁰ The only granting of bail which is referred to in Chapter XXXIX is the granting of bail to accused person, as accused person after conviction under Section 426.⁸¹ A Sessions Judge may release a person against whom an order has been made under Section 118 pending a reference under Section 123.⁸²

7. Anticipatory Bail.—See notes under Section 497 *Supra*.

8. Grant of Bail to women.—Under this section the scope of grant of bail is much wider but ordinarily the principle contained in Section 497 should be considered in such cases. Under Section 497 it is open to a Court to grant bail to a woman even in cases where she is accused of an offence which is punishable with death or imprisonment for life.⁸³

9. Bail with conditions.—A direction in the order of the High Court granting bail to the effect that if at any time the Magistrate is satisfied that there are reasonable grounds for believing that the accused is tampering with the prosecution witnesses he would be at liberty to cancel the bail is not a direction delegating to the Magistrate the power of the High Court. Conditional orders of this kind are in many cases convenient and are certainly not unusual in matters relating to bail and it is within the competency of the High Court to make such orders.⁸⁴ Defence lawyers pray before the High Court that their clients will report to the police station daily and the bail might be granted on such condition, in cases, while in opposing bail the lawyer for the state argues that if let out on bail, the accused might abscond, and such prayers are often granted.

High Court has no inherent powers apart from Section 498 to grant bail.⁸⁵ The Supreme Court has differed from *Jairam Das's* case⁸⁶ and held

77. *Joint Committee Report*, CI 1954, Ext. Part II 52.

78. *Champalal*, A 1952 MB 189; *Munshi Singh*, A 1952 A 39; A 1948 A 366 (FB) *N. S. Krishnan*, A 1951 M 250; *Mirza Muhammad*, A 1932 A 534; *Champalal*, A 1956 MB 103 (FB); 1956 Cr LJ 404; *Crown Prosecutor v. N. S. Krishnan*, A 1945 M 250; 47 Cr LJ 106.

79. *Jainul Khan*, 66 CWN 676.

80. *Karuppa v. Kundaru*, A 1952 M 833; 1952 Cr LJ 45; *Md. Abdul Majid*, A 1927 S 173; 28 Cr LJ 439.

81. *Jairam Das*, 72 IA 120; A 1945 PC 94; 46 Cr LJ 662 (PC).

82. A 1942 S 132; 44 Cr LJ 378; A 1923 C 723.

83. *Chaki*, A 1957 Raj 16; 1957 Cr LJ 102.

84. *Champalal*, A 1956 MB 103 (FB); 1956 Cr LJ 404; *Genda Singh*, A 1960 A 525.

85. *Jairam Das*, 72 IA 120; 49 CWN 477; 46 Cr LJ 662 (PC) distinguished in *Taleb Haji Hussain v. Madhukar*, A 1958 SC 376; 1958 Cr LJ 701; *Amir Chand*, A 1950 EP 53 (60); 51 Cr LJ 430 (FB).

86. 72 IA 120.

that inherent power under Section 561 has to be exercised sparingly and with caution but under Section 561A the High Court has inherent power to cancel bail granted to a person accused of a bailable offence. In view of the insertion of sub-section (2) in Section 498, it is submitted that the High Court can exercise the powers of cancellation of bail under Section 498 (2).⁸⁷

10. Scope.—It is now wellsettled that the powers of the High Court and the Sessions Judge under Section 498 are in no way controlled by Section 497 and it is open both to the High Court or to the Court of Session to admit a person to bail on good and sufficient cause in any case.⁸⁸ The discretion in granting bail under this section should be exercised in a judicial and not arbitrary manner.⁸⁹

11. Amount of the Bond.—When a man who is arrested, is not accused of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail.⁹⁰ The bond should not be excessive.⁹¹

12. Principles which should guide Courts in granting or refusing bail.—The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. The object of the detention of the accused being to secure his appearance to abide by the sentence of law, the principal enquiry is whether a recognizance would effect that end. In seeking an answer to this enquiry, Courts have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and status of the accused.⁹² In dealing with an application for bail it is relevant that the Court should consider what are the penal consequences of the act when proved, and what is the nature of the offence charged, and whether the offence charged is or is not a bailable offence.⁹³

It is the glorious principle of criminal justice that a man is considered to be innocent till he is found guilty and when he is accused of an offence he must have freedom to defend himself.⁹⁴ A protracted trial is a circumstance in favour of granting bail.⁹⁵ Delay in holding the trial is a good ground for granting bail.⁹⁶

87. *Taleb Haji Hussain v. Madhukar*, A 1958 SC 376 ; 1958 Cr LJ 701.

88. *Gulam Md. Azimuddin*, A 1959 MP 147; 1959 Cr LJ 600 ; *Shantilal*, A 1955 Raj 141 ; 1955 Cr LJ 1205 ; *Joglakar*, 54 A 115 FB ; *Ramchandra*, A 1952 MB 203 ; 1953 Cr LJ 17; *Hanumanta Reddy*, A 1953 Mys 132 (135) ; 1953 Cr LJ 1548 ; *Kripeshankar*, A 1948 A 26 ; *Safri*, A 1951 P. 497 ; 52 Cr LJ 657 ; *Kripa Shankar v. Jagdish Manohar*, A 1951 Raj 360 *Paras Ram*, A 1951 HP 13 ; 51 Cr LJ 1573 ; 52 Cr LJ 657 ; *Keshav*, A 1933 B 492 *Lakshmanan Valayudhan*, A 1952 TC 182 ; 1952 Cr LJ 909 ; *Md. Muzaffar*, A 1963 A 127 where *Joglaker*, A 1931 A 504 (SB) explained.

89. *Shanti Lal*, A 1955 Raj 141 ; 1955 Cr LJ 1201 ; *Hutahimson*, 53 A 931 ; 32 Cr LJ 1271 ; *Krishna Gopal*, A 1923 L 925 ; *Kripa Shankar*, A 1948 A 26 : 48 Cr LJ 41.

90. *Mir Hashan Ali*, 20 Bom LR 121 : 19 Cr LJ 329 : 44 IC 345—a case under Section 496.

91. *Jamini Mullick*, (1908) 36 C 166 (179) ; A 1930 L 668 ; 31 Cr LJ 980.

92. *Nagendra Nath Chakravorty*, (1923) 51 C 402 : 38 CLJ 388 ; see also *Mohammad Eusoof*, (1925) 3 R 538.

93. *Khadim Ali*, (1921) 19 ALJ 693 : 22 Cr LJ 654 : 63 IC 414 ; *Ghulam Md. Azimuddin*, A 1959 M 147 ; *Shantilal*, A 1955 Raj 141 ; *Nagendra Chandra Roy*, A 1923 C 723 : A 1954 Raj 279 : 1955 Cr LJ 66.

94. *Hanumantha Reddy*, A 1953 Mys 132 ; 1953 Cr LJ 1548 ; *Vasant Vinayak Bhagwat*, A 1951 MB 104 : 52 Cr LJ 656 (plea of the accused—Voluminous accounts needs explanation).

95. *Keshav*, A 1933 B 492.

96. *Sourendra Mohan Chakravorty*, 37 C 412 ; 11 Cr LJ 217 ; *Narendra Lal Khan*, 36 C 166 (171).

13. In any case.—These words import that the powers of the High Court are unfettered.⁹⁷ After a Coroner has drawn up an Inquisition under the Coroner's Act (IV of 1870) the High Court alone is empowered to release such persons on bail.⁹⁸ The Extradition Act (XV of 1903) provides for bail to be furnished by persons accused of certain crimes and the matter is one which must be regulated by the provisions of the Criminal Procedure Code. The High Court has the fullest discretion in the matter.⁹⁹ The High Court has no power to admit an insolvent to bail.¹

The words "in any case" and "whether there be an appeal on conviction or not" in this section do not mean that the Court can grant bail or suspend sentence once it has reached finality, *i. e.*, after the signing of the judgement.^{1a}

14. Bail pending appeal to Supreme Court.—The High Court has no jurisdiction to grant bail after a certificate under Article 134 (1) (c) has been granted, the High Court having become *functus officio*, only the Supreme Court can grant bail,² in a case of a proposed appeal to the Supreme Court.³

15. 'Whether there be an appeal on conviction or not'.—"Section 498 of the Codes gives this Court and the Court of Session very wide powers to admit to bail even where an accused person has been convicted and has not appealed. In this case, the offence with which the accused is charged is, it is true, a non-bailable offence, but even in such a case it is clear from the section quoted that the accused may be admitted to bail."⁴

Where the man convicted has not preferred an appeal bail may be granted pending the filing of the appeal and such bail may be extended on application to the Court under this section.

The view of Suhrawardy, J., in *Srilal Agarwalla's case*⁵ that the High Court in the absence of any order by any Court has no power to direct the offender to be released on bail either under Section 498 or under Section 497 cannot be regarded as good law, because Section 498 uses the expressions 'in any case whether there be appeal on conviction or not'.

16. Bail after conviction.—A Sessions Judge has no jurisdiction to release an accused, after convicting him, on bail pending his appeal to the High Court.⁶ See Section 307 (2) which empowers the Sessions Judge to grant bail in case of reference to the High Court by him. There the position is different because the accused is not yet a convicted person.

17. Sub-section (2)—Cancellation of bail.—This sub-section was added by Act 26 of 1955. See notes under "Effect of Amendment".

97. *Sourindra Mohan Chakravarty*, (1910) 37 C 412; *In re Johur Mal*, 10 CWN 1093.

98. *Jogeswar Passi*, (1903) 31 C 1: 7 CWN 889.

99. *Rudolf Stallman*, (1911) 15 CWN 736: 12 Cr LJ 358: 10 IC 958.

1. *Hormarji Ardeshev Hormarji*, (1892) 17 B 334—conviction under Section 50 of the Indian Insolvent Act.

1a. *Bashiruddin Ahmad*, A 1937 N 181; 38

Cr LJ 384; *Manikya Rao*, A 1959 A P. 639 (640): 1959 Cr LJ 1398.

2. *Gorey Lal*, A 1959 A 558: 1959 Cr LJ 1043 (1).

3. *Shaukat Ali*, A 1956 A 523: 1956 Cr LJ 1035.

4. *per Aikman J.*, in *Badri Prasad*, (1908) 5 ALJ 419 (420): (1908) AWN 195: 8 Cr LJ 49.

5. (1926) 44 CLJ 134.

6. *Basappa*, (1902) 4 Bom LR 55.

499. Bond of accused and sureties.—(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(3) For the purpose of determining whether the sureties are sufficient, the Court may, if it so thinks fit, accept affidavits in proof of the facts contained therein relating to the sufficiency of the sureties or may make such further inquiry as it deems necessary.

SYNOPSIS

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|--|---|
| 1. Corresponding sections in former Codes. | 7. Directed by the Police Officer or Court. |
| 2. Legislative Changes (1955). | —Bond to appear before Police. |
| 3. Scope. | 8. Bond executed in the name of King Emperor. |
| 4. Contents of Bail Bond. | 9. Sub-section (2). |
| 5. Forfeiture—Time and place. | 10. Sub-section (3). |
| 6. Discharge of Sureties. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 274 of the Code of 1861, Section 391 of the Code of 1872 and is the same as that of the Code of 1882.

2. Legislative Changes (1955).—Sub-section (3) has been added by Act 26 of 1955.

See Commentary on Section 514 for Forfeiture of Bond; for Form of Bond, See Schedule V, Form No. XLII.

3. Scope.—The section only contemplates the furnishing of a personal bond and a bond by one or more sufficient sureties. The accused as well as the sureties have therefore to execute only bonds. Cash security cannot be demanded but under Section 513 the accused if he offers to pay cash, may be allowed to deposit a sum of money in lieu of executing a personal bond and giving security of some persons.⁷

A condition in a bail bond that the accused should present himself at a certain police station every evening until the termination of the case is not invalid,⁸ but where a condition was imposed that he should not leave Khargpur, although he lived with his family at Midnapore was held bad and he was released on bail unconditionally.⁹ Condition in a bail bond

7. *R. R. Chari*, A 1948 A 238 : 49 Cr LJ 282 approving of *Rajballav* A 1943 P. 375; *Niamat Khan*, A 1951 N 206.

8. *Rabari Suda Dhana*, 3 Sau LR 167.

9. *Kamala Panday*, 53 CWN 699; 50 Cr LJ 1009.

other than a condition for attendance in Court is illegal.¹⁰ In bailable cases no conditions (such as ordering accused not to take part in demonstrations or make any speeches) can be imposed in an order granting bail.¹¹

4. Contents of Bail bond.—The provisions of this section as to the nature and contents of the bond are imperative and it is incumbent to get a bond from the person released on bail. A bond by the surety alone is not contemplated by the Code and there is no power in the Code to forfeit such a bond.¹² A contrary view has been held in¹³ where it has been held that although this section requires two bonds, one from the person released on bail and the other from the surety, where the person released on bail did not sign the bond but the surety only sign the bond.

When the surety furnishes the surety bond along with an affidavit as required by Section 499 (3) the Magistrate can accept his surety bond and can make further inquiry as well and for this purpose order verification from tahsil.^{13a}

The mere fact that Form No. XLII, Schedule V permits the contents of two bonds, one to be executed by the accused and the other by the surety together does not mean that both the bonds should be on the same sheet of paper.^{13a}

5. Forfeiture.—Where the bail bond was in the form prescribed in Schedule V, Form No. XLII but in the undertaking by the surety the date for accused's appearance was not mentioned, the accused having made default the security was forfeited, *held* that the bail bond should be read as one document and the undertaking by the surety should be read as referring to the date mentioned in the portion of the bond signed by the accused and that, therefore, the bond was rightly forfeited for accused's default of appearance.¹⁴

Forfeiture—Time and place.—The surety can be held liable for the production of the accused at the place mentioned in the bond.¹⁵ When a surety bond is for the attendance of the person at the wishes of the police, the place at which the attendance is required must be specified even though the words "whenever required" would be sufficient as regards the time. Where no place is mentioned the bond is defective and order for forfeiture and for payment of penalty is illegal.¹⁶ Where time is not specified in the bond but is stated that the accused shall be produced "whenever called upon to do so", held, the form of the bond was not illegal.¹⁷ Where time and place are not

10. *Giani*, 48 CWN 639.

11. *Gendu Singh*, A 1950 A 525 ; 51 Cr LJ 1377.

12. *Baidyanath Misra*, A 1947 P. 58 : 48 Cr LJ 324 ; *Brahmanand*, A 1939 A 682 : 41 Cr LJ 85 ; *Bhoop Singh*, A 1954 MB 8 : 1954 Cr LJ 354 ; *Narendra*, 59 CWN 475 ; *Balwant Singh*, A 1958 J and K 38 : 1958 Cr LJ 893 ; A 1936 N 243 : 38 Cr LJ 100 ; *Govindra Chandra*, A 1951 or 18 : 52 Cr LJ 97 ; *Chamra Meher*, A 1951 or 179.

13. *Bahar Hussain*, A 1956 A 78 ; 1956 Cr LJ 23 ; *Sribal Singh*, A 1953 A 187 : 1953 Cr LJ 446 ; *Kundan Singh*, A 1952 Pepsu 111 ; 1952 Cr LJ 1056 ;

13a. *Bahru Singh v. State of Uttar Pradesh*,

A 1963 SC 430.

Nazir Ahmad, A 1945 A 389 ; *Indar*, A 1940 L 339 ; *Abdul Aziz*, A 1946 A 116 ; *Reoti Prasad*, A 1934 A 1046. *In re K. Sivasami* A 1962 M 340.

14. *Mapillai Kader Rowther*, (1918) 19 Cr LJ 637 (M) : 46 IC 47 : A 1947 C 120 : 47 Cr LJ 635 (Magistrate can enforce bond against accused and surety).

15. *Bhoop Singh*, A 1954 MB 8 : 1954 Cr LJ 334.

16. *Bholu*, A 1952 Punj 228 ; 1952 Cr LJ 974.

17. *Manmohan Chakrabarti*, A 1928 C 261 ; *Harbilas*, A 1952 MB 2 ; 1952 Cr LJ 142.

mentioned but it is simply mentioned that the accused shall appear in the Court till the decision of the case it does not entail any penalty on the surety.¹⁸

If there is a lacuna in the bond, then the surrounding circumstances and the documents which, so to speak, accompanied the bond itself when it was put in Court, could be looked into in order to determine what the clear intention of the party was.¹⁹

6. Discharge of sureties—on suicide of the prisoner.—When an accused person who has been let out on bail commits suicide the sureties are not liable for the default of his appearance and are discharged from their obligation to produce him.²⁰

7. 'By the Police officer or the Court as the case may be'.—The 'police officer' mentioned here is not limited to the officer-in-charge of a Police station as mentioned in Sections 496 and 497 *supra*. See *Kashi Ram's* case.²¹

Bond to appear before Police—validity of—power of Magistrate to enforce penalty.—As there is no provision in the Criminal Procedure Code authorising a police officer to take a surety bond for the production of any person before the police, such a bond is *ab initio* void, and Magistrate has no power to alter it and impose fresh obligations thereunder.²¹

8. Bond executed in favour of King Emperor.—After 26th January, 1950 is not a bond under the Code and resort cannot be had to the provisions of Section 514 to forfeit the same.²²

9. Sub-section (2).—Sub-section (1) provides that the time and place where the accused is to attend must be stated in the bond,²² sub-section (2) states that if the accused is to appear before some other Court, the bond must expressly say so. When there is no mention in the surety bond of the Court in which the accused is to appear, the bond cannot be enforced.²³ Where surety bond undertook to produce in one Court and the accused asked to be presented to another Court absconded, *held*, the surety was not liable.²⁴ The obligation of the surety to produce an accused ceases on transfer and retransfer to the same Court.²⁵ The Magistrate can, when giving bail, order the accused to appear before the police.²⁶

10. Sub-section (3).—Was added by Act 26 of 1955. It provides for acceptance of affidavits from sureties for the purpose of determining the sufficiency of the sureties or for testing of the sureties by the police or any Subordinate Magistrate or for making further inquiries.

500. Discharge from custody.—(1) As soon as the bond has been executed, the person for whose appearance it has been

18. *Balwant Singh*, A 1958 J & K 38 : 1958 Cr LJ 893.

19. *Bahar Hussain*, A 1956 A 78 : 1957 SCR 770.

20. *Vijayaraghavalu Naidu*, (1912) 37 M 156 : 26 MLJ 63 : (1913) MWN 77 : 13 Cr LJ 684, following *Nrisinga Deb Chatterjee*, (1912) 16 CWN 550 : 13 Cr LJ 592 : 15 IC 1008.

21. *In the matter of Chandra Sekhar Rai*, (1884) 11 C 77, dissented from in

Kanshi Ram, (1913) 22 PR 1913 (Cr) : 6 PLR 1914 : 21 IC 679.

22. *State of U. P. v. Md. Sayed*, 1957 SCR 770 ; 1957 SC 587 : 1957 Cr LJ 888 ; *Ram Saran Singh*, A 960 P 232.

23. *Chintaram*, A 1936 N 243 : 38 Cr LJ 100 (2).

24. *Prabhu Dial*, A 1927 A 831.

25. *Hemlal Ganguly*, 37 CWN 880 : 35 Cr LJ 332.

26. *Kiamat*, A 1945 L 215.

executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him.

(2) Nothing in this section, Section 496 or Section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.

1. Corresponding sections in former Codes.—This section corresponds to Section 217 of the Code of 1861, Section 394 of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope.—A Court while releasing an accused on bail has no power to restrict the movements of the accused. Where the Magistrate ordered a woman accused to be kept in a Mahila Ashram, the surety is relieved of his responsibility under the bond as the accused in such a case has not been “released”.²⁷

See Schedule V. Form No. XLIII, V, for warrant to discharge a person imprisoned on failure to give security.

501. Power to order sufficient bail when that first taken is insufficient.—If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Application of section.
3. Power of Magistrate to cancel a security bond once accepted.
4. Power to increase the amount of bail.

1. Corresponding sections in former Codes.—This section corresponds to Section 215 of the Code of 1861, Section 392 of the Code of 1872 and is the same as that of the Code of 1882.

2. Application of section.—Tyabji, J., held: “Section 501 applies to a case where there are sureties and where through mistake, fraud or otherwise insufficient sureties have been accepted”.²⁸

3. Power of Magistrate to cancel a security bond once accepted.—When a surety offered by a person for good behaviour has once been accepted, a Magistrate has no power subsequently to cancel the security bond though he might be of opinion that such surety is an unfit person.²⁹

27. *Raghubar Dayal*, A 1938 Oudh 81 : 39 Cr LJ 219.

28. *In re Karuthan Ambulam*, (1914) 38 M 1088 (1091) : 17 Cr LJ 132 : 33 IC

308.

29. *Ramlal Acharjee*, (1897) 1 CWN 394, decision on Ss. 109, 122, 125 of Act X of 1882.

4. Power to increase the amount of bail.—A Magistrate has power to increase the amount of bail subsequently having regard to the seriousness of the charge but he has no power to order that the bank deposits of accused will stand as security.³⁰

502. Discharge of sureties.—(1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Discharge of Sureties.

1. Corresponding sections in former Codes.—This section corresponds to Section 218 of the Code of 1861, Section 395 of the Code of 1872 and is the same as that of 1882.

Liability of the surety begins from the date of acceptance of surety-bond^{30a}.

2. Discharge of Sureties.—Where a surety applies for a cancellation of his bond under Section 502 of the Code, there is no such thing as hearing the application on the merits. The presentation of the application itself imposes upon the Magistrate the duty of issuing a warrant for the arrest of the accused.³¹

When a person on bail commits suicide, the surety is discharged.³²

A Magistrate has no power after the appearance of the accused to attach bail money deposited by the surety to realise the fine imposed by the conviction,³³ even if the surety and the accused are brothers living in a joint Hindu family.³⁴ It is the Magistrate alone who can order the accused person to be re-arrested on the bond being cancelled under Section 502 and he only can direct the bond to be discharged and then the law requires that he can call upon the accused to find other sureties. The Superintendent of Police has no power to order for the re-arrest of the accused and if he is arrested under the order of the Superintendent of Police by Sub-Inspector they are jointly liable for false imprisonment.³⁵

30. *Dajiba v. Champat*, A 1951 N 206.

30a. *Bakkaru Singh v. The State of Uttar Pradesh*, A 1963 SC 430 : 1962 MWN 412 SC.

31. *In re Anant Shivaji*, (1907) 9 Bom LR 1285 : 6 Cr LJ 385 ; *Wadhwal*, A 1940 S 136 ; 41 Cr LJ 802 ; *Jha Maung*, A 1937 R 244.

32. *Nrising Deb Chatterjee*, 16 CWN 550 :

13 Cr LJ 592 ; *In re Rana Babu Pujari*, A 1916 B 221 : 17 Cr LJ 393.

33. *Raghunandan*, A 1924 Oudh 396 : 26 Cr LJ 112.

34. *Gridhari Lal*, A 1921 A 71 : 22 Cr LJ 744.

35. *Kundan Lal v. Des Raj*, A 1955 Punj 51 : 1955 Cr LJ 410.

CHAPTER XL

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES

503. When attendance of witness may be dispensed with and commission issued.—(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a High Court, Court of Session, or any Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter :

Provided that where the examination of the President or the Vice-President or the Governor of a State as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

(2) *Omitted.*

SYNOPSIS

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|---|---|
| 1. Corresponding sections in former Codes. | 7. Grounds for granting or refusing Commission. |
| 2. Legislative Changes—1898, 1951, 1955 and 1956. | —Pardanashin Ladies. |
| 3. State Amendment—Bombay. | 8. May issue commission to a Magistrate for examining a witness resident in his jurisdiction. |
| 4. Scope. | 9. Non-compliance of requisites if fatal. |
| 5. Commission examination of a witness. | |
| 6. Who can issue a commission. | |

1. Corresponding sections in former Codes.—This section corresponds to paragraphs 1 and 2 of Section 330 of the Code of 1872, Section 76 of Act X of 1875 and Sections 157 and 158 of Act IV of 1877.

2. Legislative Changes (1898).—Sub-section (4) was inserted in the Code of 1898 for the first time, otherwise the section is similarly worded as that of 1882.

Legislative Changes (1955 and 1956).—This section was substituted for the old Section 503 by the Code of Criminal Procedure (Amendment) Act, 1951 (1 of 1951), Section 21 which came into operation on 1st April 1951.

The words “or any Magistrate” have been substituted for the words “District Magistrate or Presidency Magistrate” which occurred after the words “the Court of Session” by Act 26 of 1955 and sub-section (2) was omitted by Act 26 of 1955. The words “or Rajpramukh” were omitted by A. L. O. 1956.

3. State Amendment—

Bombay.—The amendments made in sub-section (2) of Section 503 by Bombay Act 23 of 1951 as amended by Bombay Act 39 of 1951 shall be deemed to have been superseded by virtue of Article 254 of the Constitution by the Criminal Procedure Amendment Act, 26 of 1955, which is a Central Act.

4. Scope.—Where a witness expert in handwriting appears to be the principal witness in the case his examination on commission should not be granted.³⁶

Witness in criminal case should not be examined on commission except in extreme cases of delay, expense or inconvenience and in particular the procedure by way of interrogatories should be resorted to in unavoidable situations. The discretion to be used by the Magistrate is a judicial one and should not be lightly or arbitrarily exercised. Sections 503 and 506, should be used sparingly and only in clearest possible cases. The matter is one to be decided on the facts in each case. As a general rule it may however be said that the important witnesses on whose testimony the case against the accused person has to be established must be examined in Court and usually the issuing of a commission should be restricted to formal witnesses or such witnesses who could not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case. The mere fact that the proceedings have got protracted for an extraordinary length of time can by itself be no ground for issuing a commission.³⁷ There is no provision whereby the Court can make a demand on the Government that the accused should be given expenses for going to a particular place in order to cross-examine the witness whose statement has been ordered by the Court to be recorded on commission. In the absence of any such provision of law the Court has no authority to pass the expenses of the counsel for the accused.³⁸ In criminal cases a witness's personal appearance in the Court should be the rule and commission should be the exception, when the case is before the jury then commission is almost always refused.³⁹ The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in Civil or Criminal cases. Provisions of Order 26, Civil Procedure Code should guide Criminal Courts.⁴⁰

On an application by a Ruler to examine himself as his own witness on commission under Section 503, *held*, that the Magistrate has the discretion to issue commission. Magistrate's order disallowing the application was upheld by the High Court.^{40a}

5. Commission examination of a witness.—Wilson, J., held :—"I do not say that Section 503 does not include a party to a proceeding but it is certainly primarily intended for the purpose of some witness other than the parties principally concerned,—persons 'whose presence could not be obtained without an amount of delay and expense, which under the circumstances of the case the Court considers unreasonable'.⁴¹ A complainant is certainly a witness.⁴²

The mere fact of personal inconvenience cannot ordinarily justify the issue of a commission for the examination of a witness who is admittedly not *Purdanashin*.⁴³

36. *Mr. Gratu v. Beaches*, (1910) 9 MLT 334 : (1911) MWN 97 : 17 Cr LJ 64 : 9 IC 347.

37. *Dharmanand Pant v. State of U. P.*, 1957 SCR 321 ; A 1957 SC 590 1957 Cr : LJ 894.

38. *Abdul Aziz*, A 1958 Raj 127 : 1958 Cr LJ 694.

39. *Haroi Lal Narmada Prasad*, A 1952 VP 8 ; 1952 Cr LJ 296.

40. *Vishnoo Narain v. Dipchand Sitaldas*, A 1926 S 124 ; *Krishnaswamy*, A 1954 E P 294.

40a. *Abdul Alim Khan v. Sagarmal*, A 1963 MP 162.

41. *A. M. Jacob*, (1891) 19 C 113 (121).

42. *per* Coxe, J., in *Abhoyeswari v. Kishori Mohan Banerjee*, (1914) 42 C 19 (24) : 18 CWN 1020 : 15 Cr LJ 348 (349).

43. *Purnendu Nath Tagore v. Kalipada Dutta*, A 1956 C 513 : 1956 Cr LJ 1196.

6. Who can issue a Commission—Presidency Magistrate, a District Magistrate.—For other Magistrates, see Section 506 *infra*. An additional Magistrate appointed under Schedule III Part V (18) of the Code is empowered to issue a commission under Section 503 for the examination of a witness within his own jurisdiction.^{43a} Under the amended section any Magistrate can issue the commission. A Court of Session or the High Court can also issue the commission.

7. Grounds for granting or refusing commission—‘the attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable’.—A Hindu lady having been summoned as a witness on behalf of an accused applied under this section to be examined on commission on the ground (*inter alia*) that she was a “*purdanashin*” and that her enforced appearance in a criminal Court would entail a forfeiture of her dignity and position in Hindu Society, *held*, that such applications have been granted under Section 503, and granted on the principle that in matters of procedure the customs and habits of the people should be taken into consideration.⁴⁴ Straight, J., observed:—“I most unhesitatingly say that the taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a thing is unknown to English practice, and ought not to be adopted save in extreme cases of delay, expense or inconvenience.” He refused the prayer of the petitioner who was a *complainant* in a case under Section 500 I. P. C. but directed the Magistrate to make such arrangements for her examination in Court as should secure her privacy, consistent with the recording of her evidence, according to law, in the presence of the accused.⁴⁵ Straight, J., dissented from the view in *Hurro Sundary Chaudhurani*⁴⁶ which held that a *purdanashin* woman can claim to be examined on commission as a matter of right.

The fact that the Magistrate will not have the advantage of seeing and hearing witnesses being cross-examined is no ground to refuse commission.⁴⁷ The mere fact that a witness is temporarily ill is not a ground for examining him on commission,⁴⁸ but where the complainant was present twice for cross-examination and he was unable to attend for reason of health and a certificate of doctors was produced, commission should be issued.⁴⁹ A commission cannot be refused on the ground that certain documents would be produced before the commission by the witnesses to be examined on commission.⁵⁰

The language being ‘*may dispense with*’ the Magistrate may issue commission for the examination of a *purdanashin* lady as held in *Abhoyeswari’s* case⁴² seems to be correct.

The mere fact that a woman is the daughter of a *prostitute* is insufficient to show that she is not a *purdanashin* lady.⁵¹

The view of Coxe, J., in *Abhoyeswari*⁴² or the view in *Basanta Bibi*⁵² that

43a. *Bahadur Ali*, (1922) 24 Cr LJ 622 : 73 IC 510 : AIR (1923) L 158.

44. *Din Tarini Debi*, (1885) 15 C 775.

45. *In the matter of the petition of Farid-un-Nisa*, (1882) 5 A 92: (1882) Awn 184, where 4 C 20 was dissented from.

46. 4 C 20.

47. *K. D. Bose v. Upendra*, A 1951 C 380 : 52 Cr LJ 503 ; *Bala Bux*, A 1938 P. 360 : 39 Cr LJ 732.

48. *Md. Shafi*, A 1932 P. 242 : 33 Cr LJ 942.

49. *H. Guha v. R. R. Chandra*, A 1937 R 231 : 38 Cr LJ 875 ; *Panchkauri*, A 1924 C 971.

50. *K. D. Bose v. Upendra*, A 1951 C 380 : 52 Cr LJ 503.

51. *Abdul Ghaffar Beg*, (1913) 43 PLR 1913 : 18 IC 147.

52. 12 A 69.

it is very undesirable to compel the attendance of a *pardanashin* is the correct view.

The exercise of judicial discretion allowed by this section is that the attendance of a witness (who was at Indore, in a Native State) could not be obtained without unreasonable delay and expense.⁵³

There is no clear provision in the Code which says that the *pardanashin* ladies are as of right exempted from appearance in a criminal Court.⁵⁴ The Court has power to examine her in Court or private room provided that she does not become visible to the public.⁵⁵ Women should be examined in Chambers and not on commission.⁵⁶ The Calcutta High Court in a recent full bench⁵⁷ decision has reviewed the decisions of all the High Courts and held that an accused whose personal attendance has been dispensed with under Section 205 can be examined under Section 342 through an agent or pleader and her personal examination in Court is not required.

8. May issue a commission to any District Magistrate or a Magistrate of the first class within the local limits of whose jurisdiction such witness resides.—It was doubted in *Hem Coomaree Dassel*⁵⁸ whether a Presidency Magistrate could issue a commission outside his jurisdiction. In *Bal Gangadhar Tilak's* case⁵⁹ the point was not discussed, although the evidence taken on commission was used at the trial.

Proviso.—Was added by Act 26 of 1955. It provides for the examination on commission of the President, Vice-President or the Governor or Rajpramukh of a State as a witness or witnesses for the ends of justice which should be recorded by the Magistrate if he thinks fit that the examination of such a witness is necessary.

9. Non-Compliance of requisites if fatal.—If the essential pre-requisite for the validity of the issuing of a commission in Section 503 has not been complied with, the evidence so taken would be improper and could not be used against the accused. This is a defect which goes to the root of the matter and is vital in its content. Thus entire proceedings are vitiated and the evidence of the witnesses taken on commission has to be completely eschewed from the record.^{59a}

504 Commission to whom to be issued—(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the District Magistrate or Chief Presidency Magistrate, as the case may be, within the local limits of whose jurisdiction the witness is to be found.

(2) If the witness is in India, but in an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

53. *Ramchandra Govind Harshe*, (1895) 19 B 749.

54. *Mankanwar v. Sakhray*, A 1958 Raj 137; 1958 Cr LJ 137.

55. *Re Bilasray*, 33 CWN 68.

56. *Md. Bacho*, A 1930 S 56; *Saleh*, A 1936 S 221.

57. *Prova Debi*, 66 CWN 577 (FB) : A 1962 C 203.

58. 24 C 551 : 1 CWN 333; see *In re Manbhoy*, (1911) 12 Cr LJ 501.

59. 6 B 285.

59a. *Dharmanand Pant v. State of U. P.*, A 1957 SC 504.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence, of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification in the Official Gazette, prescribe in this behalf

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Commission for examination in foreign country—in Jammu and Kashmir. |
| 2. Legislative Changes. | |

1. Corresponding sections in former Codes.—This section corresponds to paragraph 1 of Section 35 of the Code of 1872, paragraph 4 of Act X of 1875 and excepting the words “Slave Trade Act, 1876, Section 3” was the same as in the Code of 1882.

2. Legislative Changes.—This section was substituted for the original section as amended in 1923 by Act I of 1951.

3. Commission for examination in foreign country—in Jammu and Kashmir.—(1) Commission for examination of witness in Australia, Canada, Ceylon and Pakistan—*see* notification in Gazette of India 1950 Part II, Section 3, Page 3, S. R. O. 4, dated 8th April, 1950.

(2) In United Kingdom—*see* Gazette of India 1958, Part II, Section 3, Page 1966.

(3) In Jammu and Kashmir—notification S. R. O. 847, dated 13th May, 1952 published in Gazette of India 1952 Part II, Section 3, Page 798.

(4) Commission for examination of witnesses in Singapore shall be sent direct to the High Court in Singapore—*see* notification, in Gazette of India, dated 17th September, 1955 Part II, Section 3, Page 1797.

(5) Commission for examination of witness in Federation of Malaya—*see* Gazette of India, 1954, Part II, Section 3, Page 1505.

(6) Notification under Section 504 directed that commissions from courts of India for the examination of witnesses in Ghana should be issued in the prescribed form to the High Court of Ghana—Gazette of India 30th March, 1963 Part II, Section 3 (ii), Page 984.

505. Execution of commissions.—(1) Upon receipt of the commission, the District Magistrate, or such Magistrate as he may appoint in this behalf, shall proceed to the place where the witness is, or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code.

(2) Upon receipt of the commission, the Chief Presidency Magistrate, or such Presidency Magistrate subordinate to him as he may appoint in this behalf, may compel the attendance of,

and examine, the witness as if he were a witness in a case pending before himself.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. State Amendments. |
| 2. Legislative Changes—1923, 1951 and 1955. | —Bombay. |
| | 4. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to paragraph 4 of Section 330 of the Code of 1872, and, excepting the words “or to whom the duty of executing such commission has been delegated”, was the same as that of the Code of 1882.

2. Legislative Changes.—This section was substituted for the original section as amended in 1923 by Act I of 1951. The words “of the first class” which occurred after the word “such Magistrate” were omitted by Act 26 of 1955.

3. State Amendments—

Bombay.—For sub-section (1) the following shall be substituted, namely :—(1) upon receipt of the Commission, the District Magistrate or such Magistrate subordinate to him as he may appoint in this behalf, shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code *vide* Bombay Act 39 of 1955.

4. Scope.—The right given to the accused under Section 256 to cross-examine after charge is not in any way affected by the provisions of Chapter XL of the Code.^{59b} Examination on commission in absence of parties is most unsatisfactory.⁶⁰

506. Parties may examine witnesses.—(1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate, Court or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Bombay. |
| 2. Legislative Changes. | 4. Scope. |
| 3. State Amendment. | |

1. Corresponding sections in former Codes.—This section corresponds to paragraph 5 of Section 330 of the Code of 1872 and is similarly worded as that of the Code of 1882.

59b. *Someswar Choudhury*, 61 C 824, 37 Cr LJ 239.

60. *Sardul Singh*, A 1926 L 587 ; 27 Cr LJ 810.

2. Legislative Changes.—This section was substituted by the Code of Criminal Procedure (Amendment) Act, 1951 (I of 1951) Section 21.

See Commentary on Section 503 under heading '*Pardanashin women*'.

3. State Amendment—

Bombay.—In the substituted sub-section (1) the words "Subordinate to him" have been inserted after "such Magistrate", *vide* Bombay Act 39 of 1955.

4. Scope.—Sections 503 and 506 should be used sparingly and only in clearest possible cases. The matter is one to be decided on the facts in each case. As a general rule it may however be said that the important witnesses on whose testimony the case against the accused person has to be established must be examined in Court and usually the issuing of a commission should be restricted to formal witnesses or such witnesses who could not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case.⁶¹ Before it becomes incumbent on a Magistrate to take action under this section it must appear that the evidence is necessary in the interests of justice.⁶²

It is open to a person accused in a warrant case to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage for reissue of commission together with his cross-examination.⁶³ If the trial Magistrate rejects the application for examination on commission, then the only remedy of the aggrieved party is to move the High Court in revision.⁶⁴

507. Return of commission.—(1) After any commission issued under Section 503 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court or Magistrate issuing the commission; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. Legislative Changes. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 35, last paragraph, of Act XI, 1874 and paragraph 6 of Section 76 of Act X of 1875 and, excepting sub-section (2), is the same as that of 1882.

61. *Dhanamanand Pant v. State of U. P.*, A 1957 SG 594 : 1957 Cr LJ 894 PC;
Bala Bux, A 1938 P. 366.

62. *Dinabandhu Banikya v. Hasan Ali*, 33

CWN 1088 : 31 Cr LJ 645.

63. *P. Q. Bombrain v. Someshwar Choudhury*, 38 CWN 673 : 36 Cr LJ 239.

64. *Saleh*, A 1936, Section 221.

2. Legislative Changes.—Sub-section (2) was new in the Code of 1898 and was inserted as a result of decision in *Ramchandra Govind Harshe's* case.⁶⁵

This section was substituted for the original Section 507 by the Criminal Procedure (Amendment) Act 1 of 1961.

3. Scope.—This section provides for the inspection of deposition taken on commission.^{65a}

In the trial *de novo* before the successor or the previous Magistrate, the examination and cross-examination of a witness taken on commission in the previous proceedings is admissible without anything further in subsequent proceedings.⁶⁶

508. Adjournment of proceeding.—In every case in which a commission is issued under Section 503, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes.—This section was substituted for the original Section 508 by the Criminal Procedure (Amendment) Act 1 of 1951.

2. Scope.—The discretion given must be exercised in a reasonable manner so as not to subject the accused to unnecessary harassment.⁶⁷ Proceedings cannot be stopped merely because the accused cited as one of his witnesses a person on whom process could not be served and who could not be examined on commission.⁶⁸

508A. Execution of foreign commissions.—(1) The provisions of Section 505 and so much of Section 506 and Section 507 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, Judges or Magistrates hereinafter mentioned as they apply to commissions issued under Section 503.

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are—

(a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extend, as the Central Government may, by notification in the Official Gazette, specify in this behalf; and

(b) any Court, Judge or Magistrate exercising jurisdic-

65. 19 B 749.

65a. *P. Q. Dombrain v. Someshwar Chaudhury*, 38 CWN 673 : 36 Cr LJ 239.

66. *Sukhranddas Hiranand*, A 1940 S. 193

: 42 Cr LJ 80.

67. *Jacob*, 19 C 118 (120).

68. *Rahman Khan*, A 1938 Pesh 101 : 37 Cr LJ 618.

tion in any such country or place outside India as the Central Government may, by notification in the Official Gazette, specify in this behalf, and having authority, under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

Legislative Changes.—This section was added by the Code of Criminal Procedure (Amendment) Act 1 of 1951. For notifications for execution of foreign commissions *see* notifications quoted in notes under Section 505 *supra* except notification regarding commission to be issued to a Court in Jammu and Kashmir.

CHAPTER XLI

SPECIAL RULES OF EVIDENCE

509. Deposition of medical witness.—(1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

Power to summon medical witness.—(2) The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Medical Certificate. |
| 2. Legislative Changes. | 7. Medical evidence. |
| 3. Rules and order. | —Reference to Text-books. |
| 4. Sub-section (1)—Attestation by a Magistrate in the presence of accused. | 8. Post-mortem report not evidence. |
| —Absence of certificate of attestation renders evidence inadmissible. | 9. Sub-section (2). |
| —Record of statement. | —Summon and examine the medical witness—where deposition taken by Magistrate is deficient. |
| 5. Scope. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 368 of the Code of 1861, Section 323 of the Code of 1872, Section 71 of Act X of 1875 and Section 152 of Act IV of 1877.

2. Legislative Changes.—The words “or taken on commission under Chapter XL” in sub-section (1) were inserted in the Code of 1898. Sub-section (2) was amended in 1882.

3. Rules and orders.—In all cases of murder the committing Magistrate should bind over the medical witness to attend at the Sessions Court at the trial unless grave inconvenience will be caused thereby—*Madras Rules of Practice*.

The only use of the medical officer's report will be to assist the police in getting up the case to refresh the memory of the Medical Officer at the time of giving his deposition and to aid the judicial officer in framing his queries.

It cannot be admitted as evidence (except under Section 32 clause (2) and Section 33 of the Evidence Act) nor is it sufficient to read it over to the medical officer and swear him to the truth of it, his deposition must be recorded *de novo* and at length in the presence of the accused—C. P. Cir. Part VI, No. 55.

Deposition must be explained to the accused to enable him to cross-examine the witness :—

Before the Medical Officer leaves the Court, his deposition is to be fully interpreted to the accused who is to be allowed to cross-examine. In order to ensure that the Medical Officer's deposition may in all cases be admissible under this section, the Magistrate must sign at the foot of it a certificate in the following form :—“The foregoing deposition was taken in the presence of the accused who had an opportunity of cross-examining the witness. The deposition was explained to the accused, and was attested by me in his presence”. This is of course specially necessary when the deposition is taken in an inquiry preparatory to the commitment in the Sessions—C. P. Cir. Part II, No. 55.

4. Sub-section (1)—Attestation.—This section requires that the deposition of a medical witness should not only be taken but also attested in the presence of the accused by the Magistrate in order to render it admissible in other proceedings. An attestation in the following form should, therefore, always be appended to such deposition, *viz.* :—“Taken before me and signed by me in the presence of the accused”.

Date.....

(Signature of Magistrate)

Bom. H. C. Cr. Cir. p. 18.

In order to secure compliance with the provisions of this section Magistrates are hereby directed to sign at the foot of the depositions of medical witnesses a certificate as follows :—

“The foregoing deposition was taken in the presence of the accused who had an opportunity of cross-examining the witness. The deposition was explained to the accused and was attested by me in his presence”.

Magistrate.

...*Calcutta Gazette*, 27th May, 1891, Part I, p. 547, *Assam Gazette*, 6th June, 1891, Part III, p. 326.

‘By a Magistrate’.—*i.e.*, by any Magistrate. The expression is not limited to the committing Magistrate who held the preliminary inquiry.⁶⁹

‘in the presence of the accused’.—These words were inserted in the Code of 1882 (Act X of 1882) in consequence of the decision in *Jhuboo Mahton*.⁷⁰

‘Taken and attested by a Magistrate in the presence of the accused’.—See Bombay, Bengal and Assam Circulars quoted *supra*.

The Court is neither bound to presume under Section 80 nor under Section 144 *ill.* (e) of the Evidence Act that the deposition was taken and attested in the presence of the accused. Before the deposition of Medical witness taken by a committing Magistrate can under Section 509, be given in evidence at the trial before the Court of Session, it must either appear from

69. *Durga*, (1883) AWN 180.

70. (1882) 8 C 739 ; 12 CLR 233.

the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the presence of the accused.⁷¹

Absence of certificate of attestation renders the deposition inadmissible.—Section 509 of the Criminal Procedure Code does not enact that a deposition of a Surgeon shall be taken and attested by a Magistrate in the presence of the accused; what it does provide is that the deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused, and should also, by the use of a few apt words on the face of the deposition, make it apparent that he has done so.⁷²

Record of Statement.—The statement of a medical witness, taken and attested by a Magistrate in the presence of the accused, is admissible as evidence in the Sessions Court, although the Medical witness is not himself called. It ought therefore to be recorded with the utmost care and accuracy.⁷³ The defect may be cured by calling the Magistrate or any other person who was present at the inquiry before him and able to testify to attestation.⁷⁴

5. Scope.—The evidence of a medical man who has actually seen the dead body and has performed the *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is as that of a medical expert admissible, *first*, to prove the nature of injuries which he observed on the dead body; and *secondly*, as opinion evidence with respect to the manner in which those injuries were inflicted, and the cause of death.⁷⁵ The examination of an expert ought generally to be by questions put hypothetically upon facts proved or to be proved by the evidence of other witnesses.⁷⁶

General.—Where the Medical Officer was cross-examined in Committal Court by only one of twelve accused, relating to the provisions of this section was against the principles of natural justice.⁷⁷ Where a medical witness is kept present in Court and his statement in the Committing Magistrate's Court is then admitted such admission is not illegal.⁷⁸ It has been held, that the section is not intended to be applied where medical witness is present in Court.⁷⁹ This section is intended to be confined to cases in which a medical witness is not called at the trial. It cannot be extended to cases where the medical witness is called and examined.⁸⁰ Even if 'deposition' means evidence given in examination-in-chief and cross-examination, when the doctor was cross-examined before the charge and that was done by way of right, his evidence is 'deposition' within the meaning of Section 509. Denial of any right under Section 256 which is that of only further cross-examination, does not deprive it of its character as deposition.⁸¹

A Session Judge is not authorised to allow a surgeon to describe the *post-mortem* appearances merely from the knowledge acquired by him from a

71. *Kachali Hari* (1890) 18 C 129, following *Riding*, (1887) 9 A 720 : (1887) AWN 228 ; *Sukha Soniya Mian*, A 1957 Raj 208 : 1957 Cr LJ 289 ; *Nawab*, A 1933 L 131 : 32 Cr LJ 443.

72. *Pohp Singh*, (1887) 10 A 174 (178, 179): 1888 AWN 11 ; *Bajrangi Lal*, (1899) 4 CWN 49 (55, 56).

73. *Bharat*, (1916) 18 Cr LJ 380 : 38 IC 764 (Oudh).

74. *Kachali Hari*, (1890) 18 C 129.

75. *Roghuni Singh*, (1882) 9 C 455 (461) : 11 CLR 569 (574, 575).

76. *Ibid* ; see *Meher Ali Mullick*, (1888) 15 C 589 ; *Nand Singh*, A 1943 L 181 : 44 Cr LJ 518.

77. *Shanker Rao*, A 1958 Mys 1 : 1958 Cr LJ 54.

78. *Nanji*, A 1957 MB 72 : 1957 Cr LJ 199.

79. *Ramaswami*, A 1936 M 426 ; 37 Cr LJ 471.

80. *Bharosey*, A 1947 Oudh 41 : 47 Cr LJ 930.

81. *Ram Deo Singh*, A 1959 A 511 : (1959) Cr LJ 936.

perusal of the notes made by another surgeon,⁸² but the opinion of a surgeon which can be judicially determined is the opinion expressed by him under examination as a *witness*.⁸³

6. Medical Certificate.—Where a Medical Officer who has given a certificate as to the cause of death of a deceased person, is subsequently examined as a witness, it is not sufficient to ask him merely to attest the accuracy of the statements made in the certificate. Such certificate being in itself no evidence the witness should be examined directly as to the cause of death, character of wounds, symptoms, *etc.*⁸⁴

Where a medical witness deposes with respect to a certificate given by him to the effect that the accused was in a fit condition to make a dying declaration, the deposition cannot be said to relate to non-medical matter so as to exclude the operation of sub-section (1).⁸⁵ Where the statement of the Medical Officer who had examined the injuries and recorded the dying declaration and his statement in the Committing Magistrate's Court was under this section, *held*, this was proper so far as it related to the injuries examined by him, but in so far as it related to the dying declaration he could only be treated as an ordinary witness and he ought to have been examined before the Committing Magistrate and as that was not done, his evidence about the dying declaration ought to be excluded from commission.⁸⁶

7. Reference to Text-books in Medical Evidence.—The evidence of a medical witness relying on text-books is not of much value unless it is exhaustive with regard to all circumstances.⁸⁷

8. Post-mortem report not evidence.—A medical man in giving evidence may refresh his memory by referring to a report which he has made in his *post-mortem* examination, but the report itself cannot be treated as evidence and no facts can be taken therefrom.⁸⁸ *Post-mortem* report is not admissible as evidence except to contradict the officer who made it⁸⁹ or by way of refreshing the memory of the person who made it.⁹⁰

9. Sub-section (2)—Power to summon medical witness.—“Although Section 323 of the Code of 1872 (corresponding to the present section) allows the examination of a Civil Surgeon taken and duly attested by a Magistrate to be given in evidence in the Court of Session, it does not in any way preclude the Sessions Judge from calling the Civil Surgeon and examining him, and this course ought to be pursued in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation or elucidation”.⁹¹ In a case depending almost entirely upon medical evidence, the evidence of the Civil Surgeon before the Magistrate should not be tendered or accepted as evidence. Before the Sessions Court the Zillah Surgeon should be examined as an expert.⁹²

82. *Savla*, (1891) Rat 549.

83. *Kamini Dossee*, (1869) 12 WR (Cr) 25 ; *Natha*, 51 CWN 200 PC.

84. *K. Venkatroyadu* (1881) 2 Weir 659; *Vid-yamati*. A 1951 HP 82 : 1952 Cr LJ 33.

85. *Jangir Singh*, A 1951 Pepru 111 : 52 Cr LJ 883.

86. *Dur Singh Ghasla Bhilala*, A 1955 MA 25 : 1955 Cr LJ 279 ; *Waris Khan*, A 1940 Oudh 209 : 42 Cr LJ 483.

87. *Chena Reddy*, A 1940 M 710 ; 42 Cr LJ 582.

88. *Roghuni Singh*, (1882) 9 C 455 (460) : 11 CLR 569.

89. *Jadab Das*, (1899) 27 C 295 (303) : 4 CWN 129 (143)—leading case on retracted confession ; *Goundan*, 59 M 349 : 37 Cr LJ 471.

90. *Ramsarup Rai*, (1901) 6 CWN 98 ; *Ramasami*, A 1938 M 336 : 40 Cr LJ 596.

91. *per* Field J., in *Roghuni Singh*, (1882) 9 C 455 (462) : 11 CLR 569 (575, 576), referred to in 22 B 596 (601), 16 CPLR 122 (123), 7 ALJ 468 (477).

92. *Mantapampella Padigudu*, (1882) 2 Weir 660.

The Court should summon and examine the medical witness as to the subject-matter of his deposition in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation.⁹³

If it appears that the evidence of the medical witness taken and attested by a Magistrate in the presence of the accused, is essentially different or requires further elucidation, the Judge should summon and examine the witness,⁹⁴ but the evidence of the Civil Surgeon who may be absent is admissible under Section 33 of the Evidence Act.

510. Report of Chemical Examiner etc.—(1) Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an Officer of the Mint, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the subject-matter of his report.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 6. Of any Chemical Examiner or Assistant Chemical Examiner. |
| 2. Legislative Changes (1955). | 7. Report cannot be admitted in appeal when not tendered in evidence. |
| 3. Documents inadmissible under the section. | 8. Identity of matter or thing is not established in the absence of evidence showing it was seized by the Chemical Examiner. |
| 4. Purporting to be a report. | 9. Sub-section (2)—Summoning and examining Chemical Examiner etc. |
| 5. Duty of Chemical Examiner and the Evidentiary value of his report.
—Report may be admitted and used as evidence—duty of the prosecution to explain difference between report of the Chemical Examiner and Seriologist. | 10. Sending of articles to Chemical Examiner. |

1. Corresponding sections in former Codes.—This section corresponds to Section 370 of the Code of 1861, Section 325 of the Code of 1872 and is the same as that of 1882.

2. Legislative Changes (1955).—In sub-section (1) after the word “Assistant Chemical Examiner to Government” the words ‘or the Chief Inspector of Explosive or the Director of Finger Print Bureau or an Officer of the Mint’ and sub-section (2) were added by Act 26 of 1955.

Report of Chemical Examiner

3. Documents inadmissible under the section.—A certificate from the Professor of Anatomy at the Grant Medical College in Bombay, as to certain bones submitted to him for examination is not *per se* admissible in evidence, but must be proved by calling the professor as a witness.⁹⁵

93. *Jangoo Singh*, A 1951 Pepsu 111 : 52 Cr LJ 883 ; *Raghuni Singh*, 9 C 455.

94. *Bharat*, (1916) 18 Cr LJ 380 : 38 IC

764 (Oudh).

95. *Ahiya Manaji*, (1922) 47 B 74 : 24 Bom LR 803 : AIR (1923) B 183.

As the reports of the Chemical Examiner and Serilogist are admissible in evidence under this section there is no need to produce them as witnesses.⁹⁶

It is wholly unnecessary to send all the bottles recovered by the police in the presence of the *panchas* and which contain the same.

4. 'Purporting to be a report.'—Under Section 370 of the Code of 1861, the original report of the Chemical Examiner bearing his signature, and not a *copy* of the report, should be put in evidence.⁹⁷ In order that the report of a Chemical Examiner relating to the discovery of poison in the matter submitted to him for examination may be admitted as evidence under Section 510, it must *purport* to be signed by the officer or officers who detect the poison and who from personal knowledge can certify to the correctness of the result embodied in their report.⁹⁸ Copy of original report of Chemical Examiner is not admissible without formal proof^{98a}.

5. Duty of Chemical Examiner and the evidentiary value of the Report.—The Chemical Examiner's duty is to indicate the number of blood stains found by him on each exhibit and the extent of such stain unless they are too minute or too numerous to be described in detail. Merely to say that blood was detected on an exhibit is not enough. It may well lead to a miscarriage of justice compelling judges to acquit when they would have convicted had the report been more revealing.⁹⁹

A report of the Chemical Analyst may be accepted in evidence even where his statement is not recorded, when no application for summoning him was made by the accused.¹ Evidentiary value of the report of the Chemical Examiner is not lost because he is not cross-examined.²

"May be used as Evidence".—Where there is difference between the report of the Chemical Examiner and that of the Imperial Serilogist, *held*, the duty to explain the difference was on the prosecution and the mere production of the report of the Chemical Examiner saying that the blood was found on the articles did not prove anything.³ Copy is not admissible.^{3a} A report of blood test by the Chemical Examiner to a police-officer is not hit by Section 162.^{3b} Where the conviction depends upon the report of the Chemical Examiner he should be examined.⁴

"Save as hereinafter provided" in Section 162.—A report of blood test submitted by the Chemical Examiner to a police officer does not become inadmissible in evidence by virtue of the provisions of Section 162 (1). Such a report can be proved under Section 510 by production of the document itself and the application of Section 162 (1) is expressly made subject to what is hereinafter provided in the Code. The word "hereinafter" in Section 162 is not restricted in its operation to Section 162 alone but applies to the body of the Code, to hold otherwise would be to introduce a patent inconsistency between Section 207-A and Section 162 for by the former section in committal proceedings statements recorded under Section 162 are to be regarded as evidence.^{4a}

96. *Rup Devi v. State of H. P.* A 1955 HP 15.
 97. *Bishumbher Doss*, (1871) 15 WR (Cr) 49; 6 BLR App 122.
 98. *Venkataswami Achari*, (1886) Weir II, 661.
 98a. *P. Parvatisam*, A 1963 Or 58.
 99. *Prabhu, Babaji v. State of Bombay*, A 1956 SC 51; 1956 Cr LJ 147.
 1. *Abdur Rahman*, A 1958 MP 285; 1958 Cr LJ 1194.

2. *Suleman*, A 1961 Guj 120.
 3. *Tulshiram*, A 1954 SC 1; 1954 Cr LJ 225.
 3a. *Parvatisam*, A 1963 Or 58.
 3b. *Ukhakole v. State of Maharashtra*, A 1963 SC 1531.
 4. *Happu*, A 1933 A 837; *Behram Sherior*, A 1944 A 321; 46 Cr LJ 162.
 4a. *Ukha Kola v. State of Maharashtra*, A 1963 SC 1531.

6. 'Of any Chemical Examiner or Assistant Chemical Examiner.'—Where the certificate was signed by a person styling himself 'Additional Chemical Examiner', *held*, it is of no more value as evidence than a piece of waste paper.^{4b}

Prior to the amendment of the section, Inspector of Explosives⁵ or the Mint Master⁶ did not come within the purview of the section but the amendments of 1955 have included their reports. Report of the Analyst appointed by the Calcutta Corporation is not evidence under this section.⁷ He must be called.⁸

7. Report cannot be admitted in appeal for the first time especially when it is not formally tendered in evidence.—Section 510 does not imply that without tendering the report of the Chemical Examiner in evidence, it can be made use of for the first time in *appeal*. It is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such, so that the accused may have a chance of questioning the identity of the packets.⁹

8. 'Upon any matter or thing duly submitted to him for examination.'—The identity of the 'matter' or 'thing' is not established where there is no evidence on the record to show that the packet received by the Chemical Examiner was the packet taken from the prisoner.¹⁰

9. Sub-section (2)—was added by Act 26 of 1955 to give effect to several decisions.¹¹

10. Sending of articles to Chemical Examiner.—The prosecution should produce evidence that the articles sent to the Chemical Examiner were the same which were recovered from the accused. Similarly it is necessary that the officer recovering the articles should immediately take steps to seal them and evidence should be produced that the seals were not tampered with till the identification is over or the articles are sent to the Chemical Examiner for analysis. If evidence as to such sealing is not produced, Court cannot place the same reliance on the discovery of blood stains on various articles as the Court would have done if necessary precautions had been taken.¹² The report of the Chemical Examiner is not usually received by the time the inquiry commences. It is the duty of the Court to furnish him with a copy of the same without any application by him.¹³ The cost of summoning defence witnesses in the Sessions trial had to be borne by the State. In the instant case the accused persons made an application for summoning Chemical Examiner.¹⁴

510A. Evidence on affidavits.—(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

4b. *Autal Muchi*, (1884) 10 C 1026.

5. *Inayet*, A 1950 A 369 ; 51 Cr LJ 1013.

6. *Zamir Hussain*, A 1950 L 97.

7. *Mahari*, A 1953 C 561 : 1953 Cr LJ 1317.

8. *Suleman Shanji*, A 1943 A 445.

9. *Wali Muhamad*, (1923) 21 ALJ 869 : AIR (1924) A 193.

10. *Autal Muchi*, (1884) 10 C 1026.

11. *Dattappa* A 1951 N 191 ; *Ujagar*, A 1939 L 149 ; 40 Cr LJ 576.

12. *Matia*, A 1955 Raj 82 ; 1955 Cr LJ 835 ; *Aulal*, 10 C 1026 ; *Opel*, 18 CWN 180 ; *Md. Din*, A 1926 L 79.

13. *In re Rangaswami*, A 1957 M 508 : 1957 Cr LJ 866.

14. *Asaram*, 1957 Cr LJ 193 (*Madhya Bharat*).

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes.—This section was inserted by Act 26 of 1955.

2. Scope.—As the object of the amendment of the Code in 1955 was to provide for speedy trial and to finish the inquiry as in Chapter XII quickly the provision for evidence of any person where evidence is of a formal character in any inquiry or trial or other proceeding has been prescribed in this section.

Sub-section (2)—provides that the Court on the application of the prosecution or the defence summon any such person who has sworn the affidavit.

In case of evidence on affidavits, the opposite party can surely serve the other side with counter-affidavits.

511. Previous conviction or acquittal how proved.—In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,—

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order ; or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered ;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

SYNOPSIS

1. Corresponding sections in former Codes.

2. Previous conviction or acquittal how proved.

3. Mode of proving previous conviction.
—May be proved—by production of certified copies of previous judgment.

4. By finger impressions to prove the identity.

5. Expert evidence on finger print—Not safe to base a conviction upon testimony of an expert.

6. Kaifat of the Record Officer is not evidence of previous conviction.

1. Corresponding sections in former Codes.—This section corresponds to Sections 326 and 515, last clause, of the Code of 1872 and is the same as that of the Code of 1882.

2. Previous conviction or acquittal how proved.—See Section 310 *supra* for procedure in case of previous conviction.

3. Mode of proving previous conviction—By production of copies of previous judgment.—In order to support the charge of previous conviction, there should be on the record a copy of some judgment or extract from a judgment or some other documentary evidence of the fact of such previous convictions as is required by Section 91 of the Evidence Act, or Section 511 of the Code and an examination of the accused in respect of these convictions is, having regard to the provisions of Section 342, without legal warrant or justification.¹⁵

Unless previous conviction is strictly proved it cannot be taken into consideration for any purpose.¹⁶ Previous convictions relied on for purposes of Section 75 Indian Penal Code must be proved in accordance with law. A mere admission by the accused is not sufficient especially when there is nothing in the record to justify the questioning of the accused under Section 342 on that point.¹⁷ See notes on Section 221 and 255A *supra*.

*A previous conviction may be proved by the admission of the fact by the accused.*¹⁸

4. By finger impressions to prove the identity of the person.—Under Section 81 of the Evidence Act it is necessary to prove the finger impressions. The manner in which a previous conviction may be proved is not limited to the methods laid down in this section.¹⁹

5. Finger-prints—comparison may be made by the Court—expert evidence inadmissible.—The Calcutta High Court has held that though a comparison of thumb-impression is allowable, such comparison must be made by the Court itself; and the opinion of an expert as to the similarity of such impression is not admissible under Section 45 of the Evidence Act.²⁰

It is not safe to base a conviction on the inconclusive evidence of an expert as to thumb impression.²¹ The previous conviction of an accused person is not proved by merely showing, though the testimony of a finger-mark expert, that the finger prints of the accused taken in Court are similar to those on a paper which purport to record certain previous convictions of the accused. In order to prove previous conviction in such a manner there ought to be evidence to prove, *first*, the similarity of the finger prints alleged to be those of the person previously convicted, and *secondly*, to identify the last-mentioned finger-prints as those of the person who has been previously convicted.²²

A previous conviction cannot be proved by the examination of the accused under Section 342.²³ A contrary view was held in *Kissan Yassu*²⁴ which cannot be regarded as good law in view of the amendment of Section 310 *supra* which no longer contains 310 (c) of the Code of 1898.

6. Evidence of previous conviction—kaifat.—A Kaifat or report from the Record Office that A had been convicted of a crime is no evidence

15. *Yasin*, (1901) 28 C 689 : 5 CWN 670 ; *Basanta Kumar Ghattak*, (1898) 26 C 49.

16. *In re, Wahid*, A 1949 M 499 ; 50 Cr LJ 729 following *S. K. Abdul*, 43 C, M 26.

17. *Sardar Ahmad*, A 1934 L 693 : 36 Cr LJ 778. *Contra* Medical Officer of Health, Agra, A 1960 A 53 (54).

18. *Dalip Singh*, A 1944 L 25; 45 Cr LJ 364 (FB) ; *Pokar Ghurmali*, A 1941 S 173 ; 43 Cr LJ 12 ; *Medical Officer of Health*,

Agra Municipality, A 1960 A 53 (54) ; *Contra Daya Ram* 30 ALJ 1082.

19. *Sahdeo*, (1904) 3 NLR 1 : 5 Cr LJ 220 ; *Murit Rai*, (1882) 6 CPLR 3 (Cr).

20. *Fakir Mahomed Sheikh*, (1896) 1 CWN 33.

21. *Abdul Hamid*, (1905) 32 C 759: 9 CWN 520.

22. *Ramdas Singh*, (1916) 21 CWN : 18 Cr LJ 462 : 39 IC 302.

23. *Yasin*, (1901) 28 C 689 : 5 CWN 670.

24. (1906) 4 NLR 163 : 9 Cr LJ 56.

of a previous conviction. There should be sworn testimony to the fact, and also the identification of the prisoner with the person previously convicted.²⁵

512. Record of evidence in absence of accused --(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) Record of evidence when offender unknown.—If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 8. If the deponent is dead statement recorded in absence of accused is admissible. |
| 2. Legislative Changes. | 9. Approver's evidence taken under this section. |
| 3. Object of sub-section (2). | 10. Use of Evidence in subsequent trial.—can be used only as corroborative evidence. |
| 4. Scope. | 11. Subsequent trial of absconder.—effect of previous trial and conviction on subsequent trial. |
| 5. If it is proved that an accused person has absconded and there is no immediate prospect of arresting him. | |
| 6. Absconded.—May in his absence examine witnesses. | |
| 7. Evidence should be recorded upon notice to surety. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 327 of the Code of 1872 and sub-section (1) is the same as that of the Code of 1882.

2. Legislative Changes.—Sub-section (2) is new in the Code of 1898. The words 'Imprisonment for life' have been substituted for "transportation" by Section 101 of Act 26 of 1955.

3. Object of sub-section (2).—"The Bombay High Court suggested that the provisions of this section should be extended to cases where the offender is unknown, and should not be confined to cases where he had absconded. We think, however, that a distinction should be drawn between the two cases, and therefore in adopting the Bombay High Court's suggestion we have provided that its procedure shall only apply to cases of great

25. *Sheikh Ramzan*, (1871) 6 Beng LR App 151 : 15 WR (Cr) 53.

gravity, that it should only be put in force under an order of the High Court, and that mere delay, expense or inconvenience in obtaining the presence of the deponent should not be sufficient ground for making the deposition evidence against the person subsequently accused"—*Select Committee Report* (1898), para 74.

4. Scope.—It is not open to a Magistrate to decline to call for the documents desired by the complainant or to record any evidence in his behalf, on the ground that the accused had absconded and no enquiry was being then conducted: but in a case like this he is bound by the provisions of this section.²⁶

Section 512 represents an exception to the provisions of Section 33 Evidence Act, which itself is an exception to the general rule only evidence recorded in the proceedings in question and in the presence of the parties can be made use of. It is hardly necessary to say in these circumstances that the conditions which are required to be fulfilled under Section 512 have to be strictly construed. An *ex post facto* finding by the Court of trial or the appellate Court that either of them is satisfied about the conditions being fulfilled would be of no avail.²⁷ The section does not apply to an appeal.²⁸ Where a witness is examined at a criminal trial, his deposition cannot be subsequently used at the trial of another accused who is absconding if the procedure laid down under this section is not observed.²⁹

5. If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him'.—Proceedings under this section should commence by evidence being taken and recorded (1) that the accused has absconded, and (2) that due pursuit having been made, there is no immediate prospect of arresting him.³⁰

6. 'Absconded'.—"But the term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues continues to do so after it has issued, he absconds".³¹

"This section requires, we consider, that the absconding should be alleged, tried and established before the departure is recorded".³² "It is clear from the language of the section that the Court which records the proceedings under it must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest".³³ This case was distinguished by the same High Court in *Bhagwati's* case³⁴ where there was evidence on the record

26. *In re Wasudeo Sadashio Lale*, (1900) 2 Bom LR 707.

27. *State of Mysore v. Sonjeeva*, A 1956 Mys 1 : 1956 Cr LJ 77; *Labai*, 40 Cr LJ 437; *Tahsildar Singh*, A 1958 A 214 (221); 1958 Cr LJ 324.

28. *Vivanath*, A 1954 N 231; *Bhimaraya*, A 1953 Hyd 63.

29. *Baharuddin*, A 1938 P. 49; 39 Cr LJ 281 (2).

30. *Punj. Cir. Vol. II*, Pp. 150-151; *State of Mysore v. Sanjeeva*, A 1956 Mys. 1; *Manbodh*, A 1944 N 274;

Janukedia, A 1947 S 122; *Bhimaraya*, A 1953 Hyd. 62.

31. *per* Turner CJ, in *Srinivasa Ayyangar*, (1881) 4 M 393 (397); 1 Weir 76.

32. *per* Macpherson J., in *Ghurbin Bind*, (1884) 10 C 1097 (1100).

33. *per* Rafiq J., in *Rustam*, (1915) 38 A 29 (31); 13 ALJ 1043; 16 Cr LJ 801 (802); 31 IC 817 (818); *Sanjeeva*, A 1956 Mys 1 : 1956 Cr LJ 77.

34. (1918) 41 A 60; 16 ALJ 902; 20 Cr LJ 6 : 48 IC 481.

showing that the accused were absconding from which the Magistrate might most reasonably have inferred that there was no immediate prospect of their arrest.

A person may hide even in his place of residence or away from it and in either case he will be absconding when he does so. Hence if a Pakistan resident came to a village in the Indian territories and committed the crime and then went back to Pakistan, it can be correctly postulated of him that he has absconded within the meaning of this section.³⁵

'May in his absence examine the witness (if any) produced'.—A statement taken in the absence of the accused from a witness for the prosecution is described as a 'deposition' in Section 512.³⁶

7. Evidence not recorded upon notice to surety.—In a proceeding under this section the Magistrate is bound to hold an enquiry, to take evidence and to come to a conclusion that the person for whom the bond was given, has during the period of surety-ship committed an offence. He is to hold an enquiry upon notice to the surety.³⁷

8. 'If the deponent is dead etc'.—Statement previously made by a witness to Magistrates, and recorded in the absence of the accused, cannot be treated as evidence in the Court of Session if the witness is living and cannot be procured. Section 512 will apply only where the witness is dead and cannot be procured.³⁸

Where the statements of witnesses have been recorded under Sections 164 and 512 a presumption of genuineness attaches to the statements and the Magistrate recording the statements need not be examined in order to corroborate them.³⁹

9. Approver's evidence taken under Section 512.—In an inquiry into an offence of murder against the accused and another it appeared that the latter who was the principal offender had absconded. A pardon was tendered to the accused and evidence recorded under Section 512; a question having arisen whether the tender of pardon was valid, *held*, that the pardon was validly tendered.⁴⁰

10. Use of evidence taken for other purposes as if it were evidence specially recorded under the terms of Section 512.—Evidence given at a trial for another purpose cannot be, by an *ex post facto* operation, converted into an equivalent of what is called a 'deposition' taken under Section 512. When at the time of taking the evidence the question of recording a deposition under that section was not under contemplation. "The provisions of the Statute forbid it. The objection to the evidence is the fundamental objection, that statements made against a person in his absence cannot be used against him in a criminal trial."⁴¹

A dying declaration is made by a person when he is in extremes and is unable to give a coherent and an accurate description of events. None of

35. *Umrao Khan*, A 1957 Raj 126 ; 1957 Cr LJ 477 ; *Janukanta*, A 1947 S 122 ; 48 Cr LJ 74.

36. *In re Karuppan Samban*, (1915) 16 Cr LJ 759 (M).

37. *Moslem Mandal*, (1926) 44 CLJ 178.

38. *Rakhia*, (1911) 157 PLR 1911 : 12 Cr LJ 214 : 10 IC 119 ; *Karam Singh*, A 1941 L 361 ; 43 Cr LJ 8.

39. *Lalji Rai*, A 1936 P. 11 ; 36 Cr LJ 235.

40. *In re Dagdu Bepu*, (1921) 46 B 120 : 23 Bom LR 839 : 22 Cr LJ 620 : 63 IC 156.

41. *Sheoraj Singh*, (1926) 48 A 375 (376) : 24 ALJ 394 : 27 Cr LJ 874 : 96 IC 122 ; AIR (1926) A 340.

these infirmities of weakness appear in the case of evidence recorded under this section. The value of the evidence recorded under Section 512 has to be judged like any other evidence given by witnesses at the trial.⁴²

11. Subsequent trial of absconder—effect of previous trial and conviction on subsequent trial.—The case of the absconding accused, when found, should be tried and decided altogether irrespective of the fact that there had been a previous trial and conviction upheld by the High Court against the other accused.⁴³

CHAPTER XLII

PROVISIONS AS TO BONDS

513. Deposit instead of recognizance.—When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Object.
3. Scope.

1. Corresponding sections in former Codes.—This section corresponds to Section 437 of the Code of 1861 and Section 399 of the Code of 1872 and is the same as 1882.

2. Object.—“The object of the law is that *sureties* should be responsible for the good behaviour of the person called upon to provide security”, not that a deposit be made in cash.⁴⁴

3. Scope.—The order on the surety to deposit a sum of Rs. 7/- which would be returned to him at the end of 6 months, if he had not meanwhile violated the order to be of good behaviour is illegal.⁴⁵

Section 513 is an enabling section. The underlying object of the section is to enable prisoners who are not likely to abscond and who at the same time cannot find sureties to be bailed on their offering cash security.⁴⁶ In exceptional cases of good behaviour a Court or Officer taking bonds may accept cash deposit if offered by the accused.⁴⁷ But demand of cash security is illegal.⁴⁸

The cash deposit allowed under this section is allowed in substitution only of the bond which the principal himself would otherwise execute and not in substitution of any bond which the surety executes.⁴⁹

42. *Tahsildar Singh*, A 1958 A 214 : 1958 Cr LJ 324.

43. *Ghure*, (1914) 36 A 168 : 12 ALJ 231 : 15 Cr LJ 200 approving of *Prag Dat*, 20 A 459 where law correctly laid down.

44. *Sheo Buksh*, (1870) 2 NWP HCR 295.

45. *Fata*, (1873) Rat. 671.

46. *Abdul Karim*, A 1933 S. 320 : 35 Cr LJ 315.

47. *Suraj Narain*, A 1935 P. 195 : 36 Cr LJ 730 (SB).

48. *Chari*, A 1948 A 238 : 49 Cr LJ 282.

49. *Luxam Lal*, 32 B 449 *Contra Abdul Sattar*, 39 Cr LJ 831.

514. Procedure on forfeiture of bond.—(1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it : and it shall authorise the attachment and sale of any movable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under Section 106 or Section 118 or Section 562 is convicted of an offence the Commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under Section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

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1. Corresponding sections in former Codes.—This section corresponds to Sections 219, 220, 221, 293, 294 and 305 of the Code of 1861 and Sections 396, 397, 398, paragraphs 1 and 2, paragraphs 1 to 5 and 7 of Section 502 and Sections 503 and 514 of the Code of 1872.

2. Legislative Changes.—In the Code of 1898 in sub-section (2) the words “or his estate if he be dead” were added. Sub-section (6) was new in the Code of 1898.

Legislative Changes (1923).—In sub-section (3) the word ‘*attachment*’ was substituted for the word ‘*distress*’ by Section 139 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). In sub-section (6) the words ‘but the party who gave the bond may be required to find a new surety, were omitted and sub-section (7) was added by the said Act.

2-a. State Amendment—

Maharashtra.—For sub-sections (2), (3) and (4) the following shall be substituted.

“(2) If sufficient cause is not shown and the penalty is not paid the Court may proceed to recover the same as if such penalty were a fine imposed by it under the Code.

(3) If such penalty is not paid and cannot be recovered in the manner stated in sub-section (2) the person so bound shall notwithstanding anything contained in the proviso to sub-section (3) of Section 386, be liable by orders of the Court which ordered the payment of the penalty, to imprisonment in Civil Jail for a term which may extend to six months”—*vide*, Maharashtra Act XXIV of 1960.

3. Report of the Select Committee.—“We note that preference has been expressed for the draft of sub-section (7) as contained in the original Bill, and on the whole, we have preferred to restore the original draft. It provides that in proceedings against a surety a certified copy of the judgment may be used to prove the commission of the offences which constituted a breach of the bond, but this proof may be rebutted. It was indeed suggested to us that we should make a certified copy of the judgment conclusive proof but we are inclined to think that this would go too far.”

4. Statement of Objects and Reasons.—“There has been a conflict of opinion whether a judgment convicting the principal in a bond taken under the Code and ordering the forfeiture of the bond is sufficient *prima facie* proof in proceedings under the section against the sureties. The amendment permits the use of such a judgment as evidence in such proceedings and

directs that the Court shall presume that such offence was committed unless the contrary is proved."

5. Effect of the Amendment.—Sub-section (6) as amended does not require the party whose surety dies before the bond is forfeited to find a new surety.

The insertion of sub-section (7) by the Amending Act XVIII of 1923 has set at rest the conflict of opinion expressed in the following cases⁵⁰ and the contrary view expressed in *Manmohan Lal* and other cases⁵¹ which held that clear proof by evidence taken in presence of the surety is necessary.

6. Application of section.—This section has been declared to apply to the security required by Section 31-A of the Rangoon Police Act, 1899 (Bur. Act IV of 1899) Bur. Code.

This section is applicable to bonds under Section 123 of the Indian Railways Act IX of 1890.

The provisions of this section shall, so far as may be, apply in the case of bonds and sureties given under the Probation of Offenders Act, 1958.

7. Scope.—A penal bond must be construed literally and strictly.⁵² The order of forfeiture is lawful where the Magistrate in passing sentence in the substantive case plainly showed his intention to confiscate the security.⁵³ Section 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid.⁵⁴

Under this section action can be taken only when the bond is taken by the Court under the provisions of the Code such as Section 91 for appearance, the serial security sections of those relating to bail, where the security is taken by a Procurement. Inspector for production of the property before the Court, no action can be taken under this section for forfeiture of the bond.⁵⁵

A bond taken under the Opium Act and not under the Code for production before the police or the Customs Department cannot be forfeited. But if it be for the appearance before a Court, it is included in paragraph 2 of sub-section (1), but it cannot be treated as being within the section when it is sought to be forfeited on the ground of the failure of the accused persons to appear before the police or the Customs Department.⁵⁶

The section expressly refers to two classes of bonds, firstly, a bond under the Code taken by a Court. The first class is subject to two limitations, the bond must be taken by a Court and it must be taken under the Code,

50. *Ali Mahomed*, (1911) 226 PLR 1911 : 12 Cr LJ 404 ; *Wadhava Singh*, (1903) 32 PR 1903 : 15 PLR 1904 ; *In re Ram Chander Lalla*, (1877) 1 CLR 134.

51. *Manmohan Lal*, (1898) 21 A 86 : (1898) 162 ; *Har Chandra Chowdhury*, (1897) 25 C 440 ; *Kishan Narain Singh*, (1922) 3 PLT 381 : 23 Cr LJ 478 : AIR (1922) P. 242.

52. *Bahadur Singh*, (1918) 26 PR Cr 1918 : 19 Cr LJ 924 : 47 IC 440 ; *M. Homi*, 32 P. 490 : 1953 Cr LJ 1653.

53. *Hussain Khan*, (1916) 15 PR 1917 Cr : 18 Cr LJ 566 : 39 IC 806.

54. *Kishan Narain Singh*, (1922) 3 PLT 381 : 23 Cr LJ 478 : 67 IC 830 : AIR (1922) P. 242 following *In re Harinam Birbhavan*, 11 Bom HCR 170.

55. *Rameshwar Dayal v. State of Assam*, 1953 SCR 126 : A 1952 SC 405 : 1953 Cr LJ 163.

56. *Dhannulal*, A 1953 MB 94 ; 1953 Cr LJ 634.

Bonds of the Second Class must be for appearance before a Court.⁵⁷ The Supreme Court in the instant case held that in view of the clear provisions in the bond, the terms of which being penal in nature, must be strictly construed.⁵⁸ Sub-section (1) of Section 514 makes two points clear, firstly the Court must be satisfied that a bail bond has been forfeited and secondly the satisfaction must be based on some proof.⁵⁹ A bond executed in favour of King Emperor by mistake after India became Republic cannot be forfeited.⁶⁰ There is palpable distinction between bonds which are not and those which are for appearance before the Court.⁶¹ In respect of appearance of an accused before the Court, it is sufficient under Section 514 that the bond is taken by the police and it is not necessary that it should be taken by the Court itself. But the bond should be executed in accordance with Section 499. A bond executed by the surety alone is not a bond within the terms of the Code of Criminal Procedure and therefore it cannot be legally forfeited under Section 514.^{61a}

Bail bond for appearance undertaking good behaviour cannot be regarded as a bond under the Code.⁶²

8. Object.—The object of the surety-bonds is to ensure that the accused person shall not evade justice.⁶³

The purpose of Section 514 is to give a chance to the accused to give an explanation and satisfy the Court that there were good reasons for his absence, that the forfeiture was beyond his control and therefore the penalty should not be imposed upon him.⁶⁴

Jurisdiction of Presidency Magistrate.—The Presidency Magistrate of Bombay has no jurisdiction under this section to order the forfeiture of a bond taken by the Police under Section 107 of the city of Bombay Police Act, 1902.⁶⁵

Forfeiture to be before the Court initiating proceeding.—Where a surety bond has been executed for the appearance of an accused person before a particular Court, under this section, proceedings to have the bond forfeited can be initiated by that Court.⁶⁶

9. "Such Court"—refers to the Court mentioned in paragraphs 1 and 2 of this section.⁶⁷ The failure of the accused to appear before another Court to which the case is transferred will not cause forfeiture of the bond, unless the terms of the bond provide for the production of the accused before the transferee Court.⁶⁸ The Court includes the successor of the Judge or Magis-

57. *M. Homi*, 32 P. 490 : A 1953 P. 302.

58. *State of Bihar v. Homi*, (1955) 2 SCR 78 : A 1955 SC 478 : 1955 Cr LJ 1017.

59. *Ganpat Lal Sharma*, A 1960 P. 325 ; 1960 Cr LJ 978 *Teja Singh v. Jenwata*, 1957 Cr LJ 162 (Raj).

60. *Hiralal Pathak*, 1958 BLJR 609 ; *Bhairon Lal Ramadhin*, ; A 1956 A 123 : 1956 Cr LJ 182 ; *State of U. P. v. Md. Sayed*, A 1957 SC 587 : A 1957 Cr LJ 888.

61. *Rajbanshi Bhagat*, A 1929 P. 658 ; 31 Cr LJ 605 ; *Manohar Kkan*, A 1961 Tripura 32.

61a. *Sailesh Chandra Chakrabarty*, A 1963 C 309 following *Rameswar Bhandari v. State of Assam*, A 1952 SC 405 : 1953 Cr

LJ 163 and *Narendra Nath Majumdar*, 59 CWN 475 ; *Rameswar Bhatia*, A 1952 SC 405.

62. *Giani Meher Singh*, 43 CWN 639 ; 41 Cr LJ 138.

63. *In re Rama Bapu Pujari*, (1916) 18 Bom LR 683.

64. *Gangaram*, 1957 Cr LJ 235 : 1956 Raj LW 459 ; *Kunju Mohammed*, A 1960 Ker 228.

65. *In re Crawford*, (1918) 42 B 400 : 20 Bom LR 379.

66. *Hirailal Shahu*, (1909) 14 CWN 259 : 10 Cr LJ 248.

67. *Hiralal Sahu*, 14 CWN 259.

68. *M. S. Rangorathnam*, 1957 Cr LJ 138 (Mad) ; *Karali*, A 1949 P. 196 ; *Puttural*, A 1956 A 705 ; 1956 Cr LJ 1361.

trate by whom a bond was taken or before whom a bond for appearance has been executed.⁶⁹

The bond is not revived on the subsequent retransfer of the case to the original Court.⁷⁰ Where there is nothing in the bond to show that surety has undertaken to produce accused in a particular Court, transferee Court has power to proceed.⁷¹

“Such bond has been forfeited”.—It is for the Court to determine whether the conditions of the bond have been broken and the bond is forfeited.⁷² On appeal to the Supreme Court in the case of *Homi*,⁷² it was held that it could not be said that the contingencies contemplated by the parties occurred, and the proceedings were set aside.⁷³ The custody of the Court continues despite the bond and the Court has the necessary power to call upon the person to produce the goods in a case of bond for production of goods, to produce goods, in spite of forfeiture of the bond.⁷⁴ The Magistrate errs in ordering the imprisonment of the persons bound over for keeping the peace as a consequence of the forfeiture of their bonds.⁷⁵ The view is well-settled that the contract by the surety is independent of and does not depend upon the bond executed by the accused. The surety bond is liable to be forfeited irrespective of the fact whether any action has been taken against the accused or not.⁷⁶ Joining the army is a voluntary act and the surety is liable for the accused's absence on this score.⁷⁷ The liability of the surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court.⁷⁸ The surety is not discharged from his liability because the amount due from the accused on his own bond has been satisfied by the attachment and sale of his property.⁷⁹

Where the accused is arrested on another charge, the surery is not released.⁸⁰

Where the surety undertook to pay a certain sum in case the accused failed to appear after the disposal of the appeal before the Privy Council and in the meantime the jurisdiction of the Privy Council came to be transferred to the Supreme Court, it was held that the penalty stipulated had not occurred.⁸¹ It was imperative according to Section 499 that the time and place had to be mentioned in the bond and if the place of the Court where the attendance was required was not at all mentioned, that surety will be invalid.⁸² The bond is forfeited when the accused fails to appear in accordance with the orders of the Court. The Magistrate is fully entitled to enforce the bonds against the accused themselves. His remedy is not con-

69. *Achhari Lal*, 36 C 749.

70. *Hem Lal*, 37 CWN 880.

71. *Ballabh Das*, A 1950 A 667 ; *Amulya*, 28 CWN 852.

72. *M. Homi*, A 1953 P. 302 : 1953 Cr LJ 1053 ; *Harwari Lal*, A 1959 A 751 referred to in *Rabindra*, 6 CWN 1021.

73. *State of Bihar v. Homi*, (1955) 2 SCR 78 : A 1955 SC 478 : 1955 Cr LJ 1017

74. *Ram Prasad Agarwalla*, A 1955 C 586.

75. *Thomas Mathai*, ILR 1956 TC 812 ; 1957 Cr LJ 812.

76. *Rahatali*, 1956 ALJ 724 : 1957 Cr LJ 116 : *Sripal Singh*, A 1953 A 481 ; *Kundan Singh*, A 1952 Pepsu 111.

77. *In re ; Bajee Sahib*, A 1943 M 519 ; 42

Cr LJ 427.

78. *Muradali Muhammad Ibrahim*, A 1941 S. 31 : 43 Cr LJ 427 ; *Amulya Charan*, 38 CWN 852 : 36 Cr LJ 133.

79. *Hemendra Chandra Dhar*, 54 CWN (2 DR) 252.

80. *Madan Mohan Beharilal*, A 1931 P. 19 ; 32 Cr LJ 457.

81. *State of Bihar v. Homi*, (1955) 2 SCR 78 : A 1955 SC 478 ; 1955 Cr LJ 1017.

82. *Roshan Lal*, A 1957 A 765 : 1957 Cr LJ 1206 MS *Rangaratham*, 1957 Cr LJ 138 (Mad) ; *Brahmanand Misra*, A 1939 A 914.

fined only to the surety.⁸³ Where proceedings are stayed by the High Court surety is not bound to produce the accused.⁸⁴

10. Nature of the proceedings.—"The proceeding to realise the penalty is of the nature of a civil proceeding and the person against whom it is held is competent to give evidence on oath in his own behalf and is also entitled to go into evidence".⁸⁵ "The course prescribed by Section 502 of the Code (Act X of 1872) and (by Section 293 of the former Code), takes the place of the cumbrous proceeding by *scire facias*, which is in most cases necessary in England before estreating recognizances to keep the peace."⁸⁶

11. Form of bond.—See Schedule V, Forms XLIV to LIII.

12. Procedure.—"We think that, according to the fair construction of Section 502 (Act X of 1872), a Magistrate is not justified in forfeiting a recognizance under that section, unless the party charged with a breach of the peace has had an *opportunity of cross-examining the witnesses* upon whose evidence the rule to show cause had been issued".⁸⁷ Notice to show cause must be given. Mere verbal notice is insufficient.⁸⁸ An order estreating a recognizance or a bail bond must be made upon evidence duly recorded in the case and not upon evidence taken in another case.⁸⁹ The decision in *Harchandra Chaudhury*⁸⁹ has been modified by the insertion of sub-section (7) which says that a certified copy of the judgment may be used as evidence.

Notice to show cause.—This section does not provide that any particular kind of formal notice should be given to the person whose bond has been forfeited. Where the bond is forfeited it is the duty of the Court to record the grounds of the proof on which the forfeiture is based.⁹⁰ Notice to the person bound by the bond either to pay the penalty thereof or show cause why it should not be paid.⁹¹ Forfeiture of the bond, in the absence of notice calling upon the surety to produce the accused is bad.⁹²

The Supreme Court has held that notice to show cause is essential and absence of notice vitiates the proceedings.⁹³

In an appeal by the surety against the Magistrate's order forfeiting his bond the Sessions Judge held that the order passed by the Magistrate without holding any enquiry and taking evidence was bad and there was another illegality in that the bail bond made out in favour of King Emperor was obviously erroneous, on a notice under Section 80 Civil Procedure Code against the Magistrate for contempt, *held*, the expressions objected to did not make out a case of contempt.⁹⁴

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| <p>83. <i>Dwijendranath</i>, A 1947 C 120 : 46 Cr LJ 635.</p> <p>84. <i>Subbodb Chandra v. Jawahar Mondal</i>, 52 CWN 784.</p> <p>85. <i>per Ainslie, J.</i>, in <i>Jiban Buksh</i>, (1871) 15 WR (Cr) 87; <i>Krishnan Narain Singh</i>, (1922) 3 PLT 381 : 23 Cr LJ 478.</p> <p>86. <i>per Garth C. J.</i>, in <i>Nobin Chander Dutt</i>, (1870) 4 C 865 (868).</p> <p>87. <i>per Garth C. J.</i> in <i>Nobin Chander Dutt</i>, (1870) 4 C 865 (FB).</p> <p>88. <i>Tarni Jadav</i>, A 1962 P. 481 following <i>Ghulam Medi v. State of Rajasthan</i>, A 1960 SC 1185; <i>Durga Das Bhattacharjee</i>, (1871) 7 Beng. LR App 37; <i>Jeeban Sheikh</i>, (1888) 9 WR (Cr) 4.</p> <p>89. <i>In the matter of Mohesh Chunder Roy</i>,</p> | <p>(1882) 10 CLR 571; followed in <i>Harchandra Chowdhry</i>, (1897) 25 C 440 (443); <i>Chandra Sekhar Roy</i>, (1884) 11 C 77; <i>Chintaram</i>, A 1936 N 243.</p> <p>90. <i>Gangaram</i>, 1957 Cr LJ 235 : 1956 Raj LW 459; <i>Fateh Chand Wadhwal</i>, A 1948 S 136: 41 Cr LJ 802; <i>Harbilas</i>, A 1952 MB 2; 1952 Cr LJ 142.</p> <p>91. <i>Prohit Anandi Prasad</i>, A 1949 A 322 : 50 Cr LJ 516.</p> <p>92. <i>Manindra Kumar Majumdar</i>, A 1943 C 246 : 44 Cr LJ 615; <i>Mt. Taro</i>, A 1949 EP 221 : 50 Cr LJ 565.</p> <p>93. <i>Ghulam Mehdi v. State of Rajasthan</i>, A 1960 SC 1185 (1186).</p> <p>94. <i>Shiv Prasad</i>, A 1960 P. 326 : 1960 Cr LJ 979.</p> |
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The Court must have proof that a bond has been forfeited.—
“We are of opinion that the taking and recording of evidence are essential.”⁹⁵

13. Individual and joint liability of principal and sureties.—The record of the conviction of the principal is sufficient evidence even against the surety and it is not necessary for Government to prove over again the *factum* of the conviction of the principal to render the surety liable for the amount of the forfeited security.⁹⁶

Forfeiture of bond against surety where principal is not bound.—Where a person stands surety for the attendance of another person before a Court and the latter fails to attend that Court on the date fixed in the bond, *held*, the surety is liable under the bond even if it turns out that the arrest of the principal was illegal.⁹⁷

14. Lapse of time.—Where a person was bound over to keep the peace for one year and on information received that he had been guilty of a breach of the conditions of his recognizance bond, proceedings under Section 514 were initiated against him, but before they came to an end, the period fixed expired: *held*, that there was no legal bar to the prosecution of the case under Section 514.⁹⁸

15. Sub-section (2).—See Schedule V, Forms No. XLIV, L and LII against the principal and Forms XLVII and LII against the surety.

It is not competent to direct that, in default of payment, the person whose recognizance is forfeited should be imprisoned without first issuing a warrant for the attachment and sale of their immovable property.⁹⁹

Where security of immovable property is given the bond has to be registered under Section 17 Registration Act and cannot affect the property unless the bond is registered.¹ Under sub-section (2) only the ‘movable property’ of the person bound can be attached and sold for the recovery of the penalty.^{1a}

16. Sub-section (3).—The Amending Act XVIII of 1923 by Section 139 substituted the word ‘attachment’ for the word ‘distress’, apparently to keep it in conformity with sub-section (2) and sub-section (4).

17. Sub-section (4)—‘to imprisonment’.—See Forms LI and LIII against the *principal* and Forms XLVIII and LIII against the surety.

A Court is not competent to order imprisonment as soon as a bond is forfeited without first issuing a warrant for the attachment and sale of immovable property.²

18. Sub-section (5).—Follows the decision in *Gulab*.³

95. *In re Hariram Birbhan*, (1874) 11 Bom HCR 170, followed in *Kishan Narain Singh*, (1922) 3 PLT 381 : 23 Cr LJ 478 : 67 IC 830 ; *Bubai Manihi*, A 1958 P 286.

96. *Ali Mahomed*, (1911) 226 PLR 1911: 12 Cr LJ 404 : 11 IC 588 following *Manmohan Lal*, 21 A 86 and holding *Harchandra Chowdhury*, 25 C 440 as incorrect.

97. *Chhaju Singh*, (1921) 2 L 204 : 22 Cr LJ 662 : 63 IC 454 following *Paran*

Singh, 54 PR 1916.

98. *Uma Dutt Missir*, (1922) 20 ALJ 693 where *re Ram Chander Lalla*, (1877) 1 CLR 134 was distinguished.

99. *Mohesh Chandra Roy*, (1882) 10 CLR 571.

1. *Nishar Ahmad*, A 1945 A 389 ; 47 Cr LJ 209.

1a. *Nanhe*, A 1918 A 182 : 19 Cr LJ 955.

2. *Mg Po*, A 1928 R 310 : 30 Cr LJ 346 ; *Mohesh*, 10 CLR 571.

3. 22 PR (Cr) 1894.

If the surety appears in response to a notice to show cause and succeeds in producing the accused within a reasonable time, he is entitled to some consideration in the matter of enforcement and the Magistrate ought to allow a substantial remission of the penalty.⁴

Under sub-section (5) the Court may at its discretion remit any portion of the penalty.⁵

Under this sub-section it is only when the final order for payment of the penalty or part thereof has been passed by Sessions Judge or the High Court that the matter may be delegated to the Court of a Magistrate for actual levy or realisation of penalty.⁶

19. Sub-section (6).—The words '*but the party who gave the bond may be required to find a new surety*' which followed the word 'bond' were omitted by Section 139 of Act XVIII of 1923 and the Legislature has inserted the next Section 514-A to provide for this contingency.

Bail bond—Prisoner Committing Suicide.—When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him.⁷

20. Sub-section (7).—See Report of the Select Committee.

The certified copy of the order binding over a person to keep the peace is admissible in evidence against the principal himself.⁸ A copy of the earlier judgment would not be evidence against the surety except in the instances mentioned in Section 514 (7), but in cases under Section 117 the surety is entitled to lead evidence in proof of forfeiture bond taken again.⁹

21. Revision.—Where no appeal lies against the order of forfeiture, no revision lies.¹⁰ Revision lies against such orders.¹¹

514-A Procedure in case of insolvency or death of surety or when a bond is forfeited.—When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of Section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and, if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

4. *Dwijendra Nath*, A 1947 C 120 : 46 Cr LJ 635 ; *Porsumal*, A 1952 Ajmeer 40 (1); *Balraj*, A 1954 B 365 : 1954 Cr LJ 1044.

5. *Girin Das Gupta*, A 1935 C 246: 37 Cr LJ 77 ; *Bharumal v. Motimal*, A 1956 Ajmeer 67.

6. *Rabindra*, 66 CWN 102.

7. *Re Vigiraghavalu Naidu*, (1912) 37 M 156 following *Nrishinha Deb Chatterjee*,

(1912) 16 CWN 550 : 13 Cr LJ 592 ; *In re Rama Bapu Pujari*, (1916) 18 Bom LR 683.

8. *Nabin*, 4 C 865 (FB) ; *Hem Chandra*, 25 C 440 ; *Mir Md.*, A 1944 S 121.

9. *Sajjan Singh*, A 1942 L 78 : 43 Cr LJ 467.

10. *Harwari Lal*, A 1959 A 751 (752) ; 1959 Cr LJ 1380.

11. *Fatta*, 16 Cr LJ 287.

Legislative Changes.—This section was inserted by Section 140 of Act XVIII of 1923 in consequence of the omission of the following words from sub-section (6) of Section 514, *viz.* “but the party who gave the bond may be required to find a new surety” as also to cover the case of a surety who becomes insolvent.

514-B. Bond required from a minor.—When the person required by any Court or officer to execute a bond is a minor such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes.—This section was also inserted by Section 140 of Act XVIII of 1923 to provide for the case of bond required from a minor.

2. Scope.—A bond may be executed on behalf of a minor but not of a major.¹²

The provisions of this section shall apply, so far as may be, in the case of bonds and sureties given under Probationary Offenders Act, 1958.

515. Appeal from, and revision of, orders under Section 514.—All orders passed under Section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

SYNOPSIS

1. Corresponding sections in former Codes.

3. Application of the section.

2. State Amendments.

4. Scope.

—Bombay.

5. Appeal.

—Uttar Pradesh.

6. Revision.

1. Corresponding sections in former Codes.—This section corresponds to Section 398, penultimate paragraph, of the Code of 1872 and is the same as that of 1882.

2. State Amendments—

1. Bombay.—For Section 515 the following section has been substituted by Bombay Act 23 of 1951 :—

“515—*Appeal from and revision of orders under Section 514*—All orders passed under Section 514 by an Executive Magistrate other than the District Magistrate shall be appealable to the District Magistrate and by a Judicial Magistrate other than a Presidency Magistrate to the Sessions Judge and if no appeal is made against such orders they may be revised in the case of the orders passed by an Executive Magistrate by the District Magistrate and in the case of orders passed by a Judicial Magistrate by the Sessions Judge”.

2. Uttar Pradesh.—For the words “to the District Magistrate” substitute the words “to the Sessions Judge”, *vide* U. P. Act 36 of 1948, Section 8.

3. Application of the section.—This section has been declared to apply to the security required by Section 31-A of the Rangoon Police Act, 1899 (Bur. Act IV of 1899).

12. *Wadhawan Singh*, AIR (1928) L 318.

The provisions of this section shall apply, so far as may be in the case of bonds and sureties given under the Probationary Offenders Act, 1950.

Under the Codes prior to the Code of 1882 no appeal was provided for against orders respecting bonds¹³ which however was specially provided for in this section. Under the earlier law neither the Magistrate nor the High Court had power to reduce the amount of the penalty and the only remedy was by a reference to the State Government¹⁴ which view also is no longer maintainable.

4. Scope.—Section 423 applies to appeals under Section 515 ; where the appellate Court is called upon to exercise the powers under Section 423 it is not entitled to dismiss the appeal for default of the appellant.¹⁵

5. Appeal.—Under this section a District Magistrate is empowered to deal on appeal or revision with the order of any Magistrate other than the District Magistrate or Presidency Magistrate.¹⁶ The term 'District Magistrate' in this section does not include an Additional Magistrate.¹⁷ Appellate Court can alter or reverse the order. The word 'alter' includes the power to raise the amount of the security forfeited.¹⁸

6. Revision.—The High Court has power to revise an order under this section.¹⁹

516. Power to direct levy of amount due on certain recognizances.—The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

SYNOPSIS

1. Corresponding sections in former Codes.
2. State Amendment.
3. Scope.

1. Corresponding sections in former Codes.—This section corresponds to the last paragraph of Section 398 of the Code of 1872, last paragraph of Section 138 of Act X of 1875 and is the same as that of 1882.

2. State Amendment—

Bombay.—After Chapter XLII add a new Chapter XLII-A (*vide* Bombay Act 48 of 1948.)

CHAPTER XLII-A

Of Costs to be paid by Complainant or Informant

516-AA. Power to order Costs against complainant or informant.—(1) If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate the accused is ordered to be discharged or acquitted by a Court including a Court of appeal or revision or if in any such case the Proceedings are quashed by the High Court by an order made under Section 561-A and if such Court is of the opinion that the complaint was made or the information was given without any reasonable or probable cause, it may at the time of making such order, if the complainant or informant is present, call upon him forthwith to show cause why he should not be ordered to pay costs to such person ;

13. *Ananthacharri*, (1881) 2 M 169 and Rat 384 no longer good law.
14. *Naki Hazi*, (1881) 8 CLR 72 ; *Nurul Huqq*, 3 C 757.
15. *Dasarath Lal*, A 1957 MP 216 ; 1957 Cr LJ 1405 (1).
16. *Gaffur*, A 1953 Ass 96 ; 1933 Cr LJ

- 704.
17. *Kaluram*, A 1951 MB 67 ; 52 Cr LJ 214.
18. *Gul Zaman*, A 1945 Pesh 6 ; *Sher Md.* A 1941 Pesh 63 ; 47 Cr LJ 754.
19. *Karam*, 13 Cr LJ 13 ; 5 Sind. LR 179.

or if the complainant or informant is not present, direct the issue of a notice to him to appear and show cause as aforesaid.

(2) The Court shall record and consider any cause which such complainant or informant may show and may make an order directing him to pay the whole or any part of such costs. Such costs may include any expenses incurred in respect of witnesses and of pleader's fees which the Court considers reasonable.

(3) The Court may, by the order directing payment of costs under sub-section (2) further order, that in default of payment the person ordered to pay such costs shall suffer imprisonment for a period not exceeding thirty days.

(4) When any person is imprisoned under sub-section (3), the provisions of Sections 68 and 69 of the Indian Penal Code, shall, so far as may be apply.

(5) No person who has been directed to pay costs by an order made under this section shall by reason of such order be exempted from any civil or criminal liability in respect of the complaint made or information given by him.

(6) Where any such order is made by a Magistrate and the amount directed to be paid exceeds fifty rupees, the complainant or the informant may, within sixty days from the date of the order, appeal against it to the court of Session.

(7) In cases where the order is appealable under sub-section (6), the costs shall not be paid before the period allowed for the presentation of the appeal has elapsed or, if an appeal is presented before the appeal has been decided and in other cases the costs shall not be paid before the expiration of one "month from the date of the order."

3. Scope.—Section 516 does not authorise the High Court or Court of Sessions to delegate to the Magistrate the power to initiate forfeiture proceeding. It is only concerned with the power to direct levy of the amount due on a forfeiture bond.^{19a}

Sections 516, 514—in the case of a bond for appearance before the Sessions Judge, Section 516 only empowers the Sessions Judge to delegate the writ of authority levying the penalty imposed to the Court of Magistrate. There must be a finding by the Sessions Judge before whose court the bond provides for appearance that the bond has been forfeited and there must be a notice issued by that Court calling upon the surety to pay the penalty.^{19b}

CHAPTER XLIII

OF THE DISPOSAL OF PROPERTY

516A. Order for custody and disposal of property pending trial in certain cases.—When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, or if it is otherwise expedient so to do, the Court, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

19a. *Hiralal Sahu*, 14 CWN 259 : 10 Cr LJ 248 ; *Rabindra Raghuvanshi v. Rup Chand*, 66 CWN 1021.

19b.

SYNOPSIS

1. Legislative Changes (1923)-(1955).
 2. Scope.
 3. Distinction between S. 516-A, 517 and 523.
 4. Property regarding which any offence has been committed.
 5. Disposal of property—procedure.
 6. Revision.
- Proper custody.
 —Order for taking photographic copies of account books.
 —Perishable goods sold during trial.
 —Complaint of theft.
 —Order returning property.

1. Legislative Changes.—This section was inserted by Section 141 of Act XVIII of 1923.

“It is proposed to add to this Chapter a new section to enable the Court to pass orders for the custody or disposal of property produced before it during inquiry”—*Statement of Objects and Reasons*.

Legislative Changes (1955).—The words ‘or if it is otherwise expedient so to do the Court’ were inserted by Act 26 of 1955.

Ex parte order in restitution proceedings is valid.²⁰

2. Scope.—Sections 516-A to 523 deal with the powers of Courts in the matter of disposal of property. Any order to be passed by a Criminal Court must come under one or another of the sections. Under which section it should pass the order depends upon the circumstances in which the property was seized or produced before it.²¹ If the property is with the police the Magistrate alone has got jurisdiction to pass orders.²²

Muddamal liquor produced under Section 170 before the Criminal Court cannot be returned to police.²³ Where a Court allows under the provisions of the Code a bond to be furnished engaging to produce the goods covered by the bond to be furnished and the bond is forfeited for failure to produce the goods, the forfeiture of the bond cannot be pleaded in extinguishment of the Court’s power to deal further with the goods or their sale proceeds.²⁴ A mere direction to the police to attach property is not tantamount to production before the Court.²⁵

Section 516-A or Section 517 cannot be applied to a case in which the property was brought into the Court by the police in proceedings under Section 512 in which it is not open to the Court to give any finding of fact as regards the guilt of the accused or otherwise²⁶. Section 516-A does not empower the Court to pass orders about the seizure of any particular property the Court has to pass orders only if the property is produced before it. Moreover the section refers to a property regarding which any offence appears to have been committed.²⁷

Delivery of stolen goods during pendency of trial.—Where in such cases identity of goods is disputed, held, it is wrong on the part of the Magistrate to allow complainant to have possession of those goods on his application for possession of the same on his undertaking to produce them in Court when necessary.^{27a}

20. *Maung Po Cho v. Maung Shwe Kin*, AIR (1928) R 310 ; *Deoji, Kalyanji*, A 1942 B 42 : 43 Cr LJ 362.

21. *Puroshattam Das*, A 1952 A 470 : 1952 Cr LJ 856 ; *Narain Sahai*, A 1963 Raj 13.

22. *Ramlal Hazarimal v. Hiralal*, A 1953 MB 241 : 1953 Cr LJ 1704.

23. *Rasul Khan*, A 1961 Guj 4 : 1961 (1) Cr LJ 54 (1).

24. *Ram Prasad Agarwalla*, 60 CWN 542 : A 1955 C 586.

25. *Ramchowat Singh v. Derji Kalyanji*, A 1942 B 42 : 43 Cr LJ 262.

26. *Ganeshi Lal Ranchoddas*, A 1958 MP 39 : 1958 Cr LJ 167.

27. *Hanuman Sahai*, A 1963 Raj 13.

27a. *Purshottum Mahadeo*, A 1963 Bom 74.

3. Sections 516-A, 517 and 523—Distinction between.—Sections 516-A and 517 deal with cases which have actually come up before the Criminal Court for inquiry or trial, while Section 516-A enables a Magistrate to provide for the interim custody of goods pending the conclusion of the inquiry or trial. Section 517 provides for the disposal of property after inquiry or trial is over. In connection with orders under Section 516-A there is no appeal necessary because the order is not a final order and is subjected to revision. An order under Section 517 is made appealable. Where there has been no inquiry or trial in a Criminal Court, the proper Section to apply will be Section 523.²⁸

4. Property regarding which any offence has been committed.—This section does not apply unless the property in respect of which the order is applied for, appears to have been used for the commission of an offence.^{28a} In a prosecution of a motor driver for an offence under Section 338 I. P. C. it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of Section 516-A, and it is illegal for the Magistrate to detain the car.²⁹

5. Disposal of property—procedure—Proper custody.—The Court is entitled to take a security bond from the person in whose custody the property is delivered, for the production of such property whenever necessary.³⁰

Order for taking photographic copies of account books.—The order of Magistrate for the taking of photographic copies of the account books recovered in pursuance of the search warrant issued by him held to be unauthorised and clearly without jurisdiction is an abuse of the process of the Court and the order was liable to be quashed.³¹

Perishable goods sold during trial.—If goods seized were sold during trial because they were of a perishable nature and at the conclusion of the trial the Magistrate passed the order of confiscation of goods, by such order he should be taken to have meant that money in deposit was to be confiscated. Such an order falls under this section and the High Court is empowered to deal with it in revision.³²

Complaint of theft—Order returning property to complainant.—Where a complaint was made to a Magistrate alleging that the accused took a motor bus from him on hire purchase agreement, made defaults in instalments and the complainant lawfully recovered the bus, but subsequently the accused stole the bus, the Magistrate without making any investigation into the alleged charge of theft called on the accused to produce it in court and when produced the Magistrate ordered it to be handed over to the complainant, held, the Magistrate's order was illegal.³³

Where the truck of a businessman was detained for nearly nine months on the allegation that it was taken into custody in connection with the

28. *Sheik Muktear*, A 1954 C 350 : 154 Cr LJ 981; *Warnam Sahai*, A 1963 Raj 63.

28a. *Makhan Lal Chatterjee*, 40 CWN 96 : 37 Cr LJ 935 (cal) where stop order on the accused to operate on bank account asked for.

29. *Phula Singh*, A 931 L 565 : 33 Cr LJ 347.

30. *Shangara Singh*, A 1929 L 658 : Cr LJ

527. See *Rasul Khan*, A 1961 Gaj 4.

31. *Thomas v. Chaker Joseph*, A 1956 TC 256 ; 1956 Cr LJ 1364.

32. *A. P. Misra*, A 1958 C 612 : 1958 Cr LJ 1386.

33. *Brojendra Chandra De v K. S. Sama*, A 1931 C 455 : 32 Cr LJ 983. See *Purusshattam Mahadev*, A 1963 B 74.

smuggling of yarn by the son-in-law of the businessman, held, that the order of detention was neither proper nor reasonable in view of the previous order of release of the truck upon security which had been furnished.³⁴

6. Revision—lies against an order passed under this section.³⁵ In passing an order under this section it is necessary that there should have been an inquiry or trial but where it is held either by the trial Court or by a Superior Court either in revision or appeal that the trial was without jurisdiction, the proceeding cannot be said to constitute a trial and it is not open to a Court to pass any order under S. 517.³⁶

517. Order for disposal of property regarding which offence committed.—(1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section such order shall not, except where the property is livestock or subject to speedy and natural decay, and save as provided by sub-section (4), be carried out for one month, or, when an appeal is presented, until such appeal has been disposed of.

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal.

Explanation.—In this section the term 'property' includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

34. *Matadin Sharma*, A 1949 P 44 : 49
Cr LJ 604.

35. *Sk. Muktear*, A 1954 C 35 ; *Ibrahim*, A

1947 N 33 : 47 Cr LJ 742.

36. *Mohammed Ali*, A 1947 AP 146 : 1957
Cr LJ 706.

SYNOPSIS

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|--|--|
| 1. Corresponding sections in former Codes. | 11. Property regarding which any offence appears to have been committed. |
| 2. Legislative changes. | 12. Property which has been used for commission of an offence. |
| 3. Scope. | 13. Powers of Customs Authorities. |
| 4. Sub-section (1).
—“when an inquiry or a trial in any Criminal Court is concluded.” | 14. Notice. |
| 5. Application to movable property.
—‘Make such order as it thinks fit’. | 15. Sub-section (2). |
| 6. Section not <i>ultra vires</i> . | 16. Sub-section (3). |
| 7. Violations of Special Law. | 17. Sub-section (4)
—order of restorations. |
| 8. Disposal. | 18. Explanation. |
| 9. Currency note and coin. | 19. Revision. |
| 10. Person claiming to be entitled to possession. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 132-A of the Code of 1861, S. 418 of the Code of 1872, S. 115 of Act X of 1875 and Ss. 243 and 244 of Act IV of 1877. Excepting the words “*property or*” before the word ‘document’ in sub-sec. (1), the section in the unamended Code of 1898 was similarly worded as that of 1882.

2. Legislative Changes.—In sub-sec. (1) the words “by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise” and sub-secs. (3) and (4) were inserted by S. 142 of Act XVIII of 1923.

“These amendments are proposed (i) to elucidate the order for disposal of a property produced before a Court, which it may pass, by explaining that this means disposal by destruction, confiscation, restoration to the person claiming to be entitled to the possession thereof; (ii) to make clear that when an appealable order is passed by a Court the property shall not ordinarily be disposed of, until the time for presentation of appeal has passed or the appeal is disposed of, except when it is subject to speedy and natural decay; (iii) the Court is enabled, if it sees fit, to restore the property to the possession of any person claiming to be entitled to it, who is willing to execute a bond for its return if need be.”—*Statement of Objects and Reasons*.

3. Scope.—This section deals with the disposal at the conclusion of inquiry or trial, of such property as well as property produced before the Court or in its custody after the trial is over.³⁷ The Court has power to make an order about any property produced before it even if it had not been used for the commission of an offence.³⁸ For passing an order under this section it is necessary that there should have been an inquiry or trial but where it is held either by the trial Court or by a superior Court either in revision or appeal that the trial was without jurisdiction, the proceeding cannot be said to constitute a trial and it is not open to a Court to pass any order under this section.³⁹ If there has been no commencement of inquiry or trial the provisions of this section will not be attracted. Hence, where the offence is compounded before an inquiry or trial commenced, this section has no application.⁴⁰ The mere fact that a first information report was lodged suspecting some person, cannot entitle a Magistrate to pass an order of disposal of properties in favour of the informant when investigation of the case

37. *Sheikh Muktear*, A 1954 C 350: 1954 Cr LJ 981; *Raul*, 34 C 347; *Pyde Rahiman*, 42 M 9; *Budhilal*, 43 Cr LJ 698.

38. *Ram Lal*, A 1954 A 758.

39. *Muhammad Ali*, 1957 MLJ (Cr) 50: 1957 Cr LJ 706.

40. *Ram Chandra v. Hastimal Jain*, A 1956 MB 161: 1956 Cr LJ 895.

reached its final stage.⁴¹ The Court has no power to pass orders under this section in respect of property or money value not in custody of the Court.⁴²

Section 517 and Explanation.—Section 517 read with the Explanation has no reference or application to the money equivalent of property unless it be the money or specie into which a stolen property has been converted or for which it has been exchanged or unless the money has been acquired by such conversion or exchange.^{42a}

4. Sub-section (1)—‘when an inquiry or trial in any Criminal Court is concluded’.—The criminal Court has no jurisdiction to make an order directing delivery of property in the absence of any criminal proceeding.⁴³

Where there has been no enquiry or trial, this section does not apply.⁴⁴ Where a lorry was purchased on a hire purchase system and the owner forcibly dispossessed the purchaser on an alleged breach of contract and the Magistrate dismissed the complaint but ordered return of lorry to the purchaser on having a bond from him to produce it whenever required, *held*, Magistrate’s order was proper.⁴⁵ Where the complainant sold a bus to the accused under a hire purchase agreement who did not pay the instalment and complainant got hold of the bus, the accused stole the bus, the complainant started a case of theft and directed the accused to produce the bus and when produced it was given over to the complainant, *held* that the order was wrong.⁴⁶

The Court is bound to restore the property when there has been an inquiry or trial and the accused has been discharged or acquitted by a criminal Court.⁴⁷

A proceeding under S. 117 is an enquiry within the meaning of this section.⁴⁸

This section *does not apply* when a complaint is dismissed under S. 203 for there is no inquiry or trial in the Magistrate’s Court.⁴⁹

‘Is concluded’.—When the accused *died* before trial and *before any evidence was recorded*, S. 517 was held not applicable.⁵⁰

“There can be no question that, under S. 517, Criminal Procedure Code, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject-matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft”.⁵¹ An order for the disposal of property which is the subject-matter of the offence can only be made upon the *conclusion* of an inquiry or trial, and not

41. *Bhupati Bayen*, 62 CWN 393 : A 1959 C 446.

42. *Bishambar Rai*, A 1953 A 199 : 1953 Cr LJ 576 where *Magendra Nath*, A 1934 C 454 and *Shamsundar v Teja Singh*, 1935 Pesh 98 ; *P. G. Valiappa Chattiav. Kaliappa Goundan*, A 1934 MWN 566, referred to.

42a. *Kanchanlal*, AIR 1963 Guj 223 : (1963) 4 Guj LR 102.

43. *Sreedam Seal*, 6 CLJ 707.

44. *Tara Chand*, A 1951 MB 154 : 52 Cr LJ 1476 ; *Ghulam Ali*, A 1945 L 47 : 47 Cr LJ 32 ; *Md. Yusuf v. Krishna Mohan*, 41 CWN 1376 ; 39 Cr LJ 245.

45. *Rama Aiyar v. Das Gupta*, A 1933 C 149.

46. *Brajendra*, 35 GWN 198.

47. *In re Annapurna Bai*, 1 B 630. See *Ramamurthy*, A 1962 AP 262.

48. *In re Pydi Ramana*, 42 M 9 : 20 Cr LJ 135.

49. *Ramasawmy Aiyar v. Venkateswara Aiyar*, 24 MLJ 1 : 14 Cr LJ 27 : 18 IC 171.

50. *Kupppammall*, (1906) 29 M 375 ; *Karmamoy*, A 1950 C 369 (case under S 145 Cr P Code) ; *Dhanawanti*, A 1955 A 63 ; *Narayan Amma Kamala Devi*, A 1961 Ker 250.

51. *Kanga Sabai*, (1910) 34 M 94 (95).

on the application of a person subsequently made after the trial is over.⁵² The same High Court held a contrary view in *Kanshi Ram*⁵³, viz., that *no period of limitation* is prescribed for an application for restoration of property under this section; it can be made within a reasonable time from the date on which an accused person is acquitted of the crime with which he is charged.

See S. 516A which authorises the Court to pass an order even before the conclusion of the trial.

The word 'concluded' has been used to mean conclusion after full enquiry.⁵⁴ Where under a bond a person engages to produce the goods in Court and the bond is forfeited, the custody of the Court continues despite the bond and the Court has the necessary power to call upon the person to produce the goods either in the original or in converted form inspite of forfeiture of the bond and penalty therefor.⁵⁵

5. Application of the section to movable property.—This section applies to movable property only and does not extend to immovable property to which the section applicable is S. 522.⁵⁶

'Make such order as it thinks fit'.—These words do not authorise a Court to direct removal of a building.⁵⁷

The words 'as it thinks fit' vest a discretion in the Court, which should be exercised judicially and not in an arbitrary manner.⁵⁸ A Magistrate has been given a wide discretion and unless it is clear that he exercised it on some wrong principle the High Court will not interfere.⁵⁹

6. Is the section violative of Article 19 of the Constitution.—The provisions of this section are not *ultra vires* as they do not offend Article 19 of the Constitution.⁶⁰

7. Violation of Special Law.—General provisions under this section will not apply to West Bengal Black-Marketing Act,⁶¹ in which special provisions for forfeiture have been made.⁶² Under S. 38A (2) of the Calcutta Suburban Police Act in respect of which an offence has been committed will be forfeited to the State but if there is a claim by a third party this section will apply.⁶³

52. *Abdul v. Ghulam Mahammad*, (1923) 4 L 460: 25 Cr LJ 84; *Vemi Reddy v. Babu Reddy*, 18 Cr LJ 469 (M); *Perumal Pillai*, A 1954 T C 198: 1954 Cr LJ 487; *Ghulam Ali*, A 1945 L 47; *Bhimaji*, A 1944 N 566: 46 Cr LJ 366; *Md. Yusuf v. Krishna Mohan*, 41 CWN 376: A 1938 C 17; *Maung Pu Tu*, A 1938 R 278: 39 Cr LJ 763.

53. (1922) 4 L 49: 73 IC 937; *Deo Pujan*, A 1940 P 198: 41 Cr LJ 559; *Kishen Chand v. Nanak Chand*, A 1926 L 9.

54. *Karmamoy Mukherjee*, A 1950 C 369: 51 Cr LJ 1340; *Tara Chand*, A 1951 MB 145; *Kedar Biswas*, 18 CWN 959.

55. *Ram Prasad Agarwalla*, 62 CWN 542: 1955 Cr LJ 148.

56. *Bisweswar Singh v. Bhola Nath Pathuk*, 18 CWN 1146: 15 Cr LJ 175; *Adepu Reddi v. Ramayya*, 22 Cr LJ 110: 59 IC 414.

57. *Nanhi*, (1900) A WN 81.

58. *In re Sadasiv*, 11 Bom LR 16: 9 Cr LJ

162; *Sorbal Ram*, A 1953 P 197: 1953 Cr LJ 1204.

59. *Subanama Ayyar v. Damodaram*, A 1937 M 313: 38 Cr LJ 690.

60. *Ram Lal*, A 1954 A 758: 1954 Cr LJ 1581.

61. *Pratap Singh*, 55 CWN 473: A 1952 C 90; *Kedarnath Agarwalla*, 54 CWN 829.

62. *G. C. Kesavala Naidu, In re*, 1955 MWN 473: A 1952 Mys 39 (vehicle used for transport of prohibited liquor confiscated under S. 13 Madras Prohibition Act): A 1952 C 90 (91); *Palai*, A 1952 Mys 55: 1952 Cr LJ 289 (Food Acquisition Order); *Jelinchand*, A 1950 A 132: A 1950 Ass 132: 51 Cr LJ 1182 (Temporary Powers Act); *Raghunath*, A 1947 B 239 (Food Grains Control Order Cl. 7A); *Bhimaji*, A 1944 N 366: 46 Cr LJ 366; *Pursottam Deoji*, A 1944 A 207 (D. I. Rules); *Maniram*, A 1937 P 257 (case under Mica Act).

63. *Ajagar Ali*, A 1956 C 157: 1956 Cr LJ 582.

8. Disposal.—The words inserted in 1923 as also the words that follow qualify this expression. The first part of S. 517 refers to cases of offences relating to property or documents.⁶⁴

Section 517 though wide in its terms does not confer on a Court an absolute power of disposition of property regarding which an offence had been committed and which had not been used for the commission of an offence.⁶⁵ Now the amendment says 'disposal' 'destruction, confiscation or delivery.....or otherwise.' It is not for a Criminal Court to assume the functions of a Civil Court⁶⁶ nor can it conclude the right of a person from whose possession the property has been taken or of any other person, to contest the decision of the Criminal Court by a Civil suit.⁶⁷ The power of disposal includes the power to confiscate.⁶⁸ 'Confiscation' is not the only remedy, where there is no evidence to prove that the property seized from the accused is stolen or fraudulently obtained, an order for confiscation under this section upon the existence of a mere belief required to sustain a conviction under S. 61E Bombay Act is palpably harsh and unreasonable.⁶⁹

Order for disposal of property.—The ordinary rule is that where an accused person is acquitted of an offence in relation to the property which has been recovered from his possession, the Court should order such property to be returned to him. If the Court thinks it proper to depart from this ordinary rule, it must give its reasons for doing so and it is conceivable that such an order may properly be passed where the accused disclaims any connection with the property recovered, where, however, the case of the accused is, that he had purchased the property recovered from some person and that third person also comes in evidence and supports the case of the accused, cannot be said that such a case falls within the ambit of any exceptional cases under this section. It then becomes a case where the title to the stolen property becomes a matter of contest between two rival parties, the ordinary rule should apply and the party should be left to establish its title to the Court.⁷⁰

An order under S. 517 at the conclusion of the trial only concludes immediate right to possession but does not conclude the right or title of any person to the ownership of the property. The real owner may proceed against the holder of the articles and it cannot be said that there is any necessity of having that order set aside.⁷¹ The stolen property should not be returned to the accused who has been acquitted.⁷² Where the accused obtained certain ornaments on false representation and pledged them with a third person, held that on the case under S. 420, I. P. C. being compounded, an order of restoration of ornaments should not be made without giving an opportunity to the third party of being heard.⁷³ Under S. 517 what the Court has to determine is as to which person is entitled to possession of the property. It is not for

64. *Abinash Chandra Bhattacharjee*, (1907) 34 C 986.

65. *Appaji Aiyer*, (1918) 41 M 644.

66. *Annapunna*, 1 B 630.

67. *Lown Karan Marwari*, 5 PLJ 321 : 56 IC 507.

68. *Balhi Singh*, A 1938 A 209 ; *In re, A. B. Samant*, A 1934 B 193 : 35 Cr LJ 1344.

69. *Suleman Issa v. State of Bombay*, 1954 SCR 976 : A 1954 SC 312 : 1954 Cr LJ 881.

70. *Dhanna*, 1957 Cr LJ 238 : 1956 Raj LW 192 ; *Muttiah*, A 1954 M 234 ; *Harihar Singh*, A 1957 P 685 : 1957 Cr LJ 1442 ; *Hukumchand Jain v. Ram Saroop*, A 1952 VP 66 : 1952 Cr LJ

1502 ; *Sital Ram*, A 1953 P 197 : 1953 Cr LJ 1204 (Case under S. 411 IPC) ; *Sardara*, A 1950 L 148 : 51 Cr LJ 1232 ; *In re Subbayya*, A 1939 M 905 : 41 Cr LJ 203 ; *Gour Mohan v. Bansidhar*, A 1923 C 598 : 24 Cr LJ 238.

71. *Jagannath Hazarilal firm v. State of Bombay*, A 1963 B 83 (civil case), where *Tribhuvan*, 9 B 131 and *Secretary of State v. Lawnkaran*, A 1920 P 182 relied on.

72. *Rasul*, A 1927 G 61 ; *Jaharlal*, A 1949 N 17.

73. *Ram Chandra v. Hasimlal Jain*, A 1956 MB 161 : 1955 Cr LJ 396 ; *Naina Mal*, A 1924 A 189 : 24 Cr LJ 804.

the Criminal Court to determine title to the property.⁷⁴ Where accused is acquitted on the ground that the prosecution had not been able to establish that the complainant was the owner of the goods, it was not open to the accused to go back on his plea and claim the goods belonging to him.⁷⁵

9. Currency note and coin.—Ordinarily, the property in cash and in bills payable to bearer and currency notes passes by mere delivery and the person who is in possession of them; and if, so, when a stolen currency note is cashed it should be returned to the person who paid the cash in good faith.⁷⁶ A judge by his order in appeal cannot direct that the currency notes recovered from the house of the accused and not proved to be stolen property should be kept in the custody of the Court till any member of the accused's family may establish his claim to the same in a competent Court. The currency notes should be returned to the person from whom they were recovered.⁷⁷ Where there are conflicting claims to the property, it may properly be ordered to remain in the custody of the trial Court pending decision of a Civil Court of competent jurisdiction.⁷⁸ Where money recovered from the house of the accused was alleged to be money stolen from the house of the complainant but the accused was acquitted on the finding that the money did not belong to the complainant, *held*, the Magistrate was wrong in directing that the money should be returned to the complainant.⁷⁹

10. "Person claiming to be entitled to possession".—It does not mean the owner; ownership involves a question of title whereas possession does not. Where the articles were seized from the custody of one who it has been found did not come into possession of them by illegal means but by way of pledge from another person who did not commit any theft, it must be presumed that the pledgee came in lawful possession of the property and that he transferred the custody to the pledgee in a lawful manner. In such a case the wife who gave the articles to the pledgee to pledge was in lawful possession.⁸⁰ Where a person was convicted under S. 379, I. P. C. for the theft of a bullock belonging to another person, the bullock was purchased by a different person not knowing it to be stolen, *held* that the owner of the bullock and not the *bona fide* purchaser was entitled to the return of the bullock.⁸¹ The object of the section is to enable a magistrate to direct the property to be given to some person to whom it appears to belong or to allow it to continue in the possession of the person in whose possession it was found or to make some other order of that nature.⁸²

11. Property regarding which any offence appears to have been committed.³—This clause includes within its meaning movable property regarding the possession of which a quarrel or a fight is begun whatever may be the offence that might ultimately have been committed.⁸³

74. *Abdul Rahim*, A 1956 A 319 : 1956 Cr LJ 566 (2).

75. *Paul*, A 1960 Ker 285 : (1960) Cr LJ 809 where *Paskar Singh v. State of M. B.*, A 1953 SC 508 and *Suleman Isa v. State of Bombay*, A 1954 SC 312 distinguished; *Kanchan Lal*, A 1963 Guj 228.

76. *In re Panandherinot*, A 1915 B 265; *Nizam*, 19 G 52; *Paru*, A 1926 S 17; *Akhoy*, A 1940 C 346.

77. *Gopinath Naik*, A 1957 Or 287 : 1957 Cr LJ 1441.

78. *Ramphal Tatwa*, 40 CWN 862 (863) following *Ramkhelawan Ahir v. Tulsi*

Talimi, 28 CWN 1094.

79. *Pushkar Singh v. State of Madhya Bharat*, A 1953 SC 508 : 1954 Cr LJ 153.

80. *Budhulal Harnarayan*, A 1942 N 82 : 43 Cr LJ 698 distinguished in *Joharilal Debi Sahai*, A 1949 N 17 : 50 Cr LJ 104 (where accused was acquitted of theft because of insufficient evidence).

81. *Sitaram Balwant Singh*, A 1948 N 248; 49 Cr LJ 373; *Chattiar Firm*, A 1935 R 205.

82. *Lakshmi*, 9 CWN 597.

83. *Shaik Dawood v. Velayuda Semetti*, (1927) 51 M 606 : 54 MLJ 312.

12. "Property which has been used for the commission of an offence".—In order that the District Magistrate should have jurisdiction to dispose of property under S. 520 it is only necessary that he should find that it appears that an offence has been committed in respect of that property, and it is not necessary that the property should be proved to have been stolen.⁸⁴

A bond cannot be regarded as an instrument for the commission of an offence such as is contemplated under this section.⁸⁵ Any property or document in regard to which an offence appears to have been committed or which has been used for the commission of offence should not be returned by a criminal Court to the person who has been convicted.⁸⁶

13. Powers of Customs Authorities.—Though this section gives a criminal Court a discretion to confiscate articles in cases of either acquittal or conviction after the conclusion of the inquiry or trial, the property can be legally and rightly held by the customs authorities until duty and discretionary penalty are paid by the claimant, if confiscation is not ordered.⁸⁷

14. Notice.—No notice is required if the order is passed simultaneously with the judgment, but if the application is made after some lapse of time it is proper that the party affected, should on general principles of law have notice of the application.⁸⁸ An order disposing the property under S. 517 not made on the application of any party and after notice but made in the property register probably at the instance of the office cannot be upheld.⁸⁹

15. Sub-section (2)—"Produced before it or in its custody".—It is not necessary that the property to be disposed of should have been used for the commission of an offence or that some offence should appear to have been committed regarding it. The Court can make an order for the disposal of any property "produced before it or in its custody".⁹⁰

Under the provisions of S. 517 the Magistrate has power to pass an order regarding the property produced before the Court in its custody, even though no offence has been committed in respect of it.¹

16. Sub-section (3).—See 'Statement of Objects and Reasons' quoted *ante*.

Limitation—of one month for presentation of appeal. This limitation applies only to the trial Court, the order may be passed by any of the Courts mentioned under sub-section (3).^{1a}

17. Sub-section (4).—See 'Statement of Objects and Reasons.'

Trial Court's power to dispose of property on acquittal—whether Sessions Court has jurisdiction to alter such order.—The Sessions Judge has no power to pass any order setting aside an order passed by a Magistrate under S. 517 when no appeal against the conviction or sentence is pending before the Sessions Judge.²

In no circumstances whether the case be one under S. 517 or 523 can an

84. *Kasiram*, A 1937 P 591 ; *Ibrahim*, A 1947 N 33.

85. *Jari Gashi*, 8 CWN 887.

86. *Spratt*, A 1934 A 207 : 35 Gr LJ 1389.

87. *Asst Collector of Customs v. Krishna Pillai*, A 1956 M 42 : 1955 Cr LJ 72.

88. *Deopujan*, A 1910 P 198 : 41 Cr LJ 559 ; *Chandram Subba Row*, A 1958 AP 403 : 1958 Cr LJ 739 ; *Himangshu Kumar Das v. Subhan Seikh*, A 1959 C 782.

89. *Ram Karishnayya*, A 1939 M 916.

90. *Ganpat v. Bani*, 21 Gr LJ 414 : 56 IC 62 (N).

1. *Russul Bibee v. Ahmed Moosajee*, (1906) 34 C 347 : 5 CLJ 44.

1a. *Alokal Senappa*, A 1960 Mys 24.

2. *Maung Mra Iun v. Ma Kra Zoe Pru*, (1928) 6 R 259 following *In re Khema Rukhad*, (1918) 42 B 664 : *Debi Ram*, (1924) 46 A 623 and *Rusul Bibee v. Ahmed Moosajee*, (1907) 34 C 347.

order be made for detention in Court custody or in the custody of one of the parties conditional on a civil suit being instituted.³

Accused acquitted—order of restoration passed by District Magistrate without jurisdiction.—An order under this section can be set aside by a Court of appeal, confirmation or revision but the District Magistrate has no jurisdiction to set aside the order of acquittal passed by the trial Court and pass an order under this section.^{3a}

18. Explanation.—Where a party has been ordered by a criminal Court to restore certain property to another but such party has already converted the property to its own use, the Court has power to order the production of such property as may be capable of production and the production of the money equivalent of such property as may be incapable of production.⁴ The provisions contained in this Explanation seem to make it clear by necessary implication that the Court is intended to be clothed with the widest powers in following up property in respect of which an offence has been committed not only in its original state, but also in any other shape or form into which it may have been converted.⁵

19. Revision.—An order under this section made by a Deputy Magistrate in a case in which the accused is acquitted may be revised under S. 520 by an Additional Sessions Judge.⁶ Absence of a prayer by the petitioner for restoration of the properties in his previous application to the High Court was no bar to his getting relief in this Rule issued by the High Court.⁷

518. Order may take form of reference to District or Sub-divisional Magistrate.—In lieu of itself passing an order under Section 517, the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 2. Scope. |
| 1a. State Amendment.—Bombay. | 3. Order has a temporary operation. |
| | 4. In the manner hereinafter mentioned. |
| | 5. Appeal, reference or revision. |

1. Corresponding sections in former Codes.—This section corresponds to S. 132-C of the Code of 1861, S. 420 of the Code of 1872 and is the same as that of 1882.

1a. State Amendment—

Bombay—For the words “to the District Magistrate or to a Sub-Divisional Magistrate” substitute “in Greater Bombay, to a Presidency Magistrate specially empowered by the State Government” and else where “to the District Magistrate or a Sub-divisional Magistrate” and in the marginal note, for the words “District or Sub-divisional Magistrate” read the words “Presidency, District or Sub-divisional Magistrate” *vide* Bom. Act 54 of 1953.

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| 3. <i>Md. Ynsuf v. Krishna Mohan</i> , A 1938 C 17 : 39 Cr LJ 245. | referred to ; <i>Muneshwar</i> , A 1956 A 199 : 1956 Cr LJ 313. |
| 3a. <i>Debi Ram</i> , (1924) 22 ALJ 505, following <i>In re Khempa</i> , 42 B 664. | 6. <i>Ramphal Tatwa v. Jashodia Malain</i> , 40 CWN 862. |
| 4. <i>Nagendra Nath Sinha</i> , A 1934 C 454 : 35 Cr LJ 886. | 7. <i>Kedar Biswas v. Mathura Nath Mitra</i> , 18 CWN 959; <i>Ram Saran Singh</i> , A 1950 P 232. |
| 5. <i>Ram Prakash Agarwalla</i> , 60 CWN 542 where <i>Biswambar Rai</i> , A 1953 A 199 | |

2. **Scope.**—Before passing an order under this section by holding an enquiry the Magistrate contemplated by the section should give the persons claiming the money an opportunity of substantiating their claims.⁹

3. **Order under this section has only a temporary operation.**—Orders passed under S. 518 of Act X of 1872 have a temporary operation only. Order of this nature may be given a permanent character in certain circumstances by the State Government.¹⁰

4. **In the manner hereinafter mentioned.**—As provided in S. 523 *infra*.

5. **Appeal, reference or revision.**—See S. 520 *infra* and notes thereunder.

An order under Ss. 517, 518 or 519 of the Code may be revised only by any one of the Courts mentioned in S. 520, even though in respect of the main case in connection with which such order was passed, no appeal or revision has taken place in any Court, or could have been entertained by the Court revising the order.¹¹

519. Payment to innocent purchaser of money found on accused.—When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | purchaser of money found on accused. |
| 2. Payment of compensation to innocent | 3. Appeal, reference or revision. |

1. **Corresponding sections in former Codes.**—This section corresponds to S. 30 and 31 Vict. C. 35, S. 10 and is the same as S. 519 of the Code of 1882.

2. **Payment of compensation to innocent purchaser of money found on accused.**—This section directs that on restitution of a stolen property an innocent purchaser may on application be given the sum not exceeding the price paid by him.

Section 519 authorises payment (to a purchaser of stolen property who buys in ignorance of the theft) of compensation out of any money found in possession of the party guilty of the theft.¹² No condition can be imposed on the return of a stolen property (poney) to an innocent purchaser.¹³ It is not competent to award compensation to innocent purchasers, to whom the property stolen has passed, out of the fine imposed (S. 545, Cr. P. Code); but under S. 519, compensation to them can be given from moneys found in the possession of the accused.¹⁴

9. *Ganga Bishen Agarwalla v. Brojo Bagdi*, (1910) 14 CWN ccxv.

10. *Ramdas*, (1920) 18 ALJ 857 : 22 Cr LJ 2 : 59 IC 34.

11. *Hussain Shah*, (1904) 17 CPLR 107 : 1 Cr LJ 764.

12. *Puyuthinni Pramutha*, (1885) 2 Weir 671; *Roshan Lal*, A 1957 East Punjab 297 : 1957 Cr LJ 1448 (2).

13. *Abdul*, (1901) 3 Bom LR 449.

14. *Dhondur*, (1901) 3 Bom LR 764.

3. Appeal, reference or revision.—See S. 520 *infra*.

520. Stay of order under Section 517, 518 or 519.—

Any Court of appeal, confirmation, reference or revision may direct any order under Section 517, Section 518 or Section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | Restoration. |
| 2. Legislative Changes. | —“May make any further orders that may be just.” |
| 3. Statement of Objects and Reasons. | 7. Necessity for Notice. |
| 4. Effect of the Amendment. | 8. Revision. |
| 5. Scope. | —Interference by the High Court in revision. |
| 6. Powers of Appellate Court. | —Limitation in applications for restoration of property. |
| —Meaning of Court of Appeal. | |
| —Appellate Court—Power to order | |

1. Corresponding sections in former Codes.—This section corresponds to S. 132-B of the Code of 1861, S. 419 of the Code of 1872 and, excepting the words ‘*and make any further orders that may be just*’ inserted in the Code of 1898, is the same as S. 520 of the Code of 1882.

2. Legislative Changes.—This section was not amended in 1923. The words “*and make any further orders that may be just*” were added in the Code of 1898.

3. Statement of Objects and Reasons.—“It will enable a superior Court to give effect to an order setting aside the order of the Court of first instance, if that order has been carried out by directing the restitution of property.”

4. Effect of the Amendment.—Owing to the scope of the section having been enlarged by the addition of the above words in the Code of 1898 the following decisions¹⁵ under the old Code, which held that the High Court or the Court of Appeal could not order restitution while *reversing an illegal order*, have been overruled, *vide Azmut Shah Khan*.¹⁶ The case of *Surendra Nath Sarma v. Rai Mohan Das*¹⁷ which follow the rulings under the old Code without considering the changes in the law effected by the amendment in 1898 can no longer be treated as good law.

The Lahore High Court has held in *Kandhi Ram*¹⁸ that these words are intended to enable superior Courts to pass proper orders in cases where property has been erroneously disposed of. The Madras High Court has held in *Arunachala Thevan v. Vellachami Thevan*,¹⁹ that these words are wide enough to empower the Court to direct the return of property.

5. Scope.—This section does not confer independent right of appeal against an order passed under Ss. 517, 518 or 519.²⁰ The jurisdiction may be regarded as a revisional one of a special kind.²¹

15. *Shib Chunder Rai*, (1868) 9 WR (Gr) 57; *Annapurna Bai*, (1877) 1 B 630; *Basudeb Sarma Gossain v. Naziruddin*, (1887); see *Abhram Umar*, (1884) 8 B 575; (1896) AWN 56, *In re Devidas Durgaprosad*, 22 B 844.

16. (1913) 35 A 374; 11 ALJ 542.

17. (1903) 30 G 690; 7 CWN 634.

18. 4 L 49; AIR (1924) L 75.

19. 46 M 162; 44 MLJ 56; 24 Cr LJ 162.

20. *Sharfuddin v. Serajuddin*, A 1961 Or 121.

21. *Maung Pu Tu*, A 1938 R 278; 39 Cr LJ 763; *Walchand v. Hari Anant*, 56 B 369; A 1932 B 534; 33 Cr LJ 807 (FB) followed in *Kantha Mal v. H. P. Admir*, A 1963 H P 45.

Section 520 refers only to orders passed under the Code and not to orders passed under other Acts or ordinance.²² The words "a Court of appeal, confirmation, reference or revision" in S. 520 refer to a Court to which appeals, references, confirmations or revisions ordinarily lie against the judgment and decision of the trial Court and do not refer to a Court to which appeal, etc., has been preferred.²³ Where the main case in which any order under S. 517, 518 or 519 was passed is itself pending before a Court of appeal, conference or revision, such Court may pass any consequential order as to the disposal of the property.²⁴

No appeal from conviction—Court of appeal may take action under this section.—The words "Court of Appeal" in S. 419 of Act X of 1872 (corresponding section) are not necessarily limited to a Court before which an appeal is at the moment pending.²⁵

'When there is a Court of appeal' resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.²⁶

6. Power of Appellate Court to pass orders regarding property in respect of which an offence has been committed.—Section 520 gives to an Appellate Court the same power as the Court which originally tried a case to pass orders under S. 517.²⁷

Order may be passed on appeal.—The High Court on appeal can order restitution of property restored to one party under S. 517.²⁸

Venue for stay of proceedings.—Where a case is appealable to the Sessions Court a District Magistrate has no power to deal with an order regarding the disposal of the property under S. 520, the only Court which can deal with such an order is the Sessions Court.²⁹

"Court of Appeal"—Meaning of.—The words "Court of Appeal" in S. 520 merely imply the Court to which appeals would ordinarily lie and do not mean that an appeal must lie in the particular case in which an order has been passed as to property.³⁰ If there is an appeal, whether it is against a conviction or against an acquittal, an order under S. 517 can be revised by the Court seised of the appeal.³¹

Appellate Court—Power to order restoration.—Curgenvin, J., held: "It seems to me doubtful whether an application made under S. 520 to a 'Court of appeal, confirmation, reference, or revision' is in the nature of an appeal. The phrase I have quoted seems only to designate the Courts

22. *Kominatin*, 49 CWN 548 : 47 Cr LJ 465.

452 : 35 A 374 : 14 Cr LJ 526 : 20 IC 1006.

23. *Ram Abhilakh*, 1961 (2) Cr LJ 602 A : A 1961 A 544 Overruling *Teleswar Jha*, A 1959 A 96 : 1959 Cr LJ 123 (See cases referred to); *Shantaram Govindaram*, A 1961 MP 1 (FB); *Fatima v. Saim Baksh*, A 1942 SI : 43 Cr LJ 386; *Kanchanlal*, A 1963 Punj 228; *Kannamal v. Administrator*, A 1963 HP 45. See cases refused to.

28. *Shwe Wa v. C. L. Mahta*, (1927) 5 R 553 : AIR (1927) R 322.

29. *In re Luxman Ranga Rangari*, (1911) 35 B 253 : 13 Bom LR 631 : 12 Cr LJ 169 : 9 IC 947 followed in, *In re Khunka Rukhad*, (1918) 42 B 664 : 20 Bom LR 395.

24. *Nagappan Konan v. Ramnarayan Pandayachi*, A 1930 M 769 : 31 Cr LJ 1085; *Dost Muhammad*, A 1944 S 310; *Sheo Dan v. Pir Dam*, A 1963 Punj 167.

25. *Joggesur Mochi*, (1878) 3 C 379 : 1 CLR 339; *Ahmed*, (1886) 9 M 448 : 2 Weir 678; *Birbikram*, 41 CWN 510; *Bonuruddin v. Gani Mian*, 40 CWN 287.

26. *Nilambar Babu*, (1879) 2 A 278.

27. *Azamat Shah Khan*, (1913) 11 ALR

30. *Bhagat Ram*, 96 PLR 1911 : 50 PWR 1911 (Cr) : 12 Cr LJ 400 : 11 IC 584, following *Tribhovan Manakchand*, 9 B 131; *Arunachala Thevan v. Velluchami Thevan*, (1922) 46 M 162; *Walchand*, 58 B 369 FB; *Sardara v. Rutta*, A 1950 L 148; *Ibrahim Rahmatullah*, A 1947 N 33 : 47 Cr LJ 742; *Sher Singh v. Chiranji*, A 1952 Pepsu 28; *Harihar Singh*, (FB) A 1957 P 685 : 1957 Cr LJ 1442.

31. *Maria Pillai*, (1928) MWN 557 (FB).

which can 'modify, alter or annul' an order passed under the preceding sections, and not to specify the nature of the application which has to be made to them'.³² An Appellate Court under this section has powers to modify, alter or annul an order made under S. 517 or make any further orders that may be reasonable or proper.^{32a}

Section 520 confers concurrent jurisdiction on the District Magistrate and the Court of Session. Where an appeal has been preferred by a particular Court from the main order of conviction or acquittal, no appeal or revision against an order as to the disposal of property can be preferred to the other Court under S. 520.³³

"And make any further orders that may be just".—A Court of appeal can pass under S. 423 (1) (d) an order of the nature contemplated under S. 520 and no separate appeal is necessary under S. 520 against the order under S. 517 to enable a court of appeal to pass such orders as may be just and also consequential.³⁴ The intention of the Legislature in adding the words "and make any further orders that may be just" is to enable a superior Court to give effect to the order of the Court of first instance by directing the restitution of the property if the order of the Court of first instance has been carried out.³⁵

7. Necessity for Notice.—Notice should ordinarily be given unless there is good reason to dispense with it before reversing on appeal an order passed under S. 517.^{35a} An order regarding the disposal of property should not be interfered with by a higher Court without notice to the other side^{35b} or hearing his objections, if any.³⁶ There is no necessity for notice when upon acquittal on appeal on a finding that the properties belonged to the accused and the appellate Court orders the return of the properties to him by the complainant.³⁷

8. Revision.—The powers of a High Court or any other Court as a Court of appeal or revision in respect of any order of disposal of property passed by a subordinate Court do not depend for their exercise on the availability or pendency of any appeal or conviction in the substantive case or on the appealability or a right of revision against the order complained of.³⁸ If the appellate Court sets aside the conviction and acquits the accused but makes an order in respect of the ornaments which was ordered by trial Court to be delivered to the complainant the implication of the order is that the ornaments should go back to the accused. But as there is no order under S. 517 in favour of the accused there will be no revision against the appellate order under S. 520 only in respect of the ornaments.³⁹

32. *K. Srivisamvorthi v. Narasinhulu Naidu*, (1927) 50 M 916 : 1927 MWN 692 : 53 MLJ 309 ; *Sakharal*, 1954 Cr LJ 1231 : A 1954 M 771 ; *Talawar Jha v. Morichand*, A 1959 A 96 : 1959 Cr LJ 123 ; *Lala Har Bhagwan Das*, A 1960 M P 195.

32a. *Onkar*, 21 ALJ 877 : AIR (1924) A 213 ; *Walchand v. Hari Anant*, 56 B 269 : 33 Cr LJ 807 (FB).

33. *Dasa Naika v. Ramjee Naika*, A 1955 Mys 32 : 1955 Cr LJ 391.

34. *Karupulu Appalanaidu v. Veka Ramnorthy*, A 1955 AP 45 : 1955 Cr LJ 355 *Contra*, *Taleswar Jha v. Moolchand*, A 1956 A 96 : 1956 Cr LJ 123 ; *Kalilshan*, A 1928 L 587 : 29 Cr LJ 810 ; *Azinal*, 35 A 374.

35. *Sekkaral*, A 1954 M 940 : 1954 Cr LJ

1414 ; *Dost Mohammad*, A 1944 Oudh 310 ; *Shere v. C. I. Mehta*, A 1927 R 322 ; *Hagu*, A 1914 C 658.

35a. *Arunachela Thevan v. Velluchami Thevan*, (1922) 46 M 162 : 44 MLJ 56 : 17 LW 462 : 32 MLT 104 : 24 Cr LJ 162 : 71 IC 514 : AIR (1923) M 324.

35b. *In re Luxman Ranga*, (1911) 35 B 253 : 13 Bom LR 131 : 12 Cr LJ 169 : 9 IC 947 followed in *Rajaram v. Kunjilal*, 20 Cr LJ 823 : 53 IC 823 (N).

36. *Ma Sein*, (1916) 9 Bur LT 193 : 17 Cr LJ 207 : 34 IC 319.

37. *Appalanandu*, A 1955 AP 45 : 1955 Cr LJ 350.

38. *Krishna Pillai*, A 1956 M 42 : 1956 Cr LJ 72.

39. *Magnibai v. Bhagwandas*, 1957 Cr LJ 289 (MB).

Interference by the High Court in revision.—The High Court has jurisdiction under S. 520 to interfere with an order under S. 517.⁴⁰ Section 520 gives the High Court ample powers to pass any order as to disposal of property which may be just on the facts of the case.⁴¹ The Calcutta High Court agreed in *Ahmad Ali v. Kunoo Khan*⁴² with the Allahabad High Court in *Manki v. Bhagbauti*⁴³ in holding that under the provisions cl. (d) of S. 423 of the Code the Court as a Court of revision has full powers to interfere with an order under S. 522. An order passed under S. 517 may be revised by a Court of Appeal although no appeal has been preferred in the case in which such order was passed.⁴⁴

Under the Code as it stood before September 1923, there was considerable doubt as to whether an Appellate Court had power to pass an order under S. 522 where the trial Court had made no order at all. Under the Code, as amended the High Court under S. 522, clause (3) has in a reference or revision power to make an order even though no such order might have been made by the trial or Appellate Court.⁴⁵

Application for restoration of property—Limitation.—No period of limitation is prescribed for an application under S. 517, or S. 520, and such an application can always be made within a reasonable time of the termination of the proceedings in which the property in dispute was produced.⁴⁶

521. Destruction of libellous and other matter.—

(1) On a conviction under the Indian Penal Code, Section 292, Section 293, Section 501 or Section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, Section 272, Section 273, Section 274 or Section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had to be destroyed.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.

1. Corresponding sections in former Codes.—This section corresponds to S. 521 of the Code of 1882 when it was introduced for the first time and is similarly worded.

2. Scope.—This section deals with destruction of libellous and other matter and sub-sec. (2) contemplates destruction of adulterated food, drink, drug or medical preparation in respect of which conviction has been had.

40. *Hagu Biswas v. Manmatha Nath Mitra*, (1913) 18 CWN 959 : 15 Cr LJ 184 : 22 IC 760 ; *Karimuddi Fakir v. Naimuddi Kabiraj*, (1904) 3 CLJ 573 : 3 Cr LJ 466 ; *Narayani Amma Kamala Devi*, A 1961 Kar 250 ; *Talewar Jha*, A 1959 A 96.

41. *Ramamani v. Kanakasabai*, (1915) 16 Cr LJ 813 : 3 IC 829 (M).

42. (1908) 36 C 44.

43. (1904) 27 A 415.

44. 2 Weir 669 : 2 Weir 538.

45. *Lachman*, (1923) 46 A 92 : 21 ALJ 871 : AIR (1924) A 212

46. *Kanshi Ram*, (1922) 4 L 49 : 3 PWR 1923 Cr : 73 IC 937 ; *Kamshi Ram*, A 1924 A 213 ; *Ibrahim Rahmatullah*, A 1957 Or 82.

Where certain passages in a book are defamatory an order passed by the Sessions Judge directing the destruction of the books cannot be sustained, but the pages containing those passages should be directed to be destroyed.⁴⁷

522. Power to restore possession of immovable property.—(1) Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force, or show of force or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 7. Sub-section (2). |
| 2. Legislative changes. | 8. Appeal. |
| 3. Report of the Select Committee. | —Can an Appellate Court pass an order for the first time. |
| 4. Effect of the amendment. | 9. Revision. |
| 5. Scope. | —Restoration of Property. |
| —‘Attended by force’. | —Within one month. |
| —Person who has been dispossessed. | —Complainant to be heard. |
| 6. Notice. | |

1. Corresponding sections in former Codes.—This section corresponds to S. 534 of the Code of 1872, S. 142 of Act X of 1875, S. 239 of Act IV of 1874. This Code before its amendment in 1923 was similarly worded as that of 1882.

2. Legislative Changes.—Sub-section (3) and certain words in sub-sec. (1) were inserted by S. 143 of Act XVIII of 1923. The expression ‘person dispossessed’ was substituted for ‘such person’ by the said Act.

3. Report of the Select Committee.—“We have extended the scope of the proposed sub-sec. (3) of S. 522 to Courts of confirmation and reference.”

4. Effect of the Amendment.—The addition of the words ‘show of force or by criminal intimidation’ has in effect superseded the following rulings⁴⁸ which held that mere show of force will not do but there must be actual use of criminal force, and restores the view adopted in *Chakoo* and other cases⁴⁹

47. *Veerabhadra Rao*, A 1940 M 953 : 42 Cr LJ 110.

48. *Ram Chandra Boral v. Jityandria*, (1897) 25 C 434 : 2 CWN 434 ; *Ishan Chandra Kulla v. Dinanath Badhak*, (1899) 27 C 174 : 4 CWN 307 ; *Churaman v. Ram Lal*, (1903) 25 A 341 ; *Srihari*

Shome v. Lal Khan, (1900) 5 CWN 250 ; *Mahesh Sahu*, 20 Cr LJ 270 : 50 IC 30 (P) ; *Bundi Singh*, 4 PLW 329 : 19 Cr LJ 516 : 45 IC 276.

49. *Chakoo*, 11 CWN 278 ; *Nga Po Tok*, 20 Cr LJ 115.

and modifies *Mohunt Luchmi Das* and other cases⁵⁰ which held that a finding of use of criminal force was necessary to support an order under this section. The following decisions under the old Code⁵¹ which held that offences of which accused is convicted must be attended by criminal force are still good law. But the amendment in 1923 by insertion of the words 'show of force or by criminal intimidation' makes the section applicable to those cases also.

5. Scope.—*To justify an order under this section the following are essential ingredients :—*

(1) **There must be a conviction of an offence.**⁵²

When the conviction is set aside an order under S. 522 passed in consequence of such conviction must also be set aside.⁵³ It has been held that the order under S. 522(1) is not a consequential or incidental order *visa vis* an order of conviction—such order does not flow automatically as a result of setting aside of the conviction.⁵⁴ The Calcutta High Court has held that if the conviction is set aside the order under S. 522 disappears.⁵⁵

(2) **Such conviction must be attended either by (i) criminal force or (ii) show of criminal force or (iii) by criminal intimidation.**

“Attended by force”.—When there is no finding and nothing on the record to show that the person has been dispossessed of the property by the use of force, no order as to possession of property can be passed.⁵⁶

This section has no application when the accused is convicted of criminal trespass not attended with criminal force.⁵⁷ Where there was an *ex parte* decree in ejectment suits in respect of certain rooms and vacant possession of the rooms was taken and then padlocked and in the absence of the landlord the tenant petitioners broke open the padlock and took possession and were convicted of trespass, held that as the dispossession was in the absence of any person, the initial dispossession was not attended by force, the order under S. 522 was without jurisdiction.⁵⁸ When complainant is wrongfully restrained from entering the room the Magistrate is competent to pass

50. *Mohunt Luchmi Das v. Pallat Lall*, (1875) 23 WR (Cr) 54; *Pan Nyun v. Moun Nyo*, (1905) 3 LBR 20; 2 Cr LJ 377; *Kaon*, 62 PLR 1917: 38 PWR 1917 (Cr): 18 Cr LJ 989; *Ali Bahadur*, 23 Cr LJ 260: 66 IC 324; AIR (1922) Oudh 144; *Soita Biswal v. Dochhi Stri*, (1907) 7 CLJ 175: 12 CWN 269; *Rajath Ammal v. Rajamanickam Pillai*, (1922) MWN 356: 23 CLJ 502.
51. *Batakala Pottivadu*, (1902) 26 M 49: 27 G 174 (1902) followed in *Mohini Mohan Chakrabarty v. Harendra Choudhury*, (1904) 31 C 691 (FB); *Hari Chand*, 16 PR (Cr) LJ 488: 51 IC 472 (L): 22 B 494.
52. *Narayan v. Visaji* (1882) 23 B 494 (497) but this decision is no longer good law inasmuch as it held that the order could not be interfered with in appeal, *vide Ahmed*, 36 C 44; *Sadho*, A 1952 A 840: A 1931 B 77: 32 Cr LJ 275.
53. *Lalchand*, A 1923 L 15; *Malkhan*, A 1945 A 226: 47 Cr LJ 89.
54. *Ram Prabhad*, A 1958 A 159: 1958

- Cr LJ 308.
55. *Osman Gani v. Baramdeo Singh*, 63 CWN 181: A 1959 C 145.
56. *Sudho Singh*, A 1952 A 840: 1952 Cr LJ 1516; *Ram Chand*, A 1939 L 184; *Balaram Sarkar*, A 1921 P 391; *Narayan*, 23 B 494; *Batakhal*, 26 M 49; *Bhagabat*, 39 C 1050; *Suba v. Ali Gahar*, A 1935 L 477; *Bagashwari*, A 1950 P 295; *Ghulab Singh v. Ram Prasad*, A 1924 Oudh 199; *Sambhu Roy v. Mati Khatik*, A 1949 C 111: 50 Cr LJ 172; *P. C. Chabla v. Ramcharan*, A 1943 A 7; *Alakal Senappa*, A 1960 Mys 24.
57. *Jamuna Das*, A 1945 A 26: 46 Cr LJ 211; *Bisheshwar Singh*, 18 CWN 1146: 15 Cr LJ 175; *Md. Shafique*, 60 CWN 440; *Sadho Singh*, A 1952 A 840: 1952 Cr LJ 1516; *Sadhu Biswal*, 11 CWN 269.
58. *Nani Gopal Deb v. Bhim Charan Rakshit*, 59 CWN 688; A 1956 C 32; *Hari Chand*, A 1919 L 248; *Debi Dayal*, A 1948 Oudh 246; *Bhani v. Narain*, A 1940 L 460: 42 Cr LJ 160.

an order under this section.⁵⁹ Actual force is not necessary, show of criminal force is enough.⁶⁰ Use of 'force' or show of criminal force or criminal intimidation in S. 522 need not necessarily be an ingredient of the offence at all. If the commission of an offence is immediately or shortly after followed by force or show of force or criminal intimidation the case will be covered by this section. Use of force etc. must be with reference to a person and not with reference to property.⁶¹

(3) That some person had been dispossessed from immovable property by the use of such force as is mentioned in ingredient No. 2.

"Person who has been dispossessed".—The foundation of an order of restoration is that it must appear that the person in whose favour the order has been passed is dispossessed of immovable property,⁶² and the dispossession should be accompanied by some force or intimidation.⁶³

(4) The order must be passed by the trial Court at the time of passing the order of conviction or within one month from the date.

(5) Such order may be passed by the Court of Appeal, confirmation, reference or revision if the original Court which ordered the conviction had not passed an order under S. 522.

(6) Such order will not prejudice any party in a civil suit.

Order can be passed some days after the conviction.⁶⁴

An order under S. 522 Cr. P. Code is not sustainable where there is no finding that the complainant has been dispossessed of any immovable property.⁶⁵ Interim order to restore possession cannot be passed.⁶⁶

Where violence was caused to a fencing and not to any person, *held*, that an order directing delivery of possession cannot be made under S. 522.⁶⁷ An order under this section can only be made where dispossession is effected by the use of criminal force as defined in S. 350, I. P. C.⁶⁸ In order to make S. 522 applicable to immovable property it is not necessary that force should be an ingredient of the offence of which the accused is convicted, provided the use of force appears from the evidence.⁶⁹ For the purpose of exercising the powers under S. 522 it is necessary that there should have been a conviction for an offence.⁷⁰

59. *Francis D'Souza*, 61 Bom LR 1180 following *Mahabir*, A 1949 A 228.

60. *Barakaty Hazi*, A 1949 M 191 : 50 Cr LJ 323; *Rajbanshi Thakur v. Chandey Jha*, A 1951 P 367; *Nani Gopal Deb v. Bhim Charan Rakshit*, 59 CWN 688; *Ram Chand*, A 1939 L 184; *Balaram*, A 1931 P 391.

61. *Mahabir*, A 1949 A 228 : 50 Cr LJ 338; *Adeper v. Ramayya*, A 1920 M 652; *Sadashio*, 18 CWN 1150; *Athawtha*, A 1943 M 257 : 44 Cr LJ 769; *Jamuna*, A 1945 A 26; *Mida Das*, A 1952 Pepsu 13.

62. *Sadho Singh*, A 1952 A 840.

63. *Rajbanshi Thakur v. Chandey Jha*, A 1951 P 307; *Francis D'Souza v. Gameng*, A 1960 B 139 : 61 Bom LR 1180 (Case of wrongful restraint).

64. *Jalindra Nath*, 14 Cr LJ 172 : 19 IC 192 followed in *Khuli v. Bekutayal*, (1918) 16 ALJ 536 : 19 Cr LJ 734 :

46 IC 414.

65. *Mohar Khan v. Gyzuddin Sheikh*, (1913) 18 CWN 399 : 15 Cr LJ 302 : 23 IC 510.

66. *Hati Nathubai Mulubhai*, A 1955 Sau 41 : 1955 Cr LJ 838.

67. *Sadashib Mandal*, (1913) 18 CWN 1150 : 15 Cr LJ 720 : 26 IC 168; *Balaram Sahu v. Chamru Sahu*, (1920) 2 PLT 120 : 22 Cr LJ 329 : 61 IC 57.

68. *Hari Chand*, (1918) 16 PR (Cr) 1919 : 20 Cr LJ 488 : 51 IC 472 following *Ishan Chandra Kalla v. Dina Nath Badhak*, 27 C 174 : 4 CWN 307, *In re Batakala Pattivadu*, 26 M 49 : 2 Weir 675 : 12 MLJ 447 modified by the amendment.

69. *Adepu Reddi v. Ramayya*, (1920) 22 Cr LJ 110 : 59 IC 414 (M).

70. *Tulsi Ram v. Abrar Ahmed*, (1915) 37 A 654.

The words "*when convicting such a person*" introduced by the Select Committee as also the words '*or at any time within one month from the date of the conviction*' provide the time when the order of restoration should be passed. These words have in effect superseded, *Mohammad v. Kora Singh*.⁷¹ The words '*person dispossessed*' are a mere grammatical alteration consequent upon the addition of '*when convicting such a person*'.

For sub-sec. (3) see 'Report of Select Committee' quoted *supra*.

6. Notice.—Though in law it is not absolutely necessary to issue notice but a notice is given to third parties.⁷²

7. Sub-section (2).—Third party's right is not affected, he may bring a Civil Suit.⁷³ A third party may be dispossessed at the time of the carrying out of the order under this section. He has his remedy under this sub-section.⁷⁴

8. Appeal.—Sections 520 and 524(2) do not apply to an order passed under this section.

For *Appeal* see S. 423(1)(d). Under the Code of 1882 (S. 404) there was no appeal the intention of the Legislature being "that an order giving possession being once made, should in so far as the Criminal Courts are concerned, have finality".⁷⁵ Under the Code of 1898 S. 423(1)(d) the Appellate Court may make any amendment or any consequential or incidental order that may be just or proper and as such provided for an appeal against an order passed under this section.⁷⁶

Can an Appellate Court pass an order under this section when the Lower Court did not pass an order under S. 522.—The Amending Act XVIII of 1923 having inserted sub-sec. (3) the view in *Narayan Visaji*⁷⁷ and *Ram's case*⁷⁵ are no longer good law. Under the new Code the High Court under S. 522(3) has in a reference or revision power to make an order even though no such order might have been made by the trial or Appellate Court.⁷⁸

An order under sub-section (1) is not a consequential or incidental order *visa vis* an order of conviction. It is an independent order. No question would arise of such an order flowing automatically as a result of an acquittal. There is nothing in this section which empowers the Appellate Court to pass an order for redelivery of possession to the person acquitted on appeal.⁷⁹

An order can be passed by the Superior Court at any time and it is not limited to one month from the date of conviction as in the case of a Magis-

71. 15 PR 1914 : 15 Cr LJ 275 : 24 IC 483.

72. *Chabbia v. Ramcharan*, A 1943 A 7 : 44 Cr LJ 164 ; *Majid Ali Sardar v. Ali Amjad*, 23 CWN 862 ; *In re Garibad Yadav*, A 1931 B 77.

73. *Narayan*, 23 B 494.

74. *Rameshwar*, 5 CWN 374.

75. *Ram Chandra Mistry v. Nobin Mirdha*, (1898) 25 C 630 : 2 CWN 225, declared obsolete by *Gourhari Gope v. Alay Gopini*, (1902) 29 C 724.

76. *Ujir Sheikh v. Syed Ali Sheikh*, (1915) 19 CWN 990 : 16 Cr LJ 606 : 30 IC 159 ; *Mahi Singh v. Mangal Khandu*,

(1911) 39 C 157 FB (163) ; *Manki v. Bhagwanti*, (1904) 27 A 415 : (1905) AWN 19 : 2 ALJ 64 ; *Gour Hari Gope v. Alay Gopini*, (1902) 29 C 724 : 6 CWN 713 ; *Ahmed Ali v. Keenoo Khan*, (1908) 36 C 44.

77. (1898) 23 B 494.

78. *Nachman*, (1923) 46 A 92 : 21 ALJ 871 : AIR (1924) A 212 ; see *Aziz Ahmed v. Buddhi Khan*, (1923) 45 A 553 : 21 ALJ 459 : 24 Cr LJ 677 (1) ; *Chunni Lal v. Baldeo*, 21 ALJ 593 : 25 Cr LJ 42 : 75 IC 731.

79. *Ramprosad*, A 1958 A 159 : 1958 Cr LJ 308.

trate passing an order under sub-sec. (1).⁸⁰ A contrary view has been held in.⁸¹ The expression "Court of appeal, reference or revision" etc. means the Court before which an appeal against conviction is actually pending. Thus the Sessions Judge under S. 520(3) can not order restoration of possession which the trial Court could not grant under sub-sec. (1).⁸²

9. Revision.—Under the general powers of revision conferred by S. 439, revision lies against an order under this section passed by the appellate Court.

Sub-section (3) introduced by the amending Act XVIII of 1923 makes it clear that the Court sitting in revision can pass an order under this section for the first time. It restores *Bisweswar Singh v. Bhola Nath Pathak*⁸³ which held that the High Court in revision could direct the sub-divisional Magistrate to restore possession of a garden to the petitioners.

A revisional application in respect of an order under S. 522(1) may be entertained by the High Court even when there is no revisional application in respect of the conviction. If the High Court were to pass an original order under S. 522(3) the question of limitation of one month from the date of conviction might have to be considered. But where the order under S. 522(1) is incorporated in the judgment itself and the lower appellate Court while upholding the conviction sets aside the order for restoration only, the High Court can in revision against the order, pass an order of restoration as it would only be restoring the order of the trial Court and no bar of limitation under S. 522(3) applies to the case.⁸⁴

Proceedings under S. 522—conviction set aside—Property—Restoration of.—Where a conviction is set aside the order under S. 522 resulting therefrom must also be set aside.⁸⁵

Order of restoration within one month of dismissal of revision from an order of conviction is valid.—An order for restoration of possession under S. 522 may be passed by a Court of Revision within one month of the date of dismissal of a criminal application for revision.⁸⁶

Complainant to be heard.—Order should not have been made behind the back of the complainant who claimed to be the auction purchaser of the property.⁸⁷

523. Procedure by police upon seizure of property taken under Section 51 or stolen.—(1) The seizure by any police-officer of property taken under Section 51, or alleged or

80. *Basanta v. Kenaram*, 57 CWN 163 : A 1953 C 393 ; *Saviram v. Dyaneswar*, A 1942 B 148 : 43 Cr LJ 708 ; *Nihal Singh*, A 1939 A 662 ; *Baram Kutty Hazi v. Raman*, A 1949 M 191 : 50 Cr LJ 228 ; *Nandoo*, A 1938 N 316 ; *Fida Hussain*, A 1933 P 617 ; *Hari Sahu*, A 1951 Or 30 : 52 Cr LJ 13 ; *Abdul Razaq*, A 1947 Oudh 1 : 47 Cr LJ 718 ; *Kishnan Morthan v. Krishna Kutty*, A 1960 Ker 348.

81. *Baram Kutty*, A 1949 M 191 : 50 Cr LJ 222 ; *Abdul Mannan, Vilaybe Ali*, A 1947 C 390 : 49 Cr LJ 908 ; *Aswini*, A 1932 C 750.

82. *Subranani Chetti v. Ganesan Pillai*, 47 Cr LJ 718 : A 1950 M 665.

83. 18 CWN 1147 : 15 Cr LJ 222 ;

Saviram v. Dyaneswar, A 1942 B 148 ; *Ram Nath Sheonarayan v. Bonaji*, A 1948 N 250 : 49 Cr LJ 383 ; *Jnanendra Nath Chakravorty v. Nagindra Nath Dey*, 60 CWN 268 Contra ; *Subramani Chettiar v. Ganesan Pillai*, A 1950 M 665.

84. *Jnanendra Nath Chakravorty v. Nagindra Nath Dey*, 60 CWN 268 ; *Ram Prasad*, A 1958 A 159.

85. *Kirpal Singh v. Labhu*, 5 PR (1895) (FB) followed in 24 Cr LJ 493 : 72 IC 957 : AIR (1923) L 15.

86. *Usman Miya v. Amir Miya*, (1926) 28 Cr LJ 191 : 99 IC 863 : AIR (1927) N 131.

87. *Majid Ali Sardar*, (1919) 30 CLJ 167 . 23 CWN 862.

suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property.

Procedure where owner of property seized unknown.—

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

SYNOPSIS

- | | |
|--|---|
| 1. Corresponding sections in former Codes | 6. "Person entitled to the possession thereof". |
| 2. Scope. | 7. Order need not be made at the time of conviction. |
| 3. Distinction between Ss. 517 and 523. | 8. Sub-section (2).
—"shall issue a proclamation". |
| 4. Distinction between Ss. 523 and 524. | 9. Revision. |
| 5. 'Make such order as he thinks fit respecting the disposal'.
—'As he thinks fit'. | |

1. Corresponding sections in former Codes.—This section corresponds to Ss. 130 and 131 of the Code of 1861, paragraph 2 of S. 387 and Ss. 415 and 416 of the Code of 1872, S. 244 of Act IV of 1877 and is the same as S. 523 of the Code of 1882.

See S. 170 (2) *supra* for power of the Officer-in-charge of a Police station to send to a Magistrate any weapon or other article etc.

The case of *Annapunna Bai*⁸⁸ under Ss. 415 and 416 of the Code of 1872 (Act X of 1872) is no longer good law.

*The provisions of the Code of 1882 are wider than that of 1872.*⁸⁹

The Magistrate had under the Code of 1882 unaffected by subsequent amendments the power of disposal of the property which he had not under the Code of 1872. The Calcutta High Court in *Surendra Nath Sarma v. Rai Mohan Das*⁹⁰ followed the decision of the Bombay High Court in *Annapunna Bai*⁹¹ a decision under the Code of 1872 which was again followed by the same High Court in *In re Devidin Durga Prasad*⁹² without considering the effect of the amendment. Hence these decisions can no longer be assumed to be good law.

88. 1 B 630.

89. *Joti Rajnak*, (1894) 8 B 338 followed in Rat 365.

90. (1903) 30 C 690 : 7 CWN 634 : 1

CWN 561.

91. (1877) 1 B 630.

92. (1897) 22 B 844.

2. Scope.—The scope of S. 523 must be confined to property seized by the police of their own motion, in the exercise of powers conferred on them by law, and which seizure requires to be reported to a Magistrate, since otherwise the Magistrate would have no knowledge of it.⁹³ Fulton, J., in *Laksman Govind Nirgudi's case*⁹⁴ doubted the correctness of this decision⁹³ and held:—“I think the words ‘seized by the police’ apply equally whether the seizure is made under a Magistrate’s warrant or without a warrant. I do not think the word ‘seized’ can be limited in the way proposed in that decision”. Power to seize property is given by S. 550.⁹⁵ The section does not apply to property seized under S. 165.⁹⁶

This section applies to property seized by the Police of their own accord as distinct from property seized under a warrant issued by Court and therefore will include even cases where the property was seized by the police during investigation.⁹⁷ An enquiry under this section must have reference to one or other of the circumstances mentioned in the section itself which would furnish a condition precedent to the holding of the enquiry.⁹⁸ An order under S. 523 freezing the account of the applicant is invalid if the account lying to the Credit of the applicant had not been seized before the passing of the order.⁹⁹ Where there has been no inquiry or trial in a criminal Court the proper section to apply will be S. 523.¹ Where there has been illegal seizure of goods in India by the Police in Kashmir, S. 523 does not apply^{1a} but see S. 105-A.

3. Distinction between Ss. 517 and 523.—Sections 517 and 523 are mutually exclusive. Section 517 applies to a case where there has been an inquiry or trial which has been concluded, while S. 523 deals with property seized by the Police under S. 51 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence. When there has been an enquiry or trial, S. 523 cannot apply. It deals only with cases of suspicion not followed by inquiry or trial.²

4. Distinction between Ss. 523 and 524.—An order upon the claim is made under S. 523 and thereafter if the claim is rejected, S. 524 provides that the property shall be at the disposal of the Government, and thus as a consequence, Magistrates are empowered to make discretionary orders for sales of such property.^{2a}

5. ‘Make such order as he thinks fit respecting the disposal’.—Clause (1) of S. 523 gives a Magistrate power either to deliver the property to the person entitled to its possession or to pass such order as he deems fit respecting its disposal. If he adopts the first alternative, he has to find out the person entitled to possession, and if no one succeeds in establishing his title to possession the property would be at the disposal of the Government. If he adopts the second alternative, the section does not specifically state

93. *In re Ratanlal Rangildass*, (1892) 17 B 748.

94. (1902) 26 B 552 (557) : 4 Bom LR 276 (279).

95. *Nasib*, 5 CWN 415.

96. *Purroshattam*, A 1952 A 470.

97. *Ganeshilal Ranchhoddas Mohajan v. Satya Narayan Tiwari*, A 1958 MP 39 : 1958 Cr LJ 187 ; *Sashi Bhushan Maity*, A 1957 Cal 148.

98. *Anima Bewa v. Dukhimoni Dasi*, 61 CWN 298 : 1957 Cr LJ 669.

99. *Textile Traders Syndicate v. State of*

U.P., A 1959 A 337 : 1959 Cr LJ 668.

1. *S. K. Mukhtear*, A 1954 C 350 ; *Kuppamal*, 29 M 375.

1a. *Wazir*, A 1954 SC 415.

2. *Tenali Sheik*, A 1957 AP 1024 : 1957 Cr LJ 1395 (see cases referred to); *Bhupati Bayen*, 62 CWN 393 : A 1959 C 446.

2a. *Wasappa Timappa v. Secretary of State*, (1915) 40 B 200 ; 17 Bom LR 979 where *Venkatasangji Mughranji*, 19 B 668 was not followed.

what the nature of the order regarding the disposal of property should be. If an order that the property should be at the disposal of Government would be proper in the circumstances of the case there is nothing in the section which prevents him from passing such an order; whether such an order would be proper or not must be decided by general principles of law and the light derived from other sections of the Procedure Code.³

Where the Magistrate recorded statement of a person from whom articles were subsequently seized but the statement was neither interpreted nor admitted to be correct, it cannot be used against the maker in subsequent judicial enquiry under this section started after seizure of article.^{3a}

Section 523 empowers a Magistrate to make such order as he thinks fit regarding the disposal of property. But the discretion given by these words must be judicially exercised, and in the absence of anything to show the title to the property, it should have been ordered to be delivered to the person in whose possession it had been at the time of the attachment.⁴ This case was followed in *Kyin Ion*⁵ where it was further held that the High Court has no power to order restitution. But the special provisions relating to investigation of claims to property mentioned in S. 523, do not deprive the person aggrieved of any right of action.⁶

“As he thinks fit”.—The discretion conferred by the words “such order as he thinks fit” is limited to the selection of one of two of the alternatives (1) delivery of the property to the person entitled to the possession thereof and (2) disposal of it.⁷ Where no case is started by the police, properties seized during investigation should ordinarily be returned to the person from whose possession they were recovered except in exceptional cases.⁸

Section 523 says that a Magistrate may order the delivery of property to the person entitled thereto. *The question is who is entitled to its possession.* The fact that the accused had been in possession of the property when the charge was made is not conclusive. The order should be passed after inquiry.⁹ The section itself does not make any Magisterial enquiry imperative. It appears that the Magistrate has to satisfy himself, on such material as is before him as to who is entitled to possession of the property concerned. Such an order can be passed on police reports and papers alone, without any independent enquiry regarding the ownership of the property.¹⁰

6. “Person entitled to the possession thereof”.—Under this section the article should be made over not to the person from whom it was

3. *Ramaswami Aiyar v. Venkataswara Aiyer*, (1912) 24 MLJ 1 : (1913) MWN 851 : 14 MLT 431 : 14 Gr LJ 27 : 18 IC 171 ; *Purshottam Das*, A 1952 A 470.

3a. *Halkibi*, A 1957 MP 93 : 1957 Cr LJ 853.

4. *Bahinu*, (1912) 5 Bom LR 25 ; *Baburam*, A 1942 Oudh 128 ; *Sagolsum v. Thiyam*, A 1959 Mainpur 8.

5. (1907) 4 LBR 14 : 6 Cr LJ 126.

6. *Wasappa Timappa Sinagar v. Secretary of State*, (1915) 40 B 200 : 17 Bom LR 979 : 31 IC 498 following *Tribhovan Manekchand*, 9 B 131.

7. *Purshottam Das*, A 1952 A 470.

8. *Shaila Behari Chatterjee*, 17 Cut LT 354 ; *Alikanju*, A 1960 Ker 343.

9. *Hushansha Rahimansha v. Mashaksha Mujaforsha*, (1910) 12 Bom LR 232 ; *In re Ratanlal*, (1892) 17 B 748 : A 1938 C 17 ; *Chunilal*, A 1924 L 76 ; *Khagendra*, A 1950 As 80 ; *Md. Yusuf*, 41 CWN 1376.

10. *Chuni Lal v. Ishar Das*, (1922) 4 L 38 (42) : 24 Cr LJ 670 : 73 IC 702 : AIR (1924) L 76 ; *Laksman Govind Nirgadi*, 22 B 552 ; *Puroshottam Das*, A 1952 A 470 ; *Suleman Haji*, A 1942 S 89 ; *Muneswar Das Singh*, A 1956 A 199 : 1956 Cr LJ 363.

seized but to the person found entitled to possession.¹¹ The person from whose possession the property was seized and who is not found to have committed an offence such as to render his possession unlawful is the person entitled to its possession.¹² Where because the accused was absconding and proceeding under S. 512 was instituted and property seized from the pawnee who produced it in Court, *held* that the person from whom property was seized was entitled to retain possession until the prosecution case was established and he was found guilty.¹³

7. Order need not be made at the time of conviction.—"Section 522 makes no mention of any application but the words used clearly allow of such being made and give jurisdiction to the Magistrate to make the order after conviction in such application."¹⁴ The Code as amended in 1923 prescribes the *time limit as one month* from the date of conviction.

8. Sub-section (2).—No enquiry by the Magistrate is necessary if known.¹⁵

This sub-section applies when the owner of the property is unknown, when accused dies pending enquiry against him, rival claimants may establish claim to property recovered from his possession.¹⁶

"Shall issue a proclamation".—No proclamation is necessary if the person entitled to possession is known.¹⁷ The mere fact that there may be confiscation under S. 524 after proclamation as prescribed by S. 523(2) does not preclude confiscation at once under S. 523(2) without issuing proclamation.¹⁸ Section 524 comes into play only after the claimants have failed to substantiate their claim or if no claimants have at all come forward.¹⁹

9. Revision.—An order under sub-sec. (2) cannot be reviewed by the Magistrate passing the order. It is open to the aggrieved party to seek redress in a higher Court.²⁰

No appeal lies from an order passed under this section.²¹ The Sessions Judge can make a reference under S. 438.²²

524. Procedure where no claimant appears within six months.—(1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found, is unable to show that it was legally acquired by him, such property shall be at the disposal of the State Government and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first class empowered by the State Government in this behalf.

11. *Haribandhu Patra*, A 1948 P 180 ; *Nallusami*, A 1943 M 302.

12. *Pursohottam Das*, A 1952 A 470 : 1952 Cr LJ 856.

13. *Ganeshilal v. Satyanarain*, A 1958 MP 39 : 1958 Cr LJ 187.

14. *Narayan v. Visaji*, (1898) 23 B 494.

15. *Ramchandra v. Hasimal Jain*, 1956 MB 161 : 1956 Cr LJ 467.

16. *Dhanwanti*, A 1955 A 63.

17. *Ganeshilal v. Satyanarain*, A 1958 MP 39.

18. *Syed Mahbub*, A 1936 N 266 : 38 Cr LJ 362.

19. *Ajaib Singh*, A 1953 Punj 22 : 1953 Cr LJ 1423.

20. *Muneshwar Bux Singh*, A 1956 A 199 : 1956 Cr LJ 363 ; *Ghulam Ali*, A 1945 L 47 : 47 Cr LJ 32.

21. *Khagendra*, A 1950 Ass 88 : 51 Cr LJ 588 Contra *Ajaib Singh*, A 1953 Punj 222 (Appeal lies).

22. *Haribandhu Patra*, A 1948 P 180 ; *Ghulam Ali*, A 1945 L 47.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

SYNOPSIS

- | | |
|---|--|
| 1. Corresponding sections in former Codes. | 4. 'Shall be at the disposal of the Government'. |
| 2. State Amendments—
—Bombay.
—Saurashtra. | 5. 'May be sold'. |
| 3. 'Is unable to show that it was legally acquired by him'. | 6. Appeal. |
| | 7. Limitation for suits to recover possession of property confiscated. |

1. Corresponding sections in former Codes.—This section corresponds to S. 132 of the Code of 1861, S. 41) of the Code of 1872, S. 244 of Act IV of 1877 and is the same as in the Code of 1882.

2. State Amendments.—

(1) **Bombay.**—In sub-sec. (1) for the words 'of a Magistrate of the first class', the words 'of an Executive Magistrate' were substituted by Bombay Act 23 of 1951.

(2) **Saurashtra.**—In sub-sec. (1) for the words 'a Magistrate' the words 'an Executive Magistrate' were substituted by Saurashtra Act 4 of 1952.

3. 'Is unable to show that it was legally acquired by him'.—These words must be read consistently with the ordinary law of evidence. The proper procedure is to give effect to the presumption in S. 110, Evidence Act and to hold the accused as owner.²³

On expiry of six months after the issue of the proclamation under S. 523 the person in whose possession the property was found can claim it and prove his title.²⁴ In spite of the order under sub-sec. (1) the rightful claimant is entitled to institute a suit for declaration of his ownership.²⁵

A Magistrate is bound to summon a witness named by a person to prove his claim to certain property seized by the Police as property suspected to have been stolen.²⁶

4. 'Shall be at the disposal of the Government'.—The words "at the disposal of the Government" may reasonably be interpreted as meaning that Government shall be free to sell the property or to hold it as a trustee for the true owner. The statute does not profess to bar the ordinary legal remedies; and there is no reason for reading into it something which is not there.²⁷ Before making any order to confiscate the property the procedure prescribed in this and the preceding sections must be followed.²⁸

5. 'May be sold'.—If any Magistrate not empowered by law in that behalf erroneously in good faith sells property under S. 524 or S. 525, his proceedings shall not be set aside merely on the ground of his not being so empowered—S. 529.²⁹

6. Appeal.—Sub-section (2) provides the *forum* for appeals against an order under sub-sec. (1).

See *Din Dayal*.²⁹ Sub-section (2) not merely gives a right of appeal, but also indicates the Court to which the appeal lies.³⁰

23. *Ashun Walad Gul Mahomed*, 8 SLR 141 : 16 Cr LJ 138 : 27 IC 202 ; *Madan*, A 1951 MB 159.

24. *Mahalabuddin*, 22 C 761.

25. *Halkibai*, A 1957 MP 93 : 1957 Cr LJ 853 : A 1938 C 17 : 39 Cr LJ 245.

26. *Sookhun Sahoo*, 18 WR (Cr) 5.

27. *Secretary of State for India in Council v.*

Lown Karan Marwari, (1920) 5 PLJ 321 : 56 IC 507 : 1 PLT 297 : (1920) Pat Supp CWN 253 : 21 Cr LJ 475 ; *Halkibai*, A 1957 MP 93.

28. *Behary*, 9 WR (Cr) 13.

29. (1881) AWN 150.

30. *Maria Pillai v. Ramanathan Chettiar*, (1928) MWN 557 (560).

If the aggrieved person does not prefer an appeal, it will be improper to entertain a revision.³¹

7. Limitation for suits to recover possession of property confiscated.—A suit for the recovery of a property forfeited by the Government is maintainable and the fact that such suit is brought more than a year after the order of confiscation is no bar as it is not necessary to set that order aside.³²

525. Power to sell perishable property.—If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported, is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees the Magistrate may at any time direct it to be sold ; and the provisions of Sections 523 and 524 shall, as nearly as may be practicable, apply to the net proceeds of such sale.

Corresponding sections in former Codes.—This section corresponds to paragraph 2 of S. 415 of the Code of 1872 and the Code before its amendment in 1923 was similarly worded as that of 1882.

CHAPTER XLIV

OF THE TRANSFER OF CRIMINAL CASES

526. High Court may transfer case, or itself try it.—

- (1) Whenever it is made to appear to the High Court—
- (a) that a fair and impartial enquiry or trial cannot be had in any Criminal Court subordinate thereto, or
 - (b) that some question of law of unusual difficulty is likely to arise, or
 - (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or
 - (d) that an order under this section will tend to the general convenience of the parties or witnesses, or
 - (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,
- it may order—

- (i) that any offence be inquired into or tried by any Court not empowered under Sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence ;

31. *Ajaib Singh*, A 1953 Punj 222 : 1953 Cr LJ 1423.

32. *Secretary of State for India v. Lown Karan*,

(1920) 5 PLJ 321 : (1920) Pat Supp GWN 253 : 1 PLT 451 : 21 Cr LJ 475 : 56 IC 507.

- (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction ;
- (iii) that any particular case or appeal be transferred to and tried before itself ; or
- (iv) that an accused person be committed for trial to itself or to a Court of Session.

(1A) Notwithstanding anything contained in sub-section (1), no application shall lie to the High Court for the exercise of its powers under the said sub-section for transferring any case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in Section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application.

Notice to Public Prosecutor of application under this section.—(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made ; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person

who has opposed the application such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case.

(7) Nothing in this section shall be deemed to affect any order made under Section 197.

Adjournment on application under this section or under Section 528.—(8) If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section or under Section 528, the Court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon :

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party if the application is intended to be made to the same Court to which the party has been given an opportunity of making such an application, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused.

(9) Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.

Explanation.—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a Court under Section 344.

(10) If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon.

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1. Corresponding sections in former Codes.—This section corresponds to S. 64 of the Code of 1872, S. 147 of Act X of 1878 and S. 181 of Act IV of 1877. Section 526 of the Code of 1882 is the same as that of the Code of 1898 but with this difference that sub-secs. (1) (e) and (e) (iv), sub-sec. (3) and sub-sec. (8) were not in the Code of 1882

2. Earlier Law.—The powers given by S. 526 of the Code of 1882 were wider than those conferred by S. 147 of the High Courts, Criminal Procedure Code (Act X of 1875). The words "criminal case" occurred in Ss. 44, 47 and 64 of the Code of 1872. By Act XI of 1874 the word "criminal" was deleted from Ss. 44 and 47 of the Code of 1872 (corresponding to Ss. 192 and 528 of the present Code) but retained in S. 64 (corresponding to the present section), and the same remained in the Codes of 1882 and 1898

but the Amending Act XVIII of 1923 has deleted the word 'criminal'. Hence the case-law on the point under the Code of 1872 has been restored and thus the High Court has power to transfer miscellaneous proceedings.

By Act III of 1884 sub-sec. (e) was introduced and read as follows:— "That such an order is expedient for the ends of justice". The Code of 1898 added in the same the following words "or is required by any provisions of this Code". Sub-section (e) (iv) was inserted by Act III of 1884. Sub-section (8) of the Code of 1898 was S. 526A of the Code of 1882 introduced by the said Act of 1884. Sub-section (3) was altogether new in the Code of 1898. Under S. 35 of Act XXV of 1861 the High Court could not transfer a case for trial to itself but it was held in *Ameer Khan*³³ that the High Court had such powers under S. 29 of the Letters Patent. This power subsequently was conferred on the Code by S. 64 of Act X of 1872. Then the High Court had not under the Code of 1872 the power to transfer an 'appeal' to itself, but it exercised such powers in *Sitapathi's* case,³⁴ and such power was expressly given by the Code of 1882.

The power of transfer of appeal by the High Court, given by Section 29 of the Letters Patent, is one which may be exercised beneficially in a fit case. This power has not been taken away by the Criminal Procedure Code of 1872, and it is expressly provided in S. 526 of the Cr. P. Code of 1882.

Certain words in sub-sec. (5) and sub-secs. (6-A), (8) and (9) were inserted by S. 145 of Act XVIII of 1923. Sub-section (8) of the Code before amendment read as follows:—

“(8) If, in any criminal case or appeal, before the commencement of the hearing the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of the case, the Court shall, exercise the powers of postponement or adjournment given by Section 344 in such manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or in the case of an appeal, before the hearing of the appeal.”

3. Legislative Changes (1955).—Sub-section (1-A) has been added. The words “or under S. 528” in sub-sec. (8) and the proviso have been added by Act 26 of 1955.

Legislative Changes (1932).—The words ‘may under this section award by way of compensation’ have been substituted for the words ‘has power under this section to award by way of costs’ by S. 2 of Act 21 of 1932. The words ‘such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case’ or sub-sec. (6-A) were substituted for ‘any expenses reasonably incurred by such person in consequence of the application’ *ibid*, and sub-sec. (8) was substituted by Act 21 of 1932, sub-sec. (10) was inserted by Act 21 of 1932.

3a. State Amendment.—

Madras.—In sub-sec. (2) of S. 526 for the words and figures “from any Court other than the Court of a Presidency Magistrate it shall except as provided in S. 267 observe”, the words “from any Court, it shall observe” were substituted *vide* Madras Act 34 of 1955.

4. Report of the Joint Committee.—“Our amendment provides for a compulsory adjournment at any stage of the case except that a Sessions Court

33. 15 WR (Cr) 69 : 7 BLR 240 (262).

34. (1882) 6 M 32.

may refuse to adjourn [sub-sec. (9)] when it is of opinion that the application has been unreasonably delayed”.

Report of the Select Committee.—“We have found S. 526 somewhat difficult to deal with. One class of opinions presses for greater safe-guards against frivolous, vexatious or dilatory applications for transfer. Another class deprecates any measure which makes a transfer more difficult to obtain. We think it is unavoidable to retain in the Code some provisions for the compulsory adjournment of a case when an intention to apply for a transfer has been notified. But we recognise that the provisions of the section, as they stand, have lent themselves to gross abuse, and therefore, feel that greater safe-guards are necessary. For these reasons in the first place, we maintain the principle of the new sub-sec. (6-A) which enables the High Court to award costs in dismissing an application. We have, however, modified it to this extent, that it will enable the High Court in cases where it is of opinion that the application was frivolous or vexatious to award such amount by way of reasonable costs in the High Court and the Court below as it thinks fit. We think the last sentence of new sub-sec. (6-A) was superfluous in view of the provisions of S. 547.

“We consider that the new sub-sec. (8) proposed by the Bill was unsatisfactory in several respects. The opening words of the sub-section contemplated notification at any stage of the case provided that it was made before the commencement of a day’s hearing. But words occurring later to the sub-section indicated that its application was confined to a notification made before the accused was called upon to enter on his defence. The Proviso, therefore, which dealt with an intention to apply for a transfer formed after the accused had entered on his defence was not a true proviso to the sub-section. We considered whether sub-sec. (8) should not refer to an application made at any stage and whether in such case discretion as to an adjournment should be compulsory. On the whole, however, we have decided in favour of rejecting the proposal to provide for a bond. Apart from other objections we think it was calculated to enhance the delays already involved by S. 526. Our amendment of the Bill therefore provides for a compulsory adjournment at any stage of the case except that a Sessions Court may refuse to adjourn when it is of opinion that the application has been unreasonably delayed.

“It was suggested to us that we should add a new clause to S. 526 providing for transfer of a case when accused has reasonable ground for apprehending that he will not get a fair and impartial trial. We think, however, that the rulings of the High Court are quite clear on the point and that it would be a mistake to amend the section”.

5. Effect of the Amendment.—The word ‘criminal’ having been deleted from sub-secs. (ii) and (iii) of S. 526 (1) (e), proceedings under Ch. VIII or Ch. XII of the Code about which there were divergent rulings under the old Code need not be considered as such proceedings now may be transferred. It has given effect to the decision in *Bansi v. Lakshmi Das* and other cases³⁵ which held that any enquiry by a Magistrate or a Criminal Court subordinate to the High Court can be transferred, and has overruled the decision³⁶ which held that the High Court could not transfer a case under the Legal Practitioner’s Act.

35. 45 A 700 : 21 ALJ 619 : 25 Cr LJ 72 : 75 IC 984 : AIR (1924) A 76 ;

36. *Jaggu Ahir v. Murli Shukul*, 34 A 533. 41 PR 1888.

The word "criminal" was by the amending Act (XI of 1874) struck out of S. 44 of the Code of 1872 but was again introduced in the Code of 1882 and retained in the Code of 1898. In view of the conflicting rulings of the different High Courts as to the applicability of this section to cases under Ch. VIII and Ch. XII the Legislature has deleted the word 'criminal'.

See Commentary under the heading 'Applicability of the section'.

The amendment introduced in sub-sec. (5) has empowered the High Court to award costs to the opposite party at the time of disposing of the application. Under the old Code of 1898 the High Court could direct security for such costs which would be recoverable provided the accused be *convicted* at the trial. This amendment is consequential upon the insertion of sub-sec. (6-A) which safeguards against abuse of the section by awarding costs to the opposite party if the High Court is of opinion that the application is frivolous or vexatious.

Sub-section (6-A) has been enacted to safeguard against frivolous, or vexatious applications by providing for the award of reasonable costs in the High Court and the Court below incurred by the opposite party.

Sub-section (8) provides for a *compulsory* adjournment at any stage in order to afford the petitioner a reasonable opportunity for moving the High Court for a transfer of the case. This has given effect to the following rulings under the old Code.³⁷ The Magistrate has no longer any option in granting adjournment³⁸ but is bound to grant the same. The words "*before the commencement of the hearing*" being substituted for "*before the commencement of the appeal*", the Court shall grant adjournment at *any stage* of the case and the words that followed in old sub-sec. (8) indicated that the accused was obliged to notify his intention of making such application before he was called upon to enter on his defence.³⁹ The present sub-sec. (8) does not enjoin upon the Court to inquire whether the application for adjournment is *bona fide* or *mala fide*.⁴⁰ The decision of the Madras High Court⁴¹ which held that sub-sec. (8) was inapplicable when the application is made *after* the commencement of the hearing *e.g.*, after the charge had been framed is *no longer good law*.

The word "Criminal" having been deleted from S. 526 (1) (c) (ii) and (iii) the substitution of the same by "In the course of any inquiry or trial" in sub-sec. (8) seems to be a consequential amendment.

Sub-section (9) contemplates that the Sessions Judge may reject an application for adjournment made under sub-sec. (8) if he is of opinion that the petitioner has had a reasonable opportunity to move earlier and has not availed of the same. So the principle of *Kalialludaly's* case⁴¹ is applicable to cases under sub-section (9).

Effect of 1955—Amendment.—Sub-section (1-A) has been inserted because under sub-sec. (1-C) of S. 528 the Sessions Judge may transfer a case from one Court to another Court. Proviso to sub-sec. (8) provides that the Court may refuse to adjourn the case upon second intimation.

37. *Palakdhari*, (1882) 15 C 455; *Virasami*, (1896) 19 M 375; *Surat Lall*, (1902) 29 C 211; 6 CWN 251.

38. *Kali Charan Ghose*, (1906) 33 C 1183; 10 CWN 793; 3 CLJ 637; 3 Cr LJ 477.

39. *Otandas*, (1915) 8 SLR 341; 16 Cr LJ 476; *Joharuddin*, (1904) 31 C 715; *Dhone Kristo*, (1901) 6 CWN 717.

40. *Raggu Mal*, (1912) 214 PLR 1912; 13 Cr LJ 746.

41. *In re Kalialludaly*, (1911) 35 M 705.

Other Sections dealing with transfer.—See Ss. 178, 191, 192, 346, 407 (2), 409 Proviso, 487, 526-A, 528, 556.

6. Scope.—After the insertion of sub-sec. (1-A) by Act 26 of 1955 if the petitioner moves the High Court for a transfer from one Criminal Court to another within the same Sessions Division the petition will not be entertained where the party has not moved the Sessions Judge in the first instance.⁴² It is only where the party moves for a transfer from one District to another outside the Sessions Division, he will move the High Court direct.

7. Procedure—Power of the High Court to transfer under the Letters Patent.—S. 29 of the Letters Patent (Beng., Mad., Bom.) and S. 22 of (All., Pat., Lah.), and S. 28 of (Rangoon) the Letters Patent read as follows :—

“And We do further ordain that the said High Court shall have power to direct the transfer of any Criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of some other officer or Court.”

High Court may direct the transfer of a case from one Court to another.

Although the High Court has no power under S. 526 to transfer a case to any Court not having jurisdiction to try a case, it has powers under the Letters Patent, now Government of India Act, 1915, as amended in 1919, to direct by way of superintendence that such Court ought to stay its hands.⁴³ Under the Code of 1861, S. 35, the High Court had no power to transfer a case of ‘trial’ to itself but the High Court exercised the powers under S. 29⁴⁴, and the Code of 1872 by S. 64 conferred such powers. Then under S. 64 no power was given to the High Court to transfer an ‘appeal’ for hearing by itself so the High Court exercised this power under the Letters Patent in *Sitapathi Naidu*.⁴⁵ The Code of 1882 by S. 526 gave the High Court this power. The word ‘criminal’ before the word ‘case’ which was deleted from S. 64 of the Code of 1872 by Act XI of 1874 but retained in the Codes of 1882 and 1898, the Calcutta High Court in *Lolit Mohun*⁴⁶ transferred a case under S. 145 by virtue of the powers under S. 29 of the Letters Patent and the Madras High Court in the case of *Armuga*⁴⁷ acting under the same section transferred a case under Ch. XII of the Code. The Bombay High Court in *Robert Conaly* and another case⁴⁸ transferred a criminal case from the Court of the Resident at Aden to Bombay High Court Original side and held further that a single Judge had power to order such a transfer.

The Rangoon High Court has held that the Letters Patent does not confer any power of transfer over and above that conferred by S. 526 since Cl. 28 is qualified by Cl. 36.⁴⁹

Extradition proceedings.—The High Court has no powers under S. 526 to transfer such proceedings but may transfer the same under S. 29 of the Letters Patent.⁵⁰

42. *Amba Prasad*, 1957 Cr LJ 272 (All).

43. *Sikka*, (1922) 24 Cr LJ 351.

44. *Ameer Khan*, 15 WR (Cr) 69 : 7 BLR 240 (260).

45. 6 M 32.

46. *Lolit Mohan*, (1901) 28 C 709 ; *Sunil Chandra Roy*, A 1954 C 305 (312).

47. (1902) 26 M 188.

48. (1904) 29 B 575 : 7 Bom LR 104 ; *In re Vasudeo*, (1918) 21 Bom LR 274 : 20 Cr LJ 215 : 50 IC 491.

49. *Ashu v. Mg Po Khan*, IR 632 : 2 Bur LJ 236 : AIR (1924) R 100.

50. *Topes*, (1918) 46 C 31 : 20 Cr LJ 241 : 49 IC 913.

8. Should the party move the High Court direct or move the Sessions Judge first.—In cases where a party seeks a transfer of a case outside the District it is not necessary to move the Sessions Judge first before coming to the High Court. One may move the High Court direct. But in cases where the transfer sought is within the District, the High Court will not entertain the application direct, as under S. 528 of the Code the District Magistrate has the jurisdiction to transfer such cases, although there is no bar to the High Court transferring such cases. Ordinarily, the High Court will not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court.⁵¹ Under the amended sub-sec. (1-A) a party has got to move the Sessions Judge before moving the High Court.

9. Is the High Court bound to issue a Rule or can it transfer a case without issuing a Rule ?—Ordinarily the High Court issues a Rule after hearing the State, or if the State does not appear on notice, the complainant, and it either grants or rejects the application for transfer after perusing the explanation of the Magistrate in whose file the case is pending. But when the accused person applies for transfer he is bound under sub-sec. (6) to issue a notice on the Public Prosecutor *i. e.*, the Deputy Legal Remembrancer for the State at least 24 hours before the application is presented before the Court. The High Court in cases where the State on notice does not oppose the application *may* instead of issuing a Rule grant the transfer. But the *practice* is to issue a Rule calling upon the District Magistrate and the complainant to show cause why the case should not be transferred with directions, in cases where there are allegations of *bias* in the sworn petition of the accused petitioner, to the trying Magistrate to offer explanations on the allegations made in the petition. Besides it is not always thought safe to proceed *ex parte* on the petition of the accused person unless the transfer asked for is on a point of law.

10. Affidavit.—Applications for transfer should always be supported by affidavit⁵¹ except when the applicant is the Advocate General, *vide* sub-sec. (4) which was introduced in consequence of the decision in *Zuhiruddin's case*.⁵²

Affidavit of accused.—Ordinarily *affidavit made by accused persons* is not accepted as it is not worth the paper on which it is written because no oath can be administered to an accused, *vide* S. 342 (4). See *Bindeshri's case*.⁵³

The Lahore High Court has held in *Gulam Muhammad*⁵⁴ that an accused can make an affidavit in support of an application for transfer and the Allahabad High Court has also held to the same effect in *Baddu Khan*^{54a}, but it seems that these decisions overlook that no oath can be administered to an accused except when he offers himself as a witness under S. 342A.

A relation or a Tadbirkar who has looked after the case for the accused should swear in an affidavit on behalf of the accused. When the complainant is the petitioner, of course he can swear the affidavit.

Inaccurate Statements in affidavit—are to be strongly deprecated. Although the making of inaccurate and *disingenuous* statements in such petitions was

51. *In re Fouseca*, (1904) 6 Bom LR 480 ; followed in *Ghulam Nabi v. Jamala*, (1923) 24 Cr LJ 466 : 72 IC 882 : AIR (1923) L 685 (1) ; *Nathuram*, A 1951 Raj 158.

52. (1876) IC 219 (FB) : 25 WR (Cr) 27.

53. (1906) 28 A 331.

54. (1922) 3 L 46 : 23 Cr LJ 399 : 67 IC 351 : AIR (1922) L 113.

54a. AIR (1928) A 182.

held highly reprehensible, it was held in the leading case of *Duperyon v. Driver*^{54b} that the application should not be rejected on that ground if leaving the objectionable statements there still remains sufficient ground to make a transfer of the case for the ends of justice.

11. Delay in moving the application.—“The impression appears to have got abroad that the processes and orders of mofussil Courts can be ignored if the parties chance to telegraph to their legal advisers either that an order has been passed by this Court or that they are ill. We must protest against the practice which has become common in this Court, to file these petitions of transfer on the *last day* when the parties are given a fortnight or three weeks to move. It is the absolute duty of parties to come to us as soon as possible and we shall be in future unable to stay proceedings ordinarily unless sufficient time is given to issue a Rule and *obtain an explanation*”.⁵⁵ Such applications should be moved at the earliest possible opportunity.⁵⁶ Pushed to its logical extreme the practice that is condemned in *Chandi Prasad Singh*⁵⁵ if abandoned, leaves the party a day or two to come to the High Court *i. e.*, he must get the certified copies of the orders with expedition-fee.

However nobody would *move on the last date* since the view in the following cases⁵⁷ that a Magistrate acts injudiciously in proceeding with a case ignoring a *Private telegram from the Vakil* who has obtained a Rule in the High Court staying further proceedings or the view in *Hem's case*⁵⁸ where it was held that the Court in cases of doubt should satisfy itself about the truth or falsehood of the telegram by telegraphing to the Registrar of the High Court or the Court should ask the pleader making the application for stay to verify the telegram, is not followed now-a-days vide *Wazid Ali*⁵⁹ and the Magistrate does not stay further proceedings unless the Record of the Rule reaches him.

12. Notice.—There is an express provision for notice in sub-sec. (6) when the applicant is the accused. Complainant petitioner is not required to give notice to the State. This remark equally applies to a party moving for a transfer of an inquiry under Ch. VIII or Ch. XII or Ch. X.

Notice to accused and complainant of proposed transfer.—See Commentary on sub-sec. (6).

When the High Court acts under sub-sec. (3) on the report of the lower Court the latter shall give notice to the accused and the complainant (if any) of the application and forward along with its report any objection that may be made to the proposed transfer—Para 78, Bom. H. C. Cr. Circ. p. 50.

Notice must be given to accused on transfer.—Before an order transferring a criminal case from the file of one Court to that of another is made, notice must be given to the accused to show cause why the transfer should not be made.⁶⁰

54b. (1896) 23 C 495.

55. per Holmwood and Imam, JJ., in *Chandi Prasad Singh*, (1912) 17 CWN 536 : 14 Gr LJ 382 : 20 IC 142.

56. *Ashiq Husain*, (1914) 15 Gr LJ 536 : 24 IC 848 (A) ; *Kishori Gir*, (1903) 8 CWN 77 ; *Joharuddin*, (1904) 8 CWN 910 : 31 C 715—see ante ; *Viraswami*, (1896) 19 M 375.

57. *Suryia Narain*, (1900) 5 CWN 110 ; *Ratnessari Pershad*, (1898) 2 CWN 498 ; *Wahed Molla*, (1906) 11 CWN 507.

58. *Hem Chandra Kar v. Mathu Sannyal*, (1909) 16 CWN 1031 : 13 Gr LJ 766 : 17 IC 78.

59. 41 C 719.

60. *In re Ramlinga Odayer*, (1927) 51 M 610.

Before the transfer of a case from one criminal Court to another can be made in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.⁶¹

13. Order of a single Judge on the original side rejecting an application for transfer is not appealable.—The Lahore High Court has held that the order is not a ‘judgment’ and hence not appealable.⁶² The Madras High Court held a contrary view in *Krishna Reddy v. Thanikachala Mudali*.⁶³

14. Subsequent or second application for transfer.—Sub-sec. (8) having been amended by Act XVIII of 1923 an application for transfer may be moved at any stage before the defence closes its case ; it follows that a second application is maintainable after the first application has been rejected.

The view of the Allahabad High Court,⁶⁴ that it will decline to permit the petitioner in a subsequent application for transfer to urge in support of the application any ground which had been or could have been put in on the previous occasion, is still good law. Under the proviso as amended in 1955 the Court may refuse to adjourn the case on second application.^{64a}

15. Is the whole case transferred?—Yes. Suppose there are 50 accused persons in a ‘rioting’ case and the application for transfer is on behalf of 5 of them ; when the case is transferred the case of all the accused persons including the 45 others who did not join is transferred.

16. Procedure after transfer.—(a) *Transfer to High Court*—Under Sub-sec. (1) (iii) the High Court may direct that any particular case or appeal be transferred to and tried before itself.

The word ‘criminal’ has been deleted from this clause and Cl. (1) (ii) by S. 145 of the Amending Act XVIII of 1923. See ‘Effect of amendment’ *supra* and the commentary under the head ‘Applicability of the section’.

When a case or appeal is transferred to the High Court, the trial may, if the High Court so directs, be by a Jury, and the appeal must be heard by the Criminal Bench. See S. 267 *supra*. See sub-sec. (2) of this section for procedure.

(b) *Case must be transferred to a competent Court*—Ss. 177 to 184 relate to place of inquiry or trial.

Section 526 enables the High Court to transfer Criminal proceedings initiated under S. 107 of the Code, to any other Criminal Court of equal or superior jurisdiction and the order of the High Court will give jurisdiction to the Court to which the case has been transferred to make the inquiry.⁶⁵ A case under S. 107 should be transferred to another District only in exceptional cases.⁶⁶ When a lower Court has no jurisdiction or is not competent to inquire into or try such offence, the High Court cannot confer jurisdiction upon such Court by directing a transfer.⁶⁷ In a later decision however it was held that such a transfer could be directed under

61. *Nobo Gopal Bose*, (1880) 6 C 491 ;
Abdool Sobhan, (1881) 8 C 63.

62. *Pahlad Rai v. Shiv Ram*, (1927) 8 L 681, see also *Khatizan v. Sonairam Daulatram*, (1920) 47 C 1104.

63. 47 M 136.

64. *Farzand Ali*, (1896) 19 A 46 : (1896)

64a. *Pratinga*, A 1958 Raj 282 : 1958 Cr

LJ 1349.

AWN 177.

65. *Wahid Ali*, (1910) 32 A 642, dissenting from *Amar Singh*, (1893) 16 A 9.

66. *Chandi Prosad Singh*, 17 CWN 536 : 14 Cr LJ 302 : 20 IC 142.

67. *Girdharilal Bapulal v. Moti Lal Behecher*, (1901) 3 Bom LR 121.

the Letters Patents.⁶⁸ The High Court cannot transfer a case committed to a wrong *Sessions Court*.⁶⁹ See commentary on S. 107 *supra*, p. 199.

(c) *Special Magistrate*—The High Court may ask the State Government sometimes to appoint special Magistrates.

17. Applicability of the section.—*The section does not apply to (1) Village Panchayat's Court.*⁷⁰ See *contra*, *Basdeo Misra v. Badal Misra*⁷¹

(2) *To proceedings before Village Magistrates.*⁷²

(3) *To extradition proceedings.*

The High Court has no jurisdiction under S. 526 Cr. P. C. to transfer an extradition proceeding.⁷³

(1) **This section applies to proceedings under Chapter VIII.**—The amendment has restored the view of the Allahabad High Court in *Wahed Ali Khan*⁷⁴ and the Calcutta view in *Wazed Ali Khan*⁷⁵ which held that the High Court had jurisdiction to transfer cases under S. 107 Cr. P. Code and the view in *Chandi Prasad Singh*,⁷⁶ that in exceptional cases only the High Court will interfere under S. 526 with the jurisdiction of the Magistrate of the District in preventive action. It has set at rest the doubts expressed in *Sital Pande*⁷⁷ and superseded the case of *Chintamon*.⁷⁸

(2) **Proceeding under S. 110, Cr. P. Code.**—The amendment has restored also the view in *Wahid Ali Khan*⁷⁴ which held that High Court had the power to transfer proceedings under S. 110 once they have been properly instituted from one District to another under (1) (ii) of S. 526 and views expressed by Ghose, J., in *Lolit v. Surja*⁷⁹ whereby it was taken as settled law that proceedings under S. 110 could be transferred from one District to another.

(3) **Proceedings under Chapter XII.**—The amendment has overruled the following decisions⁸⁰ which held that S. 526 did not apply to proceedings under S. 145 and a party to such proceeding is not entitled to an adjournment under S. 526 (8).

The Patna High Court in⁸¹ has held that a party to a proceeding under S. 145 cannot apply for an adjournment under cl. (8) although a "case" in cl. (8) includes a proceeding under S. 145. This view seems to be correct on a strict interpretation of the clause as the Legislature in sub-section (8) uses the expressions "The Public-Prosecutor, the complainant or the accused notifies to the Court", but the Legislature should have used the expression "or any person interested" as in sub-sec. (3) since the intention of the Legislature was to extend the power of transfer to miscellaneous proceedings. The Legislature perhaps thought the expression "accused" as defined in S. 340

68. *Robert Conaly*, (1904) 29 B 575 : 7 Bom LR 104.

69. *Assistant Sessions Judge, North Arcot v. Ramammal*, (1911) 36 M 387, distinguished in *Ganapatty*, 42 M 791.

70. *Satnarain v. Sarju*, (1923) 46 A 167 : 21 ALJ 925 and *Kamalapati*, (1925) 48 A 123.

71. (1926) 25 ALJ 157 : 99 IC 121 : AIR (1927) A 199.

72. *Mota Narayadu*, (1911) 21 MLJ 755.

73. *Topes*, (1918) 46 C 31 : 20 Cr LJ 241 : 49 IC 913 ; *Mohunt Dev Das*, (1898) 15 CWN 735.

74. (1910) 32 A 642.

75. (1913) 41 C 719 ; *Alimuddin Howladar*, (1902) 29 C 392.

76. *Chandi Prosad Singh*, (1912) 17 CWN 536 : 14 Cr LJ 382 : 20 IC 142.

77. *Sital Pande*, (1919) 21 Cr LJ 809 : 58 IC 681 (A).

78. *Chintamon*, (1907) 35 C 243 (246).

79. 28 C 709 (715).

80. *Lakhan Chandra v. Yakub Mandal*, (1913) 18 CWN 383.

81. *Loka Mahton v. Keli Singh*, (1927) 6 P 553 : AIR (1927) P 351.

(as amended by Act XVIII of 1923) more particularly S. 340 (2) to be quite sufficient.

The amendment has restored the following cases⁸² which held that the expression 'criminal case' includes a proceeding under S. 145, and set at rest the doubt expressed in *Loka Mahton's* case.^{82a} See commentary on S. 145 *supra* p. 386.

18. Grounds of Transfer.—The heading deals with the most important portion of this section.

A *petition of transfer* need not set out the grounds separately as in other applications in revision. It would be sufficient to state the allegations in the petition with a prayer or one may draw up separate grounds. We have observed *supra* under the heading 'Procedure' that all applications under this section except when the applicant is the Advocate-General (or the State) must be supported by an affidavit or 'affirmation' and one must generally move such applications in open Court, *vide* sub-section (4). We have also considered therein whether the accused may make an affidavit or not.

19. Sub-section I (a). 'Want of fair and impartial trial'.—This clause has raised a controversy and it is very difficult to persuade the Courts to grant a transfer on this ground. The allegation is one of bias and the High Court is loath to believe that the Magistrate has any bias against any party to any proceeding before him. *Case-law*⁸² has established that you need not prove actual bias in the Magistrate but if there is a reasonable apprehension in the mind of the petitioner that he will not get a fair and impartial trial at the hands of the trying Magistrate the case will be transferred.

English cases.—It is well to remember here the views expressed on the point by the *Judges in England*. The oft-quoted case is that of *Seargent v. Dale*⁸³ where Lush, J., observed :—"By the Common Law, a Judge who has an interest in the result of a suit is disqualified from acting, except in case of necessity. The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law in laying down the strict rule has regard not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibility of the litigant parties. One important object, at all events, is to clear away everything which might endanger in the administration of justice which is so essential to social order and security..... The applicant stands upon his legal right and calls upon us to give effect to it". In another case of personal interest on behalf of the tribunal, Viscount Cave L.C., in *Frome United Breweries Co. v. Bath Justices*⁸⁴ observed :—"My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal". Lord Carson, at p. 618 of the said report⁸⁴ observed :—"No one

82. *Jaggu Ahir v. Murli Shukul*, (1912) 34 A 553; 10 ALJ 27; 13 Cr LJ 452; 15 IC 84; *Arumuga*, (1902) 26 M 188; *Deperoy*, (1896) 23 C 495; *Mahomed Nagi Khan v. Rahamatunnisa*, (1923) 25 Cr LJ 194; 76 IC 564 Oudh; *Sudhindra Nath Dutt*, 62 CWN 1; 1957 Cr LJ 1245; *Pritam Singh v. Raghubir*

Sharan, A 1944 L 95.

82a. *Loka Mahton v. Keli Singh*, (1927) 6 P 553; AIR (1927) P 351; *Jamir*, 57 C 369.

83. (1877) 2 QBD 558 (556, 567, 568).

84. (1926) AC 586 where *The King v. Leicester Justices*, (1927) 1 KB 557 (563) was referred to.

imputed *mala fides* to the Magistrate, but Cave, J., (in *Fraser*, 9 Times L.R. 613) in giving judgment said: 'the question was, *what* would be likely to endanger the respect and diminish the confidence which it was desirable should exist in the administration of Justice?' Wright, J., stated that although the Magistrate *had acted from excellent motives* and feelings, he still had done so contrary to a well-settled principle of law, which affected the character of the administration of justice".

Justice should not only be done but should manifestly be seen to be done.—Swift, J., held:—"It is essential that justice should be administered as to satisfy reasonable persons that the tribunal is impartial and unbiased. As Lord Hewart, C. J., said in *Rex v. Sussex Justices, Ex parte Mc Carthy*: "Nothing is to be done which creates even a suspicion that there has been an improper interference with the administration of justice".⁸⁵ "Next to the importance of deciding a case fairly and impartially, is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them."⁸⁶

For any sound and reputable system of administration of justice, it is important that justice should appear to be done as that it is in fact done.⁸⁷

In the instant case⁸⁷ as the complainant was the Chief Justice of Mysore and the case caused considerable local excitement and sensation the case was transferred to a Court out side the state of Mysore.

It is true that in a judicial or quasi-judicial proceedings justice must not only be done but must appear to be done to the litigant public, it is equally true that when a lawyer is charged for professional misconduct and is being tried by a tribunal of the Bar Council, the enquiry before the Tribunal must leave no room for a reasonable apprehension in the mind of the lawyer that the tribunal may have been even indirectly influenced by any bias in the mind of any of the members of the tribunal.⁸⁸

20. Test.—Actual bias need not be proved, possibility of bias is sufficient.—The Master of the Rolls observed:—"It appears to me in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a *real likelihood that there would be a bias* on the part of the justices alleged to have been so biased. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so

85. *Rex v. Essex Justices Parkins*, (1927) 2 KB 475 (490) following *Mc Carthy*, (1924) 1 KB 256; *Amar Singh*, (1926) 6 L 396 and *Sardari Lal*, 3 L 443 followed in *Harkishen Das*, AIR (1928) L 757.

86. *per Ghose J.*, in *Lolit Mahan Maitra v. Surja Kanta Acharjee*, (1901) 28 C 709 (718) which follows *The Legal Remembrancer v. Bhairab Chandra Chakravarty*, (1897) 25 C 727 : 2 CWN 65; see *Khetu Pandey v. Mohini Nath Bishi*, 8 CWN 75 and *Kali Charan Ghose*, (1906) 33 C 1183 (1190); *Awad Singh v. Puran Kandar*, 2 PLT 198 : 22 Cr LJ 726 : 64 IC 38; *Ranadhar*, A 1954 A 645; *Nirmal Singh*, A 1954 Pepsu 91.

87. *L. S. Raju v. The State of Mysore*, (1952) SCA 499: A 1953 SC. 435.

88. *Manak Lal v. Premchand*, (1957) SCA 718 : A 1957 S C 425 following *France United Breweries Co. v. Bath Justices*, (1926) AC 586 (590); *Rex v. Sussex Justices Ex parte Mc Carthy*, (1924), KB 256; *Rex v. Essex Justices, Ex parte Parkins*, (1927) 2 KB 475; *Sudhindranath Dutt*, A 1957 C 677 : 1957 Cr LJ 1245. *Usman Hussan*, A 1947 B 409 : 38 Cr LJ 344; *Sri Rajendra Norayan*, A 1947 P 166; *Hemanta Kumar v. Nanda Kumar*, 41 CWN 188 : A 1937 C 64 : 38 Cr LJ 344; *Nirmal Singh v. Gaiinda Mal*, A 1954 Pepsu 91 : 1954 Cr LJ 748; *Pandurang Guinal Pujari*, 25 B 179; *Rupendra Dev Raikat v. Ashramali Debi*, 53 CWN 770 : A 1951 C 286; *Rajendra Debi Rai Kant v. Ashramali Debi*, 53 CWN 770 : A 1951 C 286.

biased should be incapacitated from sitting".⁸⁹ Real bias is not necessary to be proved but the question to be considered is if there is a reasonable inference that Magistrate may be prejudiced—willingly or unwillingly against the accused.⁹⁰

Stephen, J., in *Narain Chandra Bannerjee v. The Howrah Municipality*⁹¹ followed the leading case of *Duperoy v. Driver*⁹² Brett, J., observed that to give effect to insufficient and unreasonable grounds would be to encourage a distrust in the integrity and independence of the Magisterial Courts in this country which would amount to a serious evil.

What is a reasonable apprehension must be decided in each case with reference to the incidents of the case and surrounding circumstances.⁹³ Mere fanciful apprehension on the part of an accused cannot be a ground for transfer of a criminal case.⁹⁴ In the instant case⁹⁴ held, simply because the trial Magistrate is subordinate to the District Magistrate, who in his capacity as Labour Commissioner, has dealt with some matters relating to the Union of which the petitioner is the President, it does not mean that he will be influenced by the latter. A contrary view has been held in⁹⁵. To justify a transfer something more than a mere wrong order by the Magistrate is required so as to raise in the mind of the party concerned a reasonable apprehension that he could not get fair and impartial trial.⁹⁶

Court should place itself in the position of the accused.—Mitra, J., (Holmwood, J., *Contra*) following⁹¹ observed:—"What is reasonable is a question which must be decided in each case with reference to the incidents themselves and surrounding circumstances.....The foolish idea, it is true, of a litigant cannot be the criterion for judging what is reasonable apprehension, but I think *the duty of the Court is to place itself in the position of the accused*, to consider the facts and circumstances attending his position and then to decide the question of reasonableness or otherwise. *Abstract reasonableness ought not to be the standard*".⁹⁷

It is always embarrassing for a Court to try a case, of the facts of which it has some personal knowledge.⁹⁸ The High Court will not pass an order

89. *Sunderland Justices*, (1901) 2 KB 357 quoted in *Frome United Breweries v. Bath Justices*, (1926) AC 586 (607); see per Avery J., in *Perkins Ex parte*, (1927) 2 KB 475 (488).

90. *Sumeshwar*, 12 ALJ 33 (1913): 14 Cr LJ 666: 21 IC 906, followed in *Jaggan*, (1914) 36 A 239; *Ramkishan Das*, (1912) 35 A 5: 10 ALJ 357: 13 Cr LJ 823; *Duperoy v. Drivers*, (1896) 23 C 495—leading case of the Calcutta High Court on the points; *Pandurang Govind*, (1900) 25 B 179 (182): 2 Bom LR 755; *Amar Singh v. Sadhu Singh*, (1925) 6 L 396 (401); *Chiranjilal*, (1927) 9 L 537; *Girish Chandra Ghose*, 20 C 857; *Maharaj Singh*, A 1927 N 48; *Amar Nath*, A 1928 L 460.

91. (1905) 10 CWN 441; *Hari Ram*, A 1956 MB 17.

92. 23 C 495.

93. *Karan Chand Hiteshi*, A 1942 L 122: 43 Cr LJ 622; *Manik Lal*, 1957 SCR 575: A 1957 SC 425; *Rajani*, 36 C 904; *Krishna Murthy*, A 1933 N 269; *Usman Horoon*, A 1947 B 409; *Provat*

Kumar Ghosh, A 1956 C 602:

94. *B. W. Katappa v. State of Coorg*, A 1956 Mys 38; 1956 Cr LJ 628.

95. *Makhan Singh v. Ranjit Singh*, A 1961 P 170: 1961(1) Cr LJ 552.

96. *Income Tax Officer, Midnapore v. Dist. Magistrate, Midnapore*, 59 CWN 914: A 1955 C 500; *Harichand*, A 1931 L 540; *Ramnandan Prasad*, A 1957 P 67.

97. *Kali Charan Ghose*, (1906) 33 C 1183 (1190): 10 CWN 793: 3 CLJ (1191) 637: 3 Cr LJ 477 where *Narayan Chandra Banerjee v. Howrah Municipality*, (1906) 10 CWN 441 is explained; *Nandlal Agarwalla*, A 1953 P 136: 1953 Cr LJ 920; *Harnam Singh*, A 1950 EP 257: 51 Cr LJ 1313; *Krishna Murari Lal*, A 1933 N 269: 34 Cr LJ 1112. *Contra Kalicharan*, 33 C 1183; *Sushil Kumar*, A 1960 P 160: 1960 Cr LJ 501; *N. C. Bose*, A 1955 Ass 116: 1955 Cr LJ 923; *Rupendra v. Ashrumati*, A 1951 C 286; *Bagridu*, A 1930 A 405: 31 Cr LJ 764; *Abdulla*, A 1926 N 448: 27 Cr LJ 835.

98. *Ajodhia Prasad*, A 1951 A 472; *Satindra*, A 1929 C 809: 31 Cr LJ 805.

of transfer merely out of deference to the susceptibility of the accused where no sufficient grounds exist.⁹⁹

What is "reasonable" must of course depend on the degree of intelligence of the accused.¹ This view does not seem to be right. The Court is to determine not upon accused's apprehensions merely^{1a} but upon *bona fide* apprehensions of reasonable men² whether the applicant will not receive fair trial.

Cumulative effect.—Although each of the circumstances alleged may not by itself be sufficient to show that there was any *bias* on the part of the Magistrate, a transfer would nevertheless be justified where having regard to all the circumstances taken together, the accused might not unreasonably apprehend that he would not have a fair trial.³

21. Instances of transfer on this ground.—*That the Magistrate is personally interested is a good ground for transfer*—See Notes under Ss. 487 and 556 *infra*.

Complainant being a servant or relative of the Magistrate.—The mere circumstance that a trying Magistrate is the master of the complainant,⁴ or a relative⁵ does not deprive the Magistrate of his jurisdiction, though it is *expedient* that such a complaint should be referred to another Magistrate.

The mere fact that a Senior Advocate has under training a relative of the presiding officer of the Court cannot be a reasonable ground for transfer of the case.⁶

Engagement of a near relation of the Magistrate is a ground for transfer.—"It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation".⁷

Complainant and Court identical—Transfer.—In a prosecution for perjury where the accused made contradictory statements before the Sessions Judge who lodged a complaint under S. 476A, he should not hear the appeal from a conviction.⁸

Examination of the accused under S. 342 as a mouthpiece of the Public Prosecutor is a ground for transfer.^{8a}

Magistrate a necessary witness is a good ground.—A Magistrate cannot himself be a witness in a case in which he is the sole Judge of law and

99. *Pandurang Krishnaji*, A 1928 N 21 : 28 Cr LJ 898.

1. *Sardri Lal*, (1922) 3 L 443 (446); *Mursadilal*, (1927) 104 IC 227 : AIR (1927) L 709.

1a. *Pandurang Krishna Deotola*, (1927) 10 NLJ 184 : 28 Cr LJ 898 : 105 IC 226 : AIR (1928) N 21.

2. *Amernath*, (1927) 29 Cr LJ 295 : 107 IC 783 : AIR (1928) L 460; *Ratilal Jaisraj*, A 1956 B 385.

3. *Nityanand Karmakar*, (1905) 9 CWN 619 : 2 Cr LJ 339; *Jafar Husain*, (1914) 12 ALJ 736 : 16 Cr LJ 56 (case under S. 110); *B. N. Kartappa*, A 1956 Mys 38; *Ram Prasad*, A 1949 P 435 : 50 Cr LJ 935; *Hemanta*, A 1937 C 64 : 38 Cr LJ 346; *Annubeg*,

A 1944 N 320.

4. *Basapa*, (1884) 9 B 172 : 12 Cr LJ 407.

5. *Sita Ram v. Gobind Sahai*, (1912) 66 PLR 1912 : 13 Cr LJ 474 : 15 IC 314; *Mewa Ram v. Narain Das*, (1918) 16 ALJ 49 : 19 Cr LJ 702 : 46 IC 158.

6. *Chiranjilal*, A 1955 A 701.

7. *Nityaranjan Mandal*, (1925) 29 CWN 648 : 26 Cr LJ 1183 : 88 IC 607 : AIR (1925) C 806, followed in *Dwarika Singh*, (1926) 27 Cr LJ 844 : 95 IC 764; see *contra Pearay Lal v. Pullan*, 85 IC 56 : AIR (1925) Oudh 348.

8. *Sai*, (1926) 8 L 496.

8a. *Faqir*, A 1930 L 160; *Md. Yasin*, A 1954 P 437.

fact.⁹ The fact that the Magistrate trying the accused may be cited as a witness for the defence is not sufficient which may be reason for committing the case to the Court of Session instead of passing the sentence himself,¹⁰ but the fact that the evidence of the Magistrate is necessary and material to the defence is sufficient.¹¹

Bona fide intention of calling the Magistrate as a witness is required to justify an order of transfer.¹²

Magistrate taking part during investigation.—When a Magistrate was present at a search made by the police during investigation, it is expedient that the case should be tried by some other Magistrate.¹³

Magistrate acting as private arbitrator—ought not to subsequently deal with the same dispute in his capacity as a Magistrate.¹⁴

View of the locality by Magistrate—does not render him a witness and is not by itself a ground for transfer as local inspection is allowed by law.¹⁵ A contrary view has been held in *Manikam*¹⁶ which is no longer good law, see S. 539B *infra*.

Magistrate making personal inquiries for fresh evidence.—Such Magistrate is disqualified as it is impossible for him to complete the trial of the case without being influenced by what he had himself seen and heard in the markets.¹⁷

Magistrate's conduct justifying reasonable apprehension is a good ground.—The refusal by the Magistrate to permit cross-examination of P. Ws. after all of them had been examined-in-chief, the cancellation of bail bond of two of the petitioners and the increase of the bail from Rs. 100/- to Rs. 250/- in the case of the third petitioner after they applied for adjournment to move for transfer and the refusal to give them copies are good grounds for transfer.¹⁸ Where a trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour, *held*, the Magistrate was guilty of indiscretion and the accused was justified in asking for a transfer.¹⁹

Magistrate putting questions to accused prejudicial against him.—Where a Magistrate on the assurance of the Police *peshi* clerk asked a witness whether the accused had ever been challaned in a *budmashi* case, *held*, the action of the Magistrate was sufficient to direct a transfer.²⁰

Magistrate already forming decisive opinion will be precluded from trying the case.—Transfer was directed where there was an unusual and illegal procedure in acquitting the accused before disposing of the case under S. 203 without examining the complainant's witnesses whom he had summoned and the Magistrate formed a decisive opinion in the case before

9. *Donnelly*, (1877) 2 C 405; *Manikam*, (1896) 19 M 263.

10. *Mirza Abdullah*, (1897) AWN 17.

11. *Srilal Chamaria*, (1918) 19 Cr LJ 632 : 45 IC 680 (C); *Mohandas*, A 1927 S 98.

12. *Ghanesam Das*, (1914) 15 Cr LJ 368 (A) : 23 IC 736.

13. *Gaya Singh v. Mohamed Soliman*, (1901) 5 CWN 864; *Narendralal Mukherjee*, A 1956 Ass 127(2) : 1956 Cr LJ 974; *Harmusji Haribhoy*, A 1940 N 275.

14. *Gobinda Chandra Roy v. Gopal Chandra Pandit*, 18 CLJ 150 : 14 Cr LJ 602 : 21 IC 474; see *Karbanullah v. Azmat*

Meah, (1908) 12 CWN 748 : A 1953 HP 22; *Rahim Baksh*, A 1931 L 32; *Sushil Kumar Chaudhary*, A 1960 P. 160.

15. *Harsa Singh*, (1900) 13 PR 1901 (Cr) : 89 PLR 1901.

16. (1896) 19 M 263.

17. *P. A. Pokir Mohamed*, (1926) 4 R 106.

18. *Tittu Sahu*, (1920) 1 PLT 652 : (1920) Pat Supp CWN 283 : 57 IC 454.

19. *Yusuf v. Buni Lal Mandal*, (1919) 20 Cr LJ 559 : 51 IC 847 (P); *Mahomed Mian*, (1919) 20 Cr LJ 54 (P).

20. *Suraj Prosad Vaish*, (1913) 12 ALJ 50 : 15 Cr LJ 234 : 23 IC 186.

hearing the evidence for the prosecution.²¹ Where a Presidency Magistrate had made up his mind regarding a case the High Court transferred the case.²²

Magistrate conducting a trial on a gazetted public-holiday or after Court hours^{22a}—Transfer was directed.²³

Expression of opinion in a counter case if a good ground.—It is no good ground for holding that the Court is incompetent to try the second case.²⁴ It has been held however that the High Court will in the *interests of justice* transfer the case where the Magistrate in a counter case on the same facts had prejudged the guilt of the accused.²⁵ The opinion expressed by the Magistrate in a previous case in which the accused was tried and convicted on a separate and distinct charge is in itself no ground for the transfer.²⁶ Where the impressions recorded in a judgment by a Magistrate are derived from evidence, however erroneous they may be, they cannot be classed as instances of personal bias, which is regarded as disqualifying the Magistrate from trying the case.²⁷

22. Ground not sufficient for transfer.—Rejection of adjournment particularly in a murder trial is not a ground of transfer.²⁸ The fact that the Magistrate has examined the accused exhaustively under S. 342 before the prosecution case was closed,²⁹ or that he did not examine accused after the prosecution witnesses have been further cross-examined,³⁰ or the Magistrate disallowed questions in cross-examination,³¹ or wrongly admitted evidence³² or passes order which may be illegal are not grounds for transfer.

Instances of cases where transfer has not been granted.—Transfer is not granted on *fanciful and sentimental* grounds when an application is made under Cl. (I) (a) of this section^{32a} or on the possibility of the Magistrate not giving effect to a *legal* ground,^{32b} or on expression of *opinion in a counter case*,^{32c} on a *discharge* in cross case^{32d} in a *previous* case where the petitioner was tried on a separate or distinct charge,^{32e} or superior Magistrate holding strong views,^{32f} or improper exclusion of evidence or error in disallowing

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| <p>21. <i>Sinnai Gounden</i>, (1897) 20 M 388 ; <i>Makhan Singh v. Ranjit Singh</i>, A 1961 Punj 170.</p> <p>22. <i>Harish Chandra Telcherkar</i>, (1907) 10 Bom LR 201 : 7 Cr LJ 194 ; <i>Bhanwar Lal</i>, A 1951 Raj 107 ; <i>Annubeg</i>, A 1944 N 320 : 46 Cr LJ 601 ; <i>Ratilal Jasraj</i>, A 1956 B 385 : 1956 Cr LJ 712 ; <i>In re Sadashiva Goundar</i>, A 1942 M 69 ; <i>Munar Panday</i>, A 1942 P 77 : 43 Cr LJ 48 ; <i>Yar Ali Khan</i>, 29 CWN 316 : A 1925 C 480 (Magistrate observing witnesses' features and from his demeanour it appears not speaking the truth ; <i>Harbans Singh v. Daroga Singh</i>, A 1957 P 661 : 1957 Cr LJ 1308.</p> <p>22a. <i>Nirma</i>, A 1953 H P 12.</p> <p>23. <i>Ramdiva</i>, (1928) 107 IC 779 : AIR (1928) L 334 (1).</p> <p>24. <i>Hargovind</i>, (1911) 33 A 583 : 12 Cr LJ 564 : 12 IC 652 ; <i>Rajani Kanta Dutt</i>, (1909) 36 C 904 ; see <i>Dayaram</i>, AIR (1928) N 217(1).</p> <p>25. <i>Rangasami Gounden</i>, (1907) 30 M 233 : 2 MLT 89 ; <i>Chandramani Sarma v. Kunja Bendi</i>, (1900) 4 CWN 824.</p> <p>26. <i>Hayat Khan</i>, (1917) 4 PLW 21 : 19 Cr LJ 121 : 43 IC 409 ; <i>Amrit Mondal</i>,</p> | <p>1 PLJ 399 : 18 Cr LJ 95.</p> <p>27. <i>In re Vadilat Uttamram</i>, (1904) 6 Bom LR 1092.</p> <p>28. <i>Harbans Singh v. Daroga Singh</i>, A 1957 P 661 : 1957 Cr LJ 1303.</p> <p>29. <i>Monar Panday</i>, A 1942 P 77.</p> <p>30. <i>Md. Ilyas</i>, A 1950 A 312.</p> <p>31. <i>Dewan Singh</i>, A 1940 L 527 : 42 Cr LJ 284 ; <i>U. Saw</i>, A 1938 R 456 ; <i>Narayan</i>, A 1936 N 146.</p> <p>32. <i>Om Radhe</i>, A 1939 S 238 ; <i>Ananta Kumar</i>, A 1960 Tripura 14.</p> <p>32a. <i>Masher Khan</i>, (1927) 29 Cr LJ 220 : AIR (1928) L 276 : 107 IC 108.</p> <p>32b. <i>Md. Azim v. Niaz Muhammad</i>, (1928) 107 IC 773 : AIR (1928) L 317(2).</p> <p>32c. <i>Har Govinda</i>, 33 A 583 (1911) ; <i>In re Vadi Lal</i>, (1904) 6 Bom LR 1092 ; <i>Nathi Mal</i>, (1914) 15 Cr LJ 253 : 23 IC 205 ; <i>Amrita Mandal</i>, (1916) 1 PLJ 339 : 18 Cr LJ 95.</p> <p>32d. <i>Mahram Dhani Bux</i>, (1911) 5 SLR 264 : 13 Cr LJ 532 : 15 IC 804, distinguishing <i>Kali Charan Ghose</i>, (1906) 33 C 904.</p> <p>32e. <i>Hayat Khan</i>, (1917) 4 PLW 21 : 19 Cr LJ 121 : 43 IC 409.</p> <p>32f. <i>Chandi Misser v. Shyama Charan</i>, (1920) 22 Cr LJ 257 : 60 IC 657.</p> |
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certain questions and refusal of bail,^{32g} or on the co-accused being found guilty in a previous trial,^{32h} or the Sessions Judge's order for trial on graver charges.³²ⁱ

23. Sub-section (1) (b)—Case involving some questions of law of unusual difficulty.—The mere possibility or probability that difficult questions whether of law or fact will arise, is no reason for transferring a case.

The cases under which a criminal case may in England be brought up by *certiorari* for trial in a superior Court have little or no applicability inasmuch as in India an appeal both on law and facts has been provided for in criminal trials.³³

24. Sub-section (1) (c).—As to view of the place *see* commentary *ante* under the same heading.

25. Sub-section (1) (d).—Where the convenience of a large number of defence witnesses will outweigh the convenience of prosecution witnesses who are few in number, transfer should be directed.³⁴ *See* however the case of *Bhairab Chunder Chuckerbutty*³⁵ where, it was held that the confidence and impartiality of the tribunal ranks very much higher than the convenience of parties and witnesses.

Confidence in the Court administering justice on the part of both parties and of the public is a vital element in the administration of justice, so much so that a reasonable apprehension tantamount to lack of confidence has been held by the Courts to render a transfer advisable. A special Judge or a special venue directed by State Government is apt or at least is capable of being used to destroy this confidence.³⁶

If almost all the witnesses were residents of a particular locality and the trap was also laid by the Police of the place, the ends of justice will be better served if the trial took place at that place.³⁷ Though inconvenience caused to parties by adjournments is to be regretted the High Court rejected the application for transfer on this ground,³⁸ or where adjournment has been refused.³⁹

Where order of the Magistrate showed that he was of the view that the accused had conspired to delay the hearing of the case and for the purpose they had obtained false medical Certificates, transfer was granted.⁴⁰

26. Sub-section (1) (e).—*Expedient for the ends of justice.* Rankin and Mukherji, JJ., held :—“.....the question as to whether a trial before a particular Magistrate is expedient in the ends of justice or not is a question which has got to be considered from the point of view of the accused person as well, and unless it is impossible to get a Magistrate other than the one who has

32g. *Muhammad Ally*, (1909) 4 Bur LT 113; 12 Cr LJ 277; *see contra Yittu Sahu*, (1920) 1 PLT 622; 57 IC 454; *Mahamed Mian*, (1919) 20 Cr LJ 566 (C).

32h. *Nathumal*, (*see ante*) 15 Cr LJ 253; 23 IC 205 (A).

32i. *Ram Sewak*, 15 Cr LJ 367 (A).

33. *Ameerkhan*, (1879) 15 WR (Cr) 69 (80); 7 Beng LR 240.

34. *Kasinath*, (1867) Rat Unrep Cr Ca 927; *Sohanlal v. Gopal*, A 1926 L 493;

Lakshman, A 1931 B 313; 32 Cr LJ 1147 (SB).

35. (1897) 25 C 727; 2 CWN 65.

36. *Lalta*, A 1952 A 70.

37. *Ram Prasad* A 1958 Raj 184; 1958 Cr LJ 971.

38. *Ratilal Jesraj*, A 1956 B 385; 1956 Cr LJ 712.

39. *Provat Kumar Ghosh*, 60 CWN 913; A 1956 C 602.

40. *Bholanath v. Bisuashar*, 61 CWN 715; A 1957 C 683.

already convicted the accused person on the same charge at a previous trial, or unless there be *circumstances* which would *necessitate the trial* by the same Magistrate over again, it is *desirable* that the trial *should not be held before the same Magistrate*;⁴¹ and the same principle has been applied in cases where Magistrate had expressed an opinion in a counter-case.⁴² See commentary *supra* under this heading.

Cl. (e).—In a trial on a charge of conspiracy to commit criminal breach of trust and falsification of accounts of a bank which lasted for two years over 600 exhibits were filed and 200 witnesses were examined for the prosecution, the High Court quashed them but directed a retrial of some of the accused on the charge of conspiracy to falsify bank accounts and to bring into evidence a false balance Sheet. It also decided to withdraw the case under S. 526 (1) (e) to itself and added a direction under S. 526 (2) that the case be tried by a warrant procedure but without a jury. The Supreme Court held that though in these particular circumstances the High Court was justified in quashing the charges in the exercise of its inherent powers but there was no justification for directing a retrial., when these persons stood a protracted trial.⁴³ Where the complainant purchased a car through the trying Magistrate's son, the apprehension in the mind of the accused being justifiable the case should be transferred.⁴⁴ Where no practitioner in a District ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer.⁴⁵ Where communal questions becoming very prominent it is desirable that the case should be transferred.⁴⁶ Case under offence mentioned in S. 6 Criminal Law Amendment Act (1952) cannot be transferred under Cl. (e).⁴⁷

Retrial, order of, by High Court without stating if retrial to be held by the same Magistrate—Effect of such order.—It should not be presumed that it was the intention of the High Court to direct that the retrial should be held by the same Magistrate. Under these circumstances the matter is left to the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried.⁴⁸ See cases under this clause noted under Commentary on *cl. (a) ante*.

Reasons ought to be recorded.—When an order is made under S. 526 even it be for the "ends of justice".⁴⁹

If 'expediency' is political.—The *expediency* referred to in this clause is not any expediency from a political point of view but merely the expediency of justice.⁵⁰

'Or is required by any provisions of this Code'.—These words were new in the Code of 1898. See S. 191.

41. *Bali Ram Kalwar v. Sitaram Kalwar*, (1926) 30 CWN 1002 (1004). See *Ram Prasad*, A 1958 Raj 184.

42. *Rangasami Goundun*, 30 M 233; *Chandramani Sarma v. Kunja Bendi*, (1900) 4 CWN 824; *Abdul Aziz Sahib*, (1910) MWN 735.

43. *Krishna Murthy Iyer v. State of Madras*, A 1954 SC 406; 1954 Cr LJ 1024.

44. *Hemanta Kumar v. Nand Kumar*, 41 CWN 183; 38 Cr LJ 344.

45. *Lalta v. Takoor Ahmed*, A 1925 Oudh 672; *Roshanlal*, A 1930 L 954 (S. 107 proceeding).

46. *Amba Prasad v. Imam Ali*, A 1938 L 706; *Ghasoo*, A 1930 A 737; 31 Cr LJ

535; *Halim*, A 1927 P 86.

47. *Dinkar Ray Rughunath*, A 1960 Guj 30.

48. *Bali Ram Kalwar v. Sitaram Kalwar*, (1926) 30 CWN 1002 (1003); *Karam Dad*, A 1941 L 414; *Kanwar*, A 1939 L 27; A 1929 B 309; *Allah Baksh*, A 1937 L 652.

49. *Venkatachelam Chetty v. Chairman Municipal Council*, (1915) 16 Cr LJ 626; 30 IC 450.

50. *Legal Remembrancer v. Bhairab Nath Chakarvally*, 25 C 727; 2 CWN 65; but see *Kali Charan Ghose*, (1906) 33 C 1183; 10 CWN 793; 3 Cr LJ 477; *Mahomed Mian*, (1919) 20 Cr LJ 566 52 IC 54.

Failure to take objection under S. 191 does not amount to a waiver of the right.⁵¹ It has been held that the failure to inform the accused of his right to have the case tried by another Court is an illegality.⁵² The fact that a Magistrate taking cognizance of a case under paragraph (c) of S. 190 did not inform the accused that he was entitled to have the case tried by another Court, is a ground for having the proceedings set aside, but not for making an order for transfer.⁵³ See S. 487 which provides that certain Judges and Magistrates shall not try offences referred to in S. 195 when committed before themselves, and S. 556 which deals with cases in which a Judge or Magistrate is personally interested.

See also cases noted under sub-section (1) (a) heading "Magistrate forming decisive opinion 'or expression of opinion in a counter case' which properly come under this head, and also the following case⁵⁴ where it was held that there should be a transfer if circumstances had happened which lead the petitioner to reasonably believe that the Magistrate has already prejudged the case against him."

27. Sub-clause (1)(i).—Where a Court has no jurisdiction, High Court will not deal with questions of jurisdiction. It is for the Court seized with complaint to deal with the question. If the Court wrongly assumes jurisdiction the revisional powers of the High Court under S. 439 will be invoked.⁵⁵

Where the Court has no jurisdiction to entertain a case the High Court cannot by a transfer invest it with jurisdiction to try it.⁵⁶ Where on the day of framing of the charge the Magistrate was of opinion that on the prosecution evidence the offence appeared to have been committed outside the local limits of his jurisdiction, held it was a fit case for the exercise of the powers under this clause.⁵⁷ Where the accused were convicted in a jury trial before the Additional Judicial Commissioner, Sindh and the matter was referred to the Judicial Commissioner and on appeal the matter was referred to a third Judge who set aside the conviction and directed a retrial and ordered under S. 526(c) that the case be transferred to the Sessions Judge, Hyderabad, held, he had really transferred the case under S. 423.⁵⁸

28. Under Sub-clause (1) (ii) 'to any other Criminal Court of equal or superior jurisdiction'.—The Court of a Presidency Magistrate is a Court of equal jurisdiction with that of the Chief Presidency Magistrate and the High Court has the power to transfer a case from the file of a Chief Presidency Magistrate to that of any other Magistrate.⁵⁹

Sub-clause (ii).—Both the Courts must be subordinate to the High Court concerned. Hence the Judicial Commissioner, Bilaspur has no jurisdiction to transfer a case to a court in Himachal Pradesh.⁶⁰ Original Criminal side of the Hyderabad High Court is subordinate to the Appellate side and a Division Bench of the High Court can transfer a criminal case from the

51. *Akbar Momin*, (1901) 6 CWN 202.

52. *Abdul Ally*, (1900) 2 Weir 151.

53. *Gundo Chikko*, (1921) 23 Bom LR 842.

54. *Girish Chandra Ghose v. Chandra Moni Dasi*, (1901) 8 GWN 589; *Chiranjil Lal*, (1927) 9 L 537; AIR (1928) L 1; *Abdul Rab v. Azmat Ali*, (1920) 18 ALJ 1145; *Ram Diya*, (1928) 107 IC 779, cf *Nityanand*, 9 CWN 619; *Ram*, 35 A 5; per Batty, J., in *Virji*, 6 Bom LR 856.

55. *Krishna Prasanna v. Jan Mohammad*, A

1949 Ass 69 : 51 Cr LJ 147.

56. *Nirandabai*, A 1954 B 337.

57. *Amarendra Nath v. Raghunath Nandan*, 56 CWN 107 : A 1952 C 849.

58. *Hari*, 39 CWN 929 PC : A 1935 PC 122 : 36 Cr LJ 978.

59. In re *Venkateswara Sastri*, (1911) 35 M 739 : 22 MLJ 114 : (1911) MWN 50 : 12 Cr LJ 451; *Harish Chandra Talcher Kar*, (1907) 10 Bom LR 201.

60. *Har Dev Sharma v. Balmukund*, 1953 Cr LJ 145 Bilaspur.

Judge on the Original side to a Sessions Judge.⁶¹ There is no bar to the High Court transferring a case under S. 107 of the Code from one District to another,⁶² but the power should be exercised in exceptional cases as it is inconvenient to transfer such proceeding.⁶³

29. Sub-clause (iii).—The High Court can withdraw a case to itself, see the case of *Krishna Murthy Iyer v. State of Madras*,⁶⁴ noted under sub-sec. (1)(e). The High Court has jurisdiction to transfer Criminal proceedings instituted under Ss. 107-110 from one District to another to a Court superior or equal jurisdiction.⁶⁵ When on an appeal from the Sessions Judge the High Court sets aside the conviction and directs a retrial before the High Court in its Original Side Sessions, it cannot be supported either under S. 423 or S. 526.⁶⁶ The High Court has power to withdraw the appeal from the Additional Sessions Judge and hear it itself.⁶⁷

30. Sub-section (1)(iv).—The jurisdiction to commit *de novo* a case triable exclusively by Sessions as also to cases not so exclusively triable.⁶⁸ A case in a Court without jurisdiction cannot be transferred since in such a case the case cannot be said to have been legally instituted.⁶⁹

Accused person here has been used in a wider sense^{69a} as was observed in *Mutsaddi Lal*^{69b} that expression has been used in a larger sense *i.e.*, the person over whom a criminal Court exercises jurisdiction.

31. Sub-section (1-A).—See notes under Effect of Amendment. Sub-section (1-A) has been added by Act 26 of 1955. Applications for transfer from a Presidency Magistrate should be made before the City Sessions Court in the first instance (*vide* City Sessions Court, West Bengal Act 20 of 1953) and from Presidency Magistrate in Greater Bombay *vide* Bombay Act 23 of 1951.

32. Sub-section (2).—See commentary under sub-section (1) (iii) *ante*. *Procedure* is the same as that applicable to the trial Court had the case not been withdrawn. Only where the trial is by the Sessions Judge and the High Court under sub-sec. (1) (iii), withdraws the case to itself for trial that it may direct under S. 267 the trial to be by Jury.

33. Sub-section (3).—This sub-section was new in the Code of 1898. See commentary under the heading 'Notice' under "Procedure" *ante*, as also "Statement of Objects and Reasons" quoted under that head. The High Court has the power under sub-sec. (3) of this section *suo motu* to direct trial of any case by any Magistrate considered fit by it, even though neither party has applied for it, and without acting on a report of the lower court.⁷⁰

Party interested.—The Patna High Court has held that a party to a proceeding under S. 145 is not entitled under S. 526 (8) to a postponement

61. *Kasim Hussain*, A 1951 Hyd 74 : 52 Cr LJ 487.

62. *Sarfuraz Ahmed*, A 1945 Oudh 186.

63. *Chandi Prasad*, 17 CWN 536.

64. A 1954 SC 406 : 1954 Cr LJ 1020 ; *Durga Prasad*, A 1932 N 289 : 1932 Cr LJ 1225.

65. *Wahid Ali Khan*, 32 A 642 : 11 Cr LJ 412(2).

66. *Sunil Chandra Roy*, A 1954 G 306.

67. *Durga Prasad*, A 1952 N 289 : 1952 Cr LJ 1225.

68. *Botling*, A 1934 Oudh 349 : 33 Cr LJ 928.

69. *Sikka Goundan*, A 1923 M 326 : 24 Cr LJ 351.

69a. *Jaggu Ahir v. Murli Shukul*, (1912) 34 A 533, following *Arumuga*, (1902) 26 M 188 ; *Gurudas Nag*, (1905) 2 CLJ 614.

69b. (1898) 21 A 107.

70. *Ahmed Moideen v. Inspector 'D' Division* A 1959 M 261 : 1959 Cr LJ 731 ; A 1952 N 289 : 1952 Cr LJ 1225.

for the purpose of enabling him to move the High Court to transfer the case, although the Magistrate in the circumstances of the particular case could have exercised a proper discretion in giving the first party time to cross-examine the second party's witnesses.⁷¹

Where a case is prosecuted by the State, the party interested include persons who lodge the First Information Report.⁷² Ordinarily the complainant or the Public Prosecutor or the accused are parties interested, but where the first information has occupied the position of the accused he can legally be a party interested.⁷³ A third party cannot object to transfer.⁷⁴ Party interested in S. 526(8) includes an informant under S. 107.⁷⁵

34. Sub-section (4).—For sustaining applications of transfer of criminal cases made on behalf of the State two things are necessary one is proof of the facts alleged and the other an affirmation that the State feels a real apprehension that there would be miscarriage of justice. The Deputy Superintendent of Police is not competent to speak for and in the name of the State.⁷⁶

Affidavit by Police-Officer, in an application for transfer by State, is not proper.⁷⁷ An Affidavit is completely useless when all the facts averred in it have not been verified by the deponent as being true to his belief.⁷⁸

An advocate can act upon instructions from the client but he should not make wreckless allegations against the Magistrate.⁷⁹

Every application when moved by a private party must be supported by an affidavit.

For *affidavit by accused* see commentary *supra* under that head. An application under S. 64 of the Code of 1872 corresponding to S. 526 should be made, *not by a letter to the English department of the High Court*, but to the Court in its judicial capacity, and should be supported by affidavit or affirmation in the usual way.⁸⁰

An affidavit in support of an application by the State should be sworn by a gazetted officer such as the Secretary or the Joint Secretary to the State Government.⁸¹ Where an affidavit filed along with an application for transfer under S. 526 was sworn before an officer of the District Judge's Court, *held*, the affidavit was not sufficient for the purpose of S. 526 (4) and the application could not be entertained.⁸² Although S. 539 uses the expression 'Judge' which includes an Additional Sessions Judge or Assistant Sessions Judge or a Subordinate Judge, under S. 19 I. P. C. illustration (b) Judge includes a Magistrate. For sustaining applications of transfer of cases made on behalf of the State two things are necessary, one is proof of the facts alleged and the other that the State feels a real apprehension that there would be a miscarriage of justice.⁸³

71. *Loke Mahaton v. Kali Singh*, (1927) 6 P 553; AIR (1927) P 351; *State v. Hassan*, A 1961 Ker 194.

72. *Jag Bhusan*, A 1962 A 288 (case under S. 526 (8) over ruling *Sri Krishna v. Baij Nath*, A 1953 A 698 : 1953 Cr LJ 1553).

73. *Rajendra Narayan v. Bhagaban*, A 1947 P 166.

74. *Brahma Dat*, A 1950 A 483.

75. *Om Radha*, A 1939 S 238.

76. *Additional Public Prosecutor v. Banuan*, (1958) MLJ (Cr) 73.

77. *State v. Ram Sia*, A 1950 A 727.

78. *Neem Chand*, A 1953 A 99 : 1953 Cr LJ

334.

79. *Ganwar*, A 1944 S. 155 : 46 Cr LJ 223; *Surya Bhunji*, A 1933 P 201 : 34 Cr LJ 1085; *Ahebam Gokulchand*, A 1957 Manipur 36.

80. *Zuhiruddin*, (1876) 1 C 219 (FB).

81. *State of U. P. v. Ram Bahadur*, A 1957 A 278 : 1957 Cr LJ 495.

82. *Mohim Chandra v. Amjad Ali*, A 1931 C 710 (1) : 33 Cr LJ 61 (S. 539 was referred to).

83. *Additional Public Prosecutor v. Banuan*, 1958 MLJ (Cr) 73; *Contra Bishan Lal*, A 1954 HP 57.

35. Sub-section (5).—This clause in the Code of 1898 was similarly worded as in the Code of 1882. The Amending Act XVIII of 1923 substitutes “if so ordered” for “if convicted” and provides for costs to the private prosecutor opposing the application which is not conditional on the conviction of the accused. The Legislature does not in this clause provide for the costs to be awarded to the accused as this clause refers to an application, by the accused although the Legislature has provided for costs of the successful party including the accused in sub-sec. (6-A) in cases of frivolous applications.

Even in directing a transfer on the ground of expediency in the interests of justice at the instance of the accused the High Court directed the State to pay the costs of the prosecution witnesses in the case of *Khetu Panday v. Mohim Nath Bisi*.⁸⁴

36. Sub-section (6).—When the transfer is sought at the instance of the accused, notice to the Public Prosecutor within 24 hours before the hearing of the application is mandatory ; sometimes we find as a matter of practice Rules are issued on Mondays, the usual motion dates of the Calcutta High Court, although the order is not signed by the learned Judges before 24 hours actually elapse. True, from this sub-section, which is the only sub-section requiring notice to the Public Prosecutor, it follows that the complainant need not give any notice to the Public Prosecutor ; sub-sec. (6-A), it is submitted, would be meaningless, if the complainant is absolved from giving notice to the accused unless the phrase “any person who opposes the application,” is restricted to the private prosecutor, which it does not obviously mean.

Where the Magistrate directed the issue of a non-bailable warrant of arrest against the accused and directed the sureties to show cause why their bonds should not be forfeited, *held*, it was not necessary for him to issue notice under Ss. 87 and 88 on the same day, the case should be transferred.⁸⁵

*Notice must be given to the accused regarding transfer.*⁸⁶ See Commentary *ante* under heading ‘Notice’.

37. Sub-section (6-A)—was inserted in 1923 and has been enacted to safeguard against frivolous and vexatious applications as also for the reason that the Legislature now in sub-sec. (8) has made provision for compulsory adjournment with the restriction mentioned in sub-sec. (9) relating to Sessions Cases. Where in the earlier enquiry which led to the prosecution of accused under S. 182 and when the prosecution of the accused was entrusted to a first class Magistrate, *held*, it was desirable in the interest of justice that the case should be heard by a judicial officer senior to the Additional District Magistrate.⁸⁷ There is no cast iron rule that the Government neither pays nor receives costs.⁸⁸

38. Sub-section (7)—saves the trial of judges and Public Servants as contemplated in S. 197 *supra*.

Though the exercise of the power under S. 197 (2) in so far as it relates to specification of the Court is discretionary but if in any individual case the power is not exercised it must be taken that the appropriate Government did not feel called upon to allot the case to a special Court and therefore the

84. (1903) 8 CWN 75.

85. *Sushil Kumar Chaudhury*, A 1960 P 160 : 1960 Cr LJ 501.

86. *In re Ramlinga Odayar*, (1927) 51 M

610.

87. *Makhan Singh v. Ranjit Singh*, A 1961 Punj 170 : 1961 (1) Cr LJ 552.

88. *Kanver*, 52 A 263 : A 1930 A 206 FB.

allotment by another Government under S. 14 Criminal Procedure Code would effect or nullify the power of the appropriate Government under S. 197 (2).⁸⁹

39. Sub-section (8).—This clause was S. 526-A in the Code of 1882 added by Act III of 1884. See commentary *supra* under the heading “Effect of Amendment”, “Report of the Select Committee”. As under the present sub-section adjournment to move the High Court at any stage has been rendered *compulsory* see *Satraj Singh*,⁹⁰ in cases of inquiry or trial the application may be filed at any stage and the application in cases of *transfer of appeals* should be filed before the commencement of the hearing of the appeal. See the comment on *Loke Mahton’s* case⁹¹ under the Commentary, headed “Procedure”. The Legislature should have inserted “party interested” in place of “the Public Prosecutor, the complainant or the accused” as it has used in sub-sec. (3).

Although it has been held that disobedience of the mandatory provisions of this clause is a good ground of transfer,⁹² *second adjournment to move the High Court* cannot be claimed as a matter of right.⁹³ See proviso to Sub-section (8).

Sub-section (8) was amended by Act 21 of 1932, S. 2. The proviso introduced by the amending Act of 1932 enacts that the Court is not bound to adjourn the case upon a second or subsequent intimation from the same party or when adjournment had been obtained by one of the several accused. The words added by the 1955 amendment are if the application is intended to be made to the same Court to which the party has been given an opportunity of making such an application. In the unamended Code the words were ‘before the commencement of the hearing’ and any number of applications for transfer used to be filed and trial delayed. Lortwilliams, J., in *Neamat Shah’s* case⁹⁴ held that adjournment could not be refused when application is made after the close of the defence case and before argument and dissented from the Madras view in⁹⁵. Sub-sec. (8) was amended in consequence of the decision in.⁹⁴ A case is not closed for the purpose of S. 526 (8) until the arguments are completed. Where however the Magistrate refused adjournment *bona fide* under the impression that since the defence evidence was closed in both the cases and they were posted only for arguments the application was not maintainable, the refusal of the adjournment was not a valid ground for transfer of the case.⁹⁶ The Magistrate is bound to grant an adjournment to enable a party to apply to the High Court for transfer.⁹⁷ No application or affidavit is necessary.⁹⁸ Cl. (8) as amended in 1932 makes it obligatory on the trying Magistrate to grant one adjournment to enable a party to apply to the High Court for transfer. Failure to grant the adjournment is a good ground for transfer of the case from his Court.⁹⁹ Prior to the amendment it

89. *M. K. Gopalan*, A 1954 SC 302 : 1954 Cr LJ 1012.

90. *Satraj Singh*, AIR (1924) A 533, followed in *Chiranjil Lal*, (1927) 9 L 537 : AIR (1928) L 1.

91. *Loke Mahton v. Kali Singh*, (1927) 6 P 553 : AIR (1927) P 351.

92. *Walidad Khan*, (1928) 26 ALJ 1321 : AIR (1929) A 48.

93. *Kishen Rai*, AIR (1928) A 753 ; *Luthur*, A 1930 A 263 ; *Pandurang*, A 1931 B 411 : 32 Cr LJ 116 ; *Ghulam Rasul*, A 1928 L 850.

94. 35 CWN 1112 ; 33 Cr LJ 31 (2).

95. *Godiraju*, A 1952 M 790 ; *Raghu*, A 1949 P 105.

96. *Medanki Adeyya v. Dittakavi Apparao*, A 1955 Andh WR 876.

97. *Pakira*, A 1944 M 78 ; *Nenumal Vishnudas*, A 1933 S. 307 ; *Abdul Rab v. Asmat Ali*, A 1920 A 533 ; *Chiranjilal*, A 1928 L 1 ; *Neamat Shah* 35 CWN 1112 (notification of intention is enough) *Nathu Ram*, A 1951 Raj 158.

98. *Neamat Sheikh*, 35 CWN 1112 ; *Richpal*, A 1954 A 69 ; *Harichand*, A 1931 L 59 ; *Mir Ahmed Khan*, A 1953 Hyd 188.

99. *Nenumal Vishnudas*, A 1933 S. 307 ; *Nathan*, 53 M 165 *Balliram v. Marubai*, A 1936 N 253 ; *Bhagat*, A 1942 Oudh 429.

was held that the Magistrate is not bound to entertain an application for adjournment to move the High Court, if it does not disclose the grounds.¹ The proper way to approach the Court is not by sending letters or telegrams. The party must either appear in person before the Court or he must make such application by a properly authorised agent.^{1a} Sub-sec. (8) does not deprive the Magistrate of jurisdiction to take what may be described as ancillary or interim measures, where acting under S. 526 (8) a Magistrate adjourns a case under S. 107 he has jurisdiction to pass an order under S. 117 (3) for interim security.²

Party interested.—Where the manager of the accused merely appeared in Court and gave a Vakalatnama to a lawyer to appear for him and the Court allowed the proceedings to go on, the procedure is irregular. The manager is not duly authorised to represent the accused, the execution of the bond is illegal.³ See notes under sub-sec. (3). The provisions of S. 526 leave it much open to argument how far it is within the content of those provisions that the State can apply for the transfer of a case from a Court on the allegation that its presiding officer is not expected to act fairly and judicially.⁴

Conflict between Private Prosecutor and the State Prosecutor.—Where the prosecution was in the hands of the Public Prosecutor on a charge-sheet having been submitted by the Police the right of a private prosecutor is subordinated to that of the State and his application for transfer cannot be entertained when the State opposes.⁵

'Inquiry or trial'.—The words "inquiry or trial" in S. 526 (8) are intended to apply to those inquiries and trials which are specially referred to in the earlier portion of the Code therefore a District Magistrate taking cognizance of an offence is not holding an enquiry within the meaning of this clause.⁶

The Legislature having deleted the expression "before the commencement of the hearing" after the words "criminal case" and having provided for the filing of such applications "in the course of any inquiry or trial" *i.e.*, at any stage, as also having deleted the words "an order being obtained thereon before the accused is called on for his defence", the following cases,⁷ which held that such person is not entitled to an adjournment if he had a sufficient opportunity between the time of presenting the application under cl. (8) and the time when "the accused was called for his defence", are no longer good law as the same are now applicable only in Sessions trial under cl. (9).

Can emergent orders be passed after an application for adjournment under this clause?—The Allahabad High Court has held that under cl. (8) it is the duty of the Court to stay all proceedings when an application

1. *Jamir Sheikh v. Murari Mohan Chaudhury*, 57 C 869 : 34 CWN 59 ; 31 Cr LJ 698.

1a. *In re P. D. Shandani*, A 1949 B 172 ; 52 Cr LJ 622.

2. *In re Sambandam*, A 1956 M 167 : 1956 Cr LJ 246 (2) ; *Haji Bagridi*, A 1928 A 268 : 29 Cr LJ 448 ; *Sahibdino*, A 1927 S. 148 ; *Harichand*, A 1931 L 59.

3. *State v. Hassamar*, A 1961 Ker 194 ; 1961 (2) Cr LJ 89.

4. *State of U. P. v. Ram Bahadur Singh*, A

1957 A 278 : 1957 Cr LJ 495.

5. *Jamuna Kanta Jha*, (1919) 4 PLJ 656 : 20 Cr LJ 648 : 52 IC 424.

6. *Muhammad Sarif v. Rai Hari Prasad Lal*, (1925) 5 P 229 ; see *Public Prosecutor v. Chokalingam Ambalam*, (1929) MWN 60.

7. *Dhone Krislo Samanta*, (1902) 6 CWN 717 ; *Joheruddin Sarkar*, (1904) 31 C 715 : 8 CWN 910 ; *Veerasami*, (1896) 19 M 375 (379, 380).

under cl. (8) is presented, but the jurisdiction of the Court does not cease in the sense that the Court cannot pass an emergent order which the law authorises to pass *e.g.*, orders under S. 117 (3).⁸ The reasoning adopted by the learned Judges in this case⁸ that S. 117 (3) would be meaningless if the Court after an application is presented under cl. (8) were to stop all proceedings or that the Court by passing an order under S. 117 (3) is not going on with the judicial proceedings in the case, does not seem to be correct.

It is submitted that the decision⁴ is wrong since sub-sec. (8) provides "any person interested" intimates the Court. In the former sub-sec. (8) the language used was "the Public Prosecutor, the complainant or the accused". The language 'any person interested' includes the State.

40. Proviso to sub-sec. (8).—In view of the insertion of sub-sec. (1-A) the first application must be made for the purpose of enabling the party to move the Sessions Judge, and after the Sessions Judge rejects the application the party interested may file a second application for time to move the High Court. But if the party had taken a month's time for moving the High Court, he cannot file a second application for the same purpose.

41. Forfeiture of the bond.—It is the practice to move the District Magistrate before moving the High Court for a transfer and the bond is not forfeited because the High Court has not been moved within the period allowed, if it can be shown that the applicant was in fact diligently taking steps which were necessary prior to the moving of the High Court.⁹ In view of the insertion of sub-sec. (1-A) by Act 26 of 1955 the party will now have to move the Sessions Judge and not the District Magistrate.

42. Sub-section (9)—is new and the reason for this difference in the procedure in cases of applications for adjournment in Sessions trial is, as pointed out in the *Statement of Objects and Reasons* :—

"The calenders of Sessions Courts, involving the convenience of jurors, assessors and parties are particularly liable to be upset by the postponement of cases." Trial with the aid of assessors has been repealed by the Amending Act of 1955.

In considering the question whether or not the applicant had ample opportunity before to file an application for transfer regard must be had to the fact whether or not the ground on which the application for transfer is proposed to be based existed earlier on same day accused applied under S. 526(8) to adjourn the case, the Court rejecting the application proceeded under sub-sec. (9), *held*, the case did not fall under S. 526(9).¹⁰

Explanation.—The explanation was added by the amending Act 21 of 1932.

Where a party intimates his intention to move for transfer and the Court adjourns the case, the party cannot be ordered to pay costs of the day.¹¹

8. *In the matter of three Vakils of Jhansi*, AIR (1928) A 316 SB.

9. *Hassaner*, ILR (1961) Ker 606 : A

1961 Ker 194.

10. *Saligram*, A 1937 A 171.

11. *Venkataram Chetti*, A 1942 M 178

43. Sub-section (10)—was inserted by Act 21 of 1932. It gives effect to the decision in *Neamat Sheikh's* case,¹² which held that the application under sub-sec. (8) can be made before the argument begins in the trial Court. This has been extended in the case of an appeal, before argument for admission of appeal, or in the case of an appeal which has been admitted, before the argument for the appellant begins.

44. Stay of proceedings by the High Court.—The Sessions Judge is not wrong in insisting upon the petitioner supporting his allegation relating to the order of stay of further proceedings by an affidavit on a date when he has not received a copy of the order from the High Court.¹³

The Magistrate ought to stay the proceedings if a letter from the Advocate, High Court intimating that the Rule has been issued and further proceedings have been stayed is shown to him by the party or the lawyer representing him. See the recent decision of the Supreme Court in¹⁴, in a contempt of Court case where it has been held that the order communicated by an Advocate who is an officer of the Court and which is supported by an affidavit from the party is a sufficient intimation that the Court had passed the order.

The Magistrate having once adjourned under S. 526(8) should continue to adjourn either until the date for making the application has passed and no application has been made, or if an application has been made, until an order has been obtained upon it.¹⁵

526A. High Court to transfer for trial to itself in certain cases.—(1) Where any person subject to the Naval Discipline Act (other than a person to whom that Act applies by virtue of the Indian Navy (Discipline) Act, 1934) or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to Section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury.

(2) The Central Government may, by notification in the Official Gazette, declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the notification.

SYNOPSIS

1. Legislative Changes.

2. State Amendment.
—Madras.

1. Legislative Changes.—This section was inserted by S. 32 of the Criminal Law Amendment Act, (XII of 1923).

Naval Discipline Act.—29 and 30 Vict. C. 109.

12. 35 CWN 1112.

13. *Ramnandan Prasad*, A 1957 P 67 : 1957 Cr LJ 223.

14. *Hosier v. Gurbacharan*, 1962 (2) Cr LJ 238 (SC) : A 1962 SC 1089.

15. *Md. Hussain*, A 1943 L 191.

Army Act.—44 and 45 Vict. C. 58.

Air Force Act.—7 and 8 Geo. 5 C. 51.

2. State Amendment.—

Madras.—In sub-sec. (1) for the words “try the case by jury” the words “try the case in accordance with the same procedure which a Court of Session would observe if the case were tried by that Court” were substituted by Madras Act 34 of 1955.

527. Power of Supreme Court to transfer cases and appeals.—(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion which shall, except when the applicant is the Attorney-General of India or the Advocate-General, be supported by affidavit or affirmation.

(3) The Court to which such case is transferred may act on the evidence already recorded or partly so recorded and partly recorded by itself, or it may re-summon the witnesses and recommence the inquiry or trial :

Provided that in any case so transferred the person accused may, when the Court to which the case is transferred commences its proceedings, demand that the witnesses or any of them be re-summoned and reheard.

(4) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —1923 and 1952. |
| 2. Legislative Changes. | 3. Scope. |

1. Corresponding sections in former Codes.—This section corresponds to S. 64A of the Code of 1872, S. 11 of Act XI of 1874 and S. 527 of the Code of 1882 was similarly worded as that of the Code of 1898.

2. Legislative Changes.—The word “criminal” before the word “case” in sub-sec. (1) was omitted by S. 140 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

The amendment is consequential upon the deletion of the word "criminal" in S. 526 (1) (ii), (iii) *supra*.

This section was substituted for the old section by the Criminal Procedure (Amendment) Act 23 of 1952.

3. Scope.—This section is supplementary to S. 526 and confers powers on the Supreme Court to transfer cases and appeals from one High Court to another. Power of High Court to punish for contempt being inherent it is a special jurisdiction not governed by the Criminal Procedure Code. So the Supreme Court cannot transfer contempt proceedings from one High Court to another.¹⁶ Where an accused appeals from his conviction for an attempt to murder the Chief Justice of a High Court and applies for a transfer of Appeal to some other High Court on the ground that he will not have a fair and impartial hearing of the appeal in the State High Court which is presided over by the complainant it is a fit case for transfer. The appeal was transferred to the Bombay High Court from the Mysore Court.¹⁷ Where in a defamation case against certain Christians by non-Christians there is unanimity of testimony from both sides about the nature of the communal tension in that area the local atmosphere is not conducive to a fair and impartial trial and there is a good ground for transfer.¹⁸

528. Sessions Judge may withdraw cases from Assistant Sessions Judge.—(1) Any Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge subordinate to him.

(1A) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(1B) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (1A) he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

(1C) Any Sessions Judge, on an application made to him in this behalf, may, if he is of opinion that it is expedient for the ends of justice, order that any particular case be transferred from one Criminal Court to another Criminal Court in the same sessions division.

District or Sub-divisional Magistrate may withdraw or refer cases.—(2) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any

16. *Sukhdev Singh v. Judges of Pepsu Court* 1954 SCR 464: A 1954 SC 186: 1954 Cr LJ 460.

17. *L. S. Raju v. State of Mysore*, A 1953

SC 435: 1953 Cr LJ 1833; *Kuldip Singh*, A 1956 SC 391.

18. *Francis v. Banka Bihary Singh*, A 1959 SC 309: 1958 Cr LJ 569.

Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

Power to authorize District Magistrate to withdraw classes of cases.—(3) The State Government may authorize the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

(4) Any Magistrate may recall any case made over by him under Section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a village under the Madras Village-police Regulation, 1816, or the Madras Village-police Regulation, 1821, is a Magistrate for the purposes of this section.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 12. Additional Chief Presidency Magistrate how far subordinate to Chief Presidency Magistrate. |
| 2. Legislative Changes.—1923, 1946 and 1955. | —Cancellation order by superior Magistrate. |
| 3. State Amendments. | 13. May withdraw. |
| —Bombay. | —Any case. |
| —Saurashtra. | 14. Transfer to a Magistrate having no local jurisdiction. |
| —Uttar Pradesh. | 15. Cases remanded by Sessions Judge. |
| 4. Effect of 1955 Amendment. | 16. Notice to opposite party. |
| 5. Scope. | —Is want of notice a mere irregularity. |
| 6. Sub-section (1). | —When notice may be dispensed with. |
| 7. Sub-section (1-A). | 17. "Subordinate to him". |
| 8. Sub-section (1-B). | —Any Magistrate subordinate to him. |
| 9. Sub-section (1-C). | 18. Sub-section (3). |
| 10. Sub-section (2). | 19. Sub-section (4). |
| —Concurrent powers of District Magistrate and Sub-Divisional Magistrate. | —On transfer will the proceedings commence <i>de novo</i> . |
| 11. Power of Court to act on evidence taken by the transferee Court. | 20. Sub-section (5). |
| —Power of District Magistrate to transfer case. | —Recording of reasons if essential. |
| —Where Sub-Divisional Magistrate had refused the application. | 21. Sub-section (6). |

1. Corresponding sections in former Codes.—This section corresponds to S. 44, last paragraph, S. 47 and S. 48 of the Code of 1872. Section 528 of the Code of 1882 was similarly worded as that of the Code of 1898 with this modification that the words "*Chief Presidency Magistrate*" were inserted in the latter Code.

2. Legislative Changes (1923).—Sub-sections (1) and (4) were inserted by S. 147 of the Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923), original sub-secs. (1), (2) and (3) were renumbered as (2), (3) and (5) and sub-sec. (6) was substituted for original sub-sec. (4) after it was renumbered as sub-sec. (6) by *ibid*.

Legislative Changes (1946).—Sub-sections (1-A) and (1-B) were inserted by Act 3 of 1946.

Legislative Changes (1955).—In sub-sec. (1) after the words “any case” the words “or appeal” were added ; in sub-sec. (1-B) the words “recalls a case or appeal under sub-sec. (1) or sub-sec. (1-A)” were substituted for the words “recalls a case under sub-sec. (1) or recalls a case or appeal under sub-sec. (1-A)” ; and sub-sec. (1-C) was inserted by Act 26 of 1955.

3. State Amendments.—

Bombay.—In sub-sec. (2) the words ‘or Sessions Judge’ were substituted for the words ‘District Magistrate or Sub-divisional Magistrate’ and in the marginal note to the said sub-section, the words “Chief Presidency Magistrate or a Sessions Judge” were substituted for the words “District or sub-divisional Magistrate” by Bombay Act 23 of 1951.

The original sub-sec. (6) was substituted by a new sub-section by Bombay Act 30 of 1946 and the said new sub-sec. (6) was repealed by Bombay Act 23 of 1951.

“Sub-section (3-A)—Where the District Magistrate authorised under sub-sec. (3) withdraws any case from any Magistrate subordinate to him, he may inquire into or try such case himself or refer it for inquiry or trial to any other Magistrate subordinate to him and competent to inquire into or try the same”—inserted by Bombay Act 8 of 1954.

Saurashtra.—Same as the Bombay amendment excepting that the words “and may inquire into or try such case himself” were omitted, *vide* Saurashtra Act 4 of 1952.

Uttar Pradesh.—In sub-sec. (1-A) the words “or withdraw any case or appeal pending before any Additional Sessions Judge” were substituted for the words “any case or appeal which he has made over to any Additional Sessions Judge” by U. P. Act 28 of 1951.

4. Effect of 1955 Amendment.—Sub-section (1-C) is in conformity with sub-sec. (1-A) of S. 526 which provides that an application under S. 526 is not entertainable unless the party had moved the Sessions Judge under S. 528 in the first instance in a case where the transfer is asked for from one Criminal Court to another in the same Sessions division for sub-sec. (1-A) and (1-B) *see* notes under these sub-sections. An adjournment is obligatory whether the application is under S. 526 or 528.

5. Scope.—The provisions of this section give the Magistrate a very wide discretion of withdrawing cases from one Magistrate and transferring it to another. The Court must exercise its judicial discretion and not act arbitrarily.¹⁹

The District Magistrate has as much power to transfer under S. 528 (2) as the High Court has under S. 526 but neither the District Magistrate nor the High Court ought to transfer a case where the Magistrate has no jurisdiction.²⁰

Case should not be transferred merely on the basis of general allegations regarding communal feeling.²¹ This section should be read with S. 526 (1-A).

6. Sub-section (1).—“In order to facilitate arrangement for the disposal of Sessions business, it is proposed to empower Sessions Judges to withdraw or recall cases from the files of Assistant Sessions Judges. This question does not arise in the case of appeals as they are heard by Sessions or Additional Sessions Judges”—*Statement of Objects and Reasons*.

7. Sub-section (1-A).—Before the trial of Sessions case or the hearing of the appeal made over to an Additional Sessions Judge, the Sessions Judge may recall any case or appeal and proceed in the manner indicated in sub-section (1-B).

8. Sub-section (1-B).—The Sessions Judge after withdrawal of the case or appeal, may either hear it himself or transfer it for trial or hearing.

19. *Mohanlal Dwarkadas v. P. Banerjee*, 53 CWN 291 : 50 Cr LJ 521 ; *Rajendranath v. Dwijapada*, 48 CWN 583 : 48 Cr LJ 169 [cases under sub-section (2).]

20. *In re Chalappa Chettier*, A 1942 M 715.

21. *Gwarahandan Das*, A 1930 L 168 ; *Shantaram Govindram*, A 1961 MP 1.

9. Sub-section (1-C)—was inserted by Act 26 of 1955. It is now obligatory that a person seeking the transfer of his case from one criminal Court to another in the same Sessions Division must first go to the Sessions Judge of his division and he may come to the High Court only if he is aggrieved by his order and not before.²²

The word 'case' in Section 193 (2) may cover a petition filed under Section 528 before the Sessions Judge. It undoubtedly differs from the word 'appeal' or 'revision'. Petition under Section 528 filed before the Sessions Judge can be made over under Section 193 (2) to the Additional Sessions Judge, Order by the latter under Section 528 is not without jurisdiction.^{22a}

10. Sub-section (2).—The words "Chief Presidency Magistrate" were new in the Code of 1898. A Chief Presidency Magistrate can transfer a case from one Presidency Magistrate to another.²³

Concurrent powers of the District Magistrate and the Sub-divisional Magistrate under sub-section (2).—In the matter of a transfer under this section the District Magistrate and Sub-divisional Magistrate have co-ordinate authority over Magistrates subordinate to the Sub-divisional Magistrate and no appeal lies to the District Magistrate against the order passed by the Sub-divisional Magistrate.²⁴ The Madras High Court in *Santhappa Sethuram v. Govindswamy Kandiyyer*²⁵ refused to follow *Raghunath's* case²⁴ holding that the decision in *Thaman Chetti*, 14 M. 399 was not brought to the notice of the learned Judges in *Raghunath's* case.²⁴

11. Power of Court to which a case is transferred to act on evidence taken by the Court from which it came.—Section 350 is not limited to cases in which Magistrates succeed each other in their offices, but applies also to all cases transferred from the file of one Magistrate to that of another under Section 528.²⁶ See in this connexion Section 350 (3) added by the amendment. See also Section 350 (1) as amended by Act 26 of 1955.

Power of District Magistrate where Sub-divisional Magistrate has previously refused to transfer on application by the same party.—A District Magistrate is not precluded from exercising his powers of transfer under this section on the application of a party by reason of the fact that the Sub-divisional Magistrate refused to transfer the case at the request of a party.²⁵ A contrary view was held in *Narayanasamy Aiyer v. Kuppasamy Aiyar*.²⁷

12. Additional Chief Presidency Magistrate how far subordinate to the Chief Presidency Magistrate.—The Additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate who has powers under Section 528 to make the order withdrawing a case to his own file,²⁸ and similarly an Additional District Magistrate is subordinate to the District Magistrate for the purposes of Section 192 (1), Section 407 (2) and Section 528 (2) and (3). *Vide* Section 10 (3) added by Act XVIII of 1923. Section 407 has been repealed by Section 81 of Act 26 of 1955.

Transfer order of, by competent Magistrate—cancellation of order by superior

22. *Pratinpa*, A 1958 Raj 282 : 1958 Cr LJ 1349.

22a. *V. P. Seth*, A 1964 AP 59.

23. *Murgesa Mudaliar*, (1902) 13 MLJ 69.

24. *Raghunatha Pandaram*, (1902) 26 M 130.

25. (1917) 40 M 791.

26. *Mohesh Chandra Saha*, (1908) 35 C 457, followed in *Palainandy Gounden*, (1908)

32 M 218 and *Nanhua*, (1914) 36 A 315; see *cantra Augnu*, (1889) AWN 130.

27. (1915) 5 LW 372 : 18 Cr LJ 57 : 37 IC 41.

28. *Mohini Mohan Roy v. Punam Chand Sethie*, (1924) 28 CWN 903, following *Santhappa Sethuram v. Govindswamy Kandiyyer*, 40 M 791 and dissenting from *Raghunath Pandaram*, 26 M 130 (132).

Magistrate without notice to party who obtained original order, legality of.—When a complainant has obtained from a competent Magistrate an order of transfer of a case made after hearing both the parties, a Magistrate of superior jurisdiction should not cancel the order and re-transfer the case to the original Magistrate without hearing the complainant in support of the order of transfer.²⁹ The District Magistrate *has no appellate powers* as regards the order of the Sub-divisional Magistrate withdrawing a case from the Subordinate Magistrate.³⁰ But after a case has once been referred to another Magistrate, a District Magistrate cannot pass an order in the case unless he has *formally* withdrawn or recalled it to his own Court.³¹

13. 'May'.—The powers under this section are very large,³² but it is not intended that the powers should be exercised without due discretion and really good reasons which in the interests of the administration of justice demand a transfer.³³

'Withdraw'.—A desire to inform himself as to the nature of the dispute between a landlord and his tenants in a particular estate is not a *sufficient reason* for the withdrawal of the case under this section by the District Magistrate.³⁴ The Magistrate of the District has the authority to call up to his own Court any criminal case without limitation as to the stage of proceeding at which it may be called. If the Magistrate, having in the exercise of his authority withdrawn any case, finds that it did not come within the jurisdiction of his Magistracy he would not merely be competent but *bound* to refuse to proceed further with the case.³⁵

The sub-divisional Magistrate can withdraw a case from any Magistrate and transfer it to another Magistrate although he had not taken cognizance of it.^{35a}

The fact that a Magistrate is transferred is no ground for the District Magistrate withdrawing the case to his own file and dealing with it. The case should go either to the sub-divisional Magistrate or the successor of the trying Magistrate.^{35b}

'Any case'.—The word 'criminal' before 'case' in Section 526 having been deleted we need not discuss the cases bearing on that. Even under the Code of 1898 the expression was 'any case'. The Courts mentioned in subsection (2) have the power to withdraw any case *e. g.* cases under Chapter VIII,³⁶ Sections 133, 144, 145, 147³⁷ and 488³⁸ and it includes proceeding upon a complaint.³⁹ See Commentary on Section 192 *supra* at pp. 612-614.

14. Transfer to a Magistrate having no local jurisdiction.—A District Magistrate has no power under Section 528 to make over the initiation of proceedings in a case under Section 107 to a Magistrate who has no local jurisdiction in the matter.⁴⁰ Where the High Court transferred a case under Section 110 initiated before a Magistrate of the first class the District

29. *In re Manikkam Pillai*, (1920) 39 MLJ 714 : (1920) MWN 767: 22 Cr LJ 199: 60 IC 55.

30. *Kishori Lal*, AIR (1928) A 546.

31. *Grish Chandra Ghose*, (1871) 16 WR (Cr) 40.

32. *Umrao Singh v. Fakir Chand*, 3 A 749.

33. *Ghansham v. Waryam*, 13 PR 1899: PLR No. 2 of 1900.

34. *Amrit Majhi*, (1919) 46 C 854 (860): 23 CWN 623.

35. *Vilatee Khanum*, (1875) 24 WR (Cr) 4.

35a. *Khirode Gopal Saha*, 58 CWN 765: A

1955 C 111.

35b. *Gurupada*, A 1948 C 78.

36. *Dinendro Nath Sanyal*, (1882) 8 C 851; see *Chintamony*, 35 C 243 (246).

37. *Dhanpat Singh v. Chatterput Singh*, (1893) 20 C 513; *Asaram*, 24 Cr LJ 407, *Satish Chandra Panday v. Rajendra Narain Bagchi*, (1895) 22 C 898 (901).

38. *Ghulam Rukia v. Niaz Ali*, PR 5 of 1905 Cr.

39. *Asram v. Bhagirathi*, (1911) 7 NLR 97: 12 Cr LJ 437.

40. *Nagireddy, Kone Reddy*, (1917) 41 M 246.

Magistrate who was instructed in the said order to transfer the case to a competent Magistrate could not transfer the proceedings to a Magistrate of the 2nd class for disposal.⁴¹

The words 'for inquiry or trial' used in sub-section (2) mean a full trial and not a partial trial based on the evidence partly recorded by the Magistrate on the evidence recorded by the other Magistrate from whose file the case was transferred.^{41a}

15. Cases remanded by Sessions Judge.—The District Magistrate has no jurisdiction to transfer a case from the file of a subordinate Magistrate to whom it has been remanded by the Sessions Judge for further inquiry.⁴²

A party seeking a transfer not outside the District has to move the Sessions Judge under *sub-section (1c)* for withdrawing a case to his own file and then transfer to some other competent Magistrate. Even in cases where one has to move the High Court one has to move the Sessions Judge under this section although he may move the High Court direct in cases where the transfer is sought outside the District. The Magistrate mentioned here may also act *suo moto* as in Section 526 (3). 'Grounds', 'Affidavits' etc. will be the same as under Section 526 *supra*.

Convenience of the accused must be taken into consideration.⁴³

16. Notice to opposite Party.—When an application is made to the Sessions Judge of a District for the withdrawal or removal of a case from the Court of a Subordinate Magistrate by one of the parties to such a case, notice of such application should be given to the opposite party, and an opportunity should be afforded to him, if desirous of doing so, to show cause against its being granted.⁴⁴

Notice if essential under this section or the omission a mere irregularity.—"The order of the District Magistrate does not give any reasons for the transfer as required by Section 528 nor was any notice given to the petitioner. It has frequently been held by this Court that a case should not be transferred without notice to the parties,⁴⁵ on the other hand, this rule has been relaxed in cases where the Magistrate himself asked for a transfer⁴⁶; and as regards the omission to record reasons for the transfer it has been held in *Dukhi Kewat*⁴⁷, to be only an irregularity"⁴⁸. In *Virji's* case⁴⁹ want of notice was held by the Bombay High Court to be an irregu-

41. *Govind Sahai*, (1914) 37 A 20.
41a. *In re Gamla Pillai*, A 1961 M 342.
42. *Akhil Dome v. Ram Chandra Mandal*, (1908) 8 CLJ 241.
43. *Jagdamba Sahay*, (1928) 29 Cr LJ 373 : 108 IC 329.
44. *Umrao Singh v. Fakir Chand*, (1881) 3 A 749 (752), followed in *In the matter of Teacotta Shikdar*, (1882) 8 C 393 ; *Ajodhya Lal v. Prag Narain*, (1902) 7 CWN 114 ; *Jogeshwar*, A 1929 A 932 : 31 Cr LJ 36 ; *Mugha v. Rattan Singh*, A 1950 HP 42 ; *Chhota Lal*, A 1935 A 815 ; 38 Cr LJ 918 ; *L. Dwarka Das*, A 1931 L 29, *Kanaichi Ammal*, A 1929 M 11 ; *Karanchandra*, A 1927 N 244 (notice not essential but should be given).
45. *In re Daud Hussan*, (1889) Rat. Unrep. Cr Ca 460, *In re Ratanji Premji*, (1889) Rat. Unrep. Cr Ca 474, *In re Nageshwar*, (1899) 1 Bom LR 347 ; *In re Krishna Anant Rai*, (1896) Rat. Cr Ca

877: *In re Mahaddu*, (1892) Rat. Cr Ca 590 ; *Sadashiv*, (1896) 22 B 549 ; see to the same effect *In re Ramlinga Odayar*, (1927) 51 M 610, not cited in *Sripad*, 30 Bom LR 70 ; *Jogindra Singh v. Amar Singh*, A 1952 Pepsu 97 : 1952 Cr LJ 1046.
46. *In re Haraji Sakham*, (1918) 21 Bom LR 276 : 20 Cr LJ 320 : 50 IC 496 ; *Kuppumuthu Pillai*, (1900) 24 M 317.
47. (1906) 28 A 421.
48. *In re Shripad Chandravarkar*, (1927) 52 B 151 (158) : 30 Bom LR 70. See the comment of this case under Section 488 *supra*.
49. *In re Virji*, (1904) 6 Bom LR 856 ; see to the same effect *Rahom Ghani v. Fazal Elahi*, (1926) 28 Cr LJ 38 : 99 IC 70 : AIR 1927 L 80 (2) ; *Udhmal Karmanal*, A 1938 S 205 ; *Balliam*, A 1945 N 56 ; *Kumarswami*, A 1942 M 221 ; *Hariram*, A 1933 L 485 ; *Kamal*, A 1938 A 517 ; 39 Cr LJ 878 ; *V. P. Seth*, A 1964 AP 59,

larity, where the earlier view,⁵⁰ which held that an order of transfer under Section 528 without notice is illegal, was doubted. The Patna High Court has also held that the omission is a mere irregularity.⁵¹

When notice may be dispensed with.—An order for the transfer of a case, made *at the request of the Magistrate* on whose file the case stands, and not on the application of the party, is an exception to the general rule that an order of transfer should not be made under Section 528 without notice to the other side.⁵² Under special circumstances such order can be made without notice.⁵³

Notice to complainant—where the District Magistrate transfers a case from the file of subordinate Magistrate to his own is not required.⁵⁴

17. 'Subordinate to him'.—An Additional District Magistrate is subordinate to the District Magistrate for the purposes of sub-sections (2) and (3) of this section and Section 407 (2) and Section 192 : *see* Section 10 (3) as amended. In cases of *Additional Chief Presidency Magistrate* he would not be subordinate to the Chief Presidency Magistrate unless the State Government has defined the extent of the subordination, *vide* Section 21 (2). It was held in *Prakash Chunder Dutt*⁵⁵ that the Code did not define the relations between a District Magistrate and an Additional District Magistrate : *see* Section 10 (3) added by Act XVIII of 1923. Hence this view has been modified. Section 407 has been repealed by Act 26 of 1955.

"Any Magistrate subordinate to him".—A District Magistrate has power to withdraw any case from a subordinate Magistrate even though he has not made it over to him and may refer it for enquiry or trial to any other Magistrate subordinate to him and competent to enquire with or try the same. If the Sub-divisional Magistrate has rejected an application under Section 528 (2) it is open to the aggrieved party to move the District Magistrate.⁵⁶ Now one has to move the Sessions Judge.

18. Sub-section (3).—*See* Section 529 (i)—withdrawing a case and trying it himself under this section erroneously in good faith does not vitiate the conviction.

19. Sub-section (4)—is new in the Code as amended in 1923. Referring to this clause the *Select Committee* observed as follows :—

"We think that some of the powers which the new sub-section (4) proposes to confer are already provided for by sub-section (2) of Section 192. We also think that this new sub-section goes too far in providing unnecessary powers of transfer of cases within the district and actually in enabling a District Magistrate to confer on a subordinate Magistrate powers which he does not himself possess. We think it sufficient to provide first class Magistrates with a power to withdraw cases or recall cases made over to Magistrates subordinate to them under sub-section (2) of Section 192, and we

50. *Sadashiv Narayan*, (1896) 22 B 459, *In re Nageshwar Sitaram*, (1899) 1 Bom LR 347 and *Vedu Bapu v. Bhagwandas*, (1902) 5 Bom LR 28.

51. *Gobinda Swami*, (1922) 2 P 333 : (1923) Pat. Supp. CWN 47 ; *Kamalchin*, A 1929 M 51.

52. *Kuppumuthu Pillai*, (1900) 24 M 317 ; *Abdullah*, (1909) 3 PR 1910 Cr : 35 PWR 1909 Cr : 11 Cr LJ 150.

53. *In re Masha Sabjee Sahib*, (1903) 11 Cr LJ 533 : 8 MLT 222 : 7 IC 856, following *Aligrisami Naidu*, 26 M 41.

54. *In re Dukhi Kewat*, (1906) 28 A 421 : 3 ALJ 224 : 3 Cr LJ 327.

55. (1907) 34 C 918 no longer good law.

56. *Kishori Bala Sohail v. Bhagwandas*, A 1956 C 266 : 1956 Cr LJ 741 ; *Sagarmal*, A 1936 S. 281.

think it unnecessary to confer any further power in respect of the transfer of cases upon Presidency Magistrates." See Commentary on Section 192 (2) *ante*, p. 614.

On transfer will the proceedings be commenced de novo?—See Section 350 (3) introduced by the Amending Act XVIII of 1923 under which the Magistrate from whose file the case has been transferred ceases to exercise jurisdiction and the provisions of Section 350 will apply to the case of his successor, *i. e.* it was the right of the *accused* to demand a *de novo* trial under the unamended Section 350. Upon the amendment of Section 350 by Act 26 of 1955 the trial shall be continued from the stage at which it was left by the predecessor of the Magistrate to whom the case had been transferred *see case*^{56a}.

20. Sub-section (5).—It was originally sub-section (3) which has been renumbered. This sub-section was not in the Code of 1882, but was inserted by Act III of 1884.

Recording of reasons if essential.—Omission to record reasons has been held to be an irregularity,⁵⁷ but the Madras High Court held the omission to be an illegality.⁵⁸ The Patna High Court has held that this section in terms does not require that the Magistrate should give any reason, but it is a sound rule of practice that there should be something on the record showing why the order was made.⁵⁹

21. Sub-section (6)—was originally sub-section (4) in the Code of 1898 renumbered as sub-section (6) with the addition of *the Madras Village Police Regulation*. The amendment in 1898 has superseded *Madavaraya v. Subba Rau*⁶⁰ which held under the Code of 1882 that a village Magistrate was not a Magistrate under the Code from whose file the case could be transferred.

The words "*or the Madras Village Police Regulation, 1821*" follow the decision in *Sevakolandai v. Ammayan*.⁶¹

CHAPTER XLIVA.—[*Supplementary provisions relating to European and Indian British subjects and others.*] *Sections 528-A to 528-D Rep. by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), Section 3 (with effect from the 6th April 1949.)*

CHAPTER XLV

OF IRREGULAR PROCEEDINGS

529. Irregularities which do not vitiate proceedings.

56a. *Ananta Gopal Shastri v. The State of Bombay*, A 1958 SC 915 followed in *Raghunath Prasad*, A 1959 A 345.

57. *In the matter of Dukhi Kewat*, (1906) 28 A 421, followed in *In re Shripad Chandra Varkar*, (1927) 52 B 151 (158) : 30 Bom LR 70 ; *Nobocoomar Bannerjee*, (1870) 14 WR (Cr) 12 : 5 BLR App. 45 (case under S. 36 of the Code of 1851).

58. *Venkatachalam Chetti v. Chairman Municipal Council*, (1915) 16 Cr LJ 626 : 30

IC 450 ; *Sardara*, 5 LLJ 230 : 24 Cr LJ 187.

59. *Mahammad Sharif v. Rai Hari Prasad Lal*, (1925) 5 P 229 (233) ; *Prakash*, 34 C 948 ; *Jokhram*, A 1947 P 339 ; *Ahebam Gokul Chand*, A 1957 Manipur 32 (failure to record reasons will not vitiate proceedings unless it has prejudiced the accused).

60. (1891) 15 M 94.

61. (1902) 26 M 395.

—If any Magistrate not empowered by law to do any of the following things, namely:—

- (a) to issue a search-warrant under Section 98;
- (b) to order, under Section 155, the police to investigate an offence;
- (c) to hold an inquest under Section 176;
- (d) to issue process, under Section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;
- (e) to take cognizance of an offence under Section 190, sub-section (1), clause (a) or clause (b);
- (f) to transfer a case under Section 192;
- (g) to tender a pardon under Section 337 or Section 338;
- (h) to sell property under Section 524 or Section 525; or
- (i) to withdraw a case and try it himself under Section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Clause (e). |
| 2. Scope. | 6. Clause (f). |
| 3. Clause (a).
—not empowered by any law. | 7. Clause (g). |
| 4. Clause (b). | 8. Erroneously and in good faith. |
| | 9. Irregularities curable. |

(This section and the next deal with irregularities on the part of the Magistrates).

1. Corresponding sections in former Codes.—This section corresponds to Sections 32 and 34, clause (9) of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope.—Schedules III and IV specify the ordinary powers of Magistrates of different classes and the additional powers with which the persons by whom they may be invested.

This section makes it quite clear that the proceeding mentioned therein shall not be set aside “merely” on the ground of the Magistrate not being empowered by law. Where there are other grounds on which the proceedings are questioned this section cannot be availed of.⁶²

3. Clause (a) ‘not empowered by any law’—i. e., whether by the Code of Criminal Procedure or by any special or local law.

62. *Tulshidas Rakhit v. N. N. Khosal*, 56 CWN 198 : 1953 Cr LJ 344.

If there is no jurisdiction consent cannot confer the same.⁶³

4. Clause (b).—Where the Magistrate duly took cognizance of the case the order to the Prosecuting Inspector to investigate the complaint does not affect the validity of the subsequent proceedings.⁶⁴

5. Clause (e).—Under clause (e), if any Magistrate not empowered by law to take cognizance of an offence under Section 190 (1) (a) or (b) erroneously in good faith takes such cognizance his proceedings cannot be set aside merely on the ground of his not being so empowered.⁶⁵ Unless prejudice is caused, if a Magistrate not empowered by law takes cognizance of an offence under Section 190 (1) (a) or (b) the conviction cannot be set aside,⁶⁶ but the proceedings are void under Section 530 (k) if the Magistrate not empowered takes cognizance under Section 190 (1) (c).

Where a Magistrate of the first class though not empowered to do so takes in good faith cognizance of an offence under Section 190 (1) (a) and (b) the defects in the absence of any prejudice to the accused is covered by Section 529.⁶⁷

6. Clause (f).—Where a transfer is not authorised under Section 192 (2) of the Code the proceedings may be saved under clause (f).⁶⁸

Where a conditional order is made under Section 133 by a sub-divisional Magistrate and on appearance of the person the case is transferred to a competent Subordinate Magistrate the transfer order will be an irregularity curable under Clause (f) of this section.⁶⁹

Where a District Magistrate transfers a case under Section 144, even assuming that he had not the power to transfer, it is covered by this clause (f).⁷⁰

Where a District Magistrate appoints Sub-divisional Magistrate during his tour and such Magistrate not being empowered under Section 192 transfers the case to his own file, held that the transfer is valid under Section 529 (f).⁷¹

Where a Special Judge appointed under the West Bengal Special Courts Act of 1952 had no jurisdiction to take cognizance in December 1952 took cognizance of an offence under Section 165-A I. P. C. he must be deemed to have acted erroneously in good faith, the provisions of Section 529 (e) would apply.⁷²

When *Bhajahari's* case⁷² went to the Supreme Court, Kapur J. held :—

“The Section 529 (e) applies to Magistrates and would not apply to a special judge whose jurisdiction arises not on his taking cognizance under

63. *Bholanath*, 2 C 23 ; *Jethalal*, 7 Bom LR 527.

64. *Chidambaram Pillai*, (1908) 32 M 3 (11). See *Gulab Singh*, A 1962 B 268 : 1962 (2 Cr LJ 741.

65. *Bengali Gope*, (1926) 5 P. 448 ; *Makbuluddin*, A 1950 A 5 : 51 Cr LJ 222 ; *Chunilal*, A 1933 A 399 ; 34 Cr LJ 761 ; *Bhat*, A 1931 A 517 ; *Nishan*, A 1955 E P. 65.

66. *Chunilal*, A 1933 A 399 ; 34 Cr LJ 765 ; *Asha Das*, A 1953 Ass 1 ; 1953 Cr LJ 168 ; *Khemchand*, A 1927 A 79.

67. *Purshottam*, A 1954 SC 700.

68. *Akbar Ali Khan v. Domi Lal*, (1900) 4

CWN 821 ; *Dasrath Rai*, (1909) 36 C 869 ; *Kishori Lal Roy v. Srinath Roy*, (1908) 36 C 370 ; see *Hasanali Mujawar*, (1928) 30 Bom LR 653 : AIR (1928) B 286.

69. *Tejnarain Singh*, A 1945 P 316 : 47 Cr LJ 179.

70. *Sevagan Chettiar v. Karupan Chettiar*, A 1937 M 487 ; 38 Cr LJ 884.

71. *Ram Krishna Sinha*, 42 CWN 246 : 39 Cr LJ 417.

72. *Bhajahari Mondal*, A 1955 C 385 : 1956 Cr LJ 991 reversed in *Bhajari Mondal*, A 1959 SC 8.

Section 190 but on the case for an offence specified in the schedule being distributed to him by the State Government by a notification".⁷³

7. Clause (g).—Where the Magistrate of a particular District had no jurisdiction under the circumstances to make the tender of pardon which he did, *held*, that his action was not covered by this clause.⁷⁴

Section 529 saves proceedings of the Magistrate who, not empowered by law to tender a pardon under Section 337 or Section 338, erroneously in good faith tendered the pardon. The essential conditions for the application of the section are that the Magistrate who tenders the pardon has no power to do so and that he does it erroneously in good faith.⁷⁵

A pardon under Section 337 (1) granted *bona fide* is fully protected by Section 529.^{75a}

8. Erroneously and in good faith.—These words do not protect deliberate negligence and wilful disregard of the clear provisions of the Code and the binding decisions of the High Court.⁷⁶

In view of the provisions of this section, want of jurisdiction to transfer a case under Section 192 by reason of the transferring Magistrate not having taken cognizance of the case would not render invalid subsequent proceedings, provided it can be shown that the transfer was made erroneously and in good faith.⁷⁷

9. Irregularities curable.—Irregularities during the course of the preliminary Police investigation may affect the weight to be attached to the evidence of the complainant and his witnesses but will not vitiate the proceedings.⁷⁸ Where a Magistrate is empowered by law and is otherwise competent to take cognizance of an offence, any irregularity in the manner of the exercise of the jurisdiction is not by itself fatal to the proceedings.⁷⁹

530. Irregularities which vitiate proceedings.—If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely :—

- (a) attaches and sells property under Section 88 ;
- (b) issues a search-warrant for a letter, parcel or other thing in the Post-office, or a telegram in the Telegraph Department ;
- (c) demands security to keep the peace ;
- (d) demands security for good behaviour ;
- (e) discharges a person lawfully bound to be of good behaviour ;

73. *Bhajahari Mondal v. State of West Bengal*, A 1958 SC 8 (13) followed in *Ajit Knmar*, 65 CWN 977 (FB).

74. *Chidda*, (1897) 20 A 40.

75. *Ramachandra Reddy*, A 1958 AP 165 : 1958 Cr LJ 343.

75a. *State of A. P. v. Gendeswara Rao*, A 1963 SC 1850 See for Scope of S. 239.

76. *Tulshibala Rakhit v. N. N. Khosla*, 56

CWN 193 ; A 1953 C 109 ; *Ramchandra Reddy*, A 1958 A P 165.

77. *Khudiram*, 57 CWN 512 : A 1953 C 573.

78. *Abdulla Khan*, A 1933 S 188 : 34 Cr LJ 250 ; *Trilokinath Sinha*, A 1952 Raj 94.

79. *Asha Das*, A 1953 Ass 1 : 1953 Cr LJ 168. *Tollygunge Municipality*, A 1942 C 288.

- (f) cancels a bond to keep the peace ;
- (g) makes an order under Section 133, as to a local nuisance ;
- (h) prohibits, under Section 143, the repetition or continuance of a public nuisance ;
- (i) issues an order under Section 144 ;
- (j) makes an order under Chapter XII ;
- (k) takes cognizance, under Section 190, sub-section (1), clause (c), of an offence ;
- (l) passes a sentence under Section 349, on proceedings recorded by another Magistrate ;
- (m) calls, under Section 435, for proceedings ;
- (n) makes an order for maintenance ;
- (o) revises, under Section 515, an order passed under Section 514 ;
- (p) tries an offender ;
- (q) tries an offender summarily ; or
- (r) decides an appeal ;

his proceedings shall be void.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Instances. |
| 2. Scope. | 4. Clause (p). |
| 3. "His proceedings shall be void". | 5. Clause (q). |

1. Corresponding sections in former Codes.—This section corresponds to Section 34 of the Code of 1872 and excepting the words '*parcel or other thing*' in clause (b) and Section 190 substituted in place of sub-section 191 in clause (k) it is the same as that of the Code of 1882.

2. Scope.—Order void for want of jurisdiction is nevertheless valid unless set aside by a competent Court.⁸⁰ An omission to object to jurisdiction does not amount to a waiver.⁸¹

Where the petitioner was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence ; *held*, this vitiates the conviction.⁸² Except in the cases mentioned in Section 353 of the Code a trial is vitiated by failure to examine the witness in the presence of the accused person.⁸³

3. "His proceedings shall be void".—Where the facts disclose an offence under Section 465 Penal Code, which the Magistrate has jurisdiction to try the mere fact that the same facts disclose a more serious offence (under Section 460 I. P. C.) beyond the Magistrate's competence to try will not

80. *Md. Hanif*, A 1951 N 185 : 52 Cr LJ 74 ; *Rakhu Sari v. Panchannan Mandal*, A 1937 C 256 : 35 Cr LJ 688 ; *Yana*, 4 L BR 49 : 6 Cr LJ 287.

81. *Mohammad*, A 1943 P 330.

82. *Re Subramania Ayyer*, (1913) 38 M 304, following *Hardwar Singh v. Khaga Ojha*,

(1893) 20 C 870 ; *Basappa*, (1895) 18 M 394 and *Damri Thuker v. Bhuvani Sahoo*, (1896) 23 C 195.

83. *Bigan Singh*, (1927) 6 P 691. See *Kanhaiyalal v. Devi Singh*, A 1961 M P, 302 —Case on S. 145.

render his proceedings void if the Magistrate tried the offender only for the offence he was competent to try.⁸⁴

Where the accused was tried on charges under Sections 420 and 366, Penal Code and was convicted upon both charges, the conviction under Section 420 in the absence of prejudice, is not vitiated on the ground that the Magistrate had no jurisdiction to try the offence under Section 366. In such a context his proceedings in Section 530 must be taken to mean the proceedings in which the Magistrate was not empowered by law and are not to be construed as embracing any other proceeding or proceedings.⁸⁵

Where a complaint is made against a number of persons of whom a few are such as against whom sanction of Government is necessary and no evidence has been recorded, the applicability of this section does not arise in the case.⁸⁶ In a joint trial the Court acts within jurisdiction in respect of some of the accused against whom sanction under Section 197 is necessary, it does not vitiate the trial of the other accused.⁸⁷

An order which is void for want of jurisdiction must nevertheless be regarded as valid unless it is set aside by a Court of competent jurisdiction.⁸⁸

Where a charge was framed under Section 409 I. P. C. before the Sub-divisional Magistrate and was subsequently altered to one under Section 408 I. P. C. and the case was transferred to a second class Magistrate but the High Court quashed the proceedings on the ground that the offence fell under Section 409 and thereafter the second class Magistrate sent the records to the sub-divisional Magistrate. The accused objected to the trial being proceeded with, the High Court held that the effect of quashing was not to wipe out the first information report or the charge sheet filed before the sub-divisional Magistrate and this section had no application.⁸⁹

4. Clause (p).—Where the facts disclose an offence within the jurisdiction of the Magistrate it seems a complete fallacy to say he is not empowered to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction.^{89a}

What is barred under Section 15 (2) of the U. P. Private Forests Act is not the cognizance of an offence by a Magistrate of the first class but a trial of the case by him.⁹⁰ Where the trial of Court lying within exclusive jurisdiction of a Panchayat is by a Second Class Magistrate, the trial is void.⁹¹ Proceedings under Section 6 of the Prevention of Corruption Act in the absence of sanction as required are void.⁹²

Where a Magistrate tries a person for an offence less serious than was actually committed, the High Court will interfere if the Magistrate deliberately overlooked the aggravating circumstances and facts with a view to

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| <p>84. <i>Raghunandan Prasad</i>, A 1956 V P 19 : 1956 Cr LJ 1023.</p> <p>85. <i>Awadh Singh</i>, A 1947 P 28 : 48 Cr LJ 292 ; <i>Balgovind Thakur</i>, A 1926 P 393 ; <i>Dawson</i>, A 1925 R 25.</p> <p>86. <i>Molabux v. Champalal</i>, ILR (1952) 2 Raj 64.</p> <p>87. <i>Jagabandhu</i>, A 1955 C 177.</p> <p>88. <i>Rukhe Sarif v. Panchanan Mandal</i>, A 1937 C 256 : 38 Cr LJ 688 : 38 Cr LJ 688.</p> <p>89. <i>Govindaswami</i>, A 1948 M 178 : 48 Cr</p> | <p>LJ 174.</p> <p>89a. <i>Ayyan</i> (1901) 24 M 675 and <i>Sundya</i>, 13 CWN 501, followed in <i>Dawson</i>, (1924) 2 R 455 ; distinguished in <i>Sripat Rai</i>, A 1931 A 10 : 32 Cr LJ 360.</p> <p>90. <i>Jaddu</i>, A 1952 A 873 : 1952 Cr LJ 1556.</p> <p>91. <i>Nausang v. Janta</i>, A 1952 HP 27 : 1952 Cr LJ 542.</p> <p>92. <i>Mahendra Chandra Dey</i>, A 1949 Ass 3 ; 50 Cr LJ 540 ; <i>Fazlur Rahman</i>, A 1937 Pesh 52.</p> |
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securing for himself jurisdiction over the offence. If the Magistrate really believed that the whole facts revealed to him constituted an offence triable by him the High Court will not interfere.⁹³

5. Clause (q)—declares that if a Magistrate not empowered by law tries offender summarily, his proceedings shall be void.⁹⁴ Where a Magistrate tries an offence under Section 4, Bombay Gambling Act summarily Clause (q) applies.⁹⁵

531. Proceedings in wrong place.—No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Object. |
| 2. Scope. | 4. Trial at a wrong place. |
| | 5. Irregularity is curable. |

1. Corresponding sections in former Codes.—This section corresponds to Section 70 of the Code of 1872, Section 24 of Act IV of 1877 and is the same as that of the Code of 1882.

2. Scope.—The introduction of the words “local area” provides for a case in which the local jurisdiction is not confined to the same Province or High Court, a defect in Section 70 of the Code of 1872, pointed out in the case of *Hiraman Ayah*.⁹⁶

This section has *relation* only to a trial of an offence committed in *British India*,⁹⁷ and to districts, divisions, sub-divisions and local areas created by the Criminal Procedure Code.⁹⁸

This section applies to a case where the Magistrate has authority to commit, but has not territorial jurisdiction in the place where the alleged offence is committed.⁹⁹ Where only a particular Court is empowered this section has no application.¹

3. Object.—The manifest intention of Section 531 is to provide against the contingency of a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place.^{1a} The *policy* of the Code as indicated by sections 531 to 538 is to uphold in most cases the orders passed by the criminal Court which was lacking in local jurisdiction or which had commit-

93. *In re Periana Mudali*, A 1942 M 31 : 43 Cr LJ 361 ; *Dataraya Nagappa*, A 1960 Mys 85.

94. *Kailash Chunder Pal v. Joynuddi*, (1900) 5 CWN 253 ; *Chandra*, 27 CWN 148 ; *Baliwant*, A 1949 A 629 : 50 Cr LJ 970 ; *Sahadeviah*, A 1950 Mys 21 : 50 Cr LJ 970.

95. *Md. Kerajmal*, A 1939 S 341 : 41 Cr LJ 160.

96. 13 Beng LR App. 4 : 21 WR (Cr) 66 ; *Diwan*, A 1936 N 55 ; *Wahidan*, A 1950

A 482 : 51 Cr LJ 1286.

97. *Bapu Daldi*, (1882) 5 M 23 (25).

98. *Bitchitranund Dass*, (1989) 16 C 667 ; *Keshub Mahajan*, (1882) 8 C 985 (FB) ; *Ali Mohamad Kasim*, A 1931 R 164.

99. *Rayan Kutti*, (1903) 26 M 640 following *Fazal Azim*, 17 A 36 (FB) ; *Abbi Reddi*, 17 M 402 and *James Ingle*, 16 B 200.

1. *Mir*, 16 Bom LR 84.

1a. *Doraiswamy Mudali*, (1906) 30 M 94.

ted illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned.² An order of commitment is an order within the meaning of this section.³

4. "Trial at a wrong place."—The fact that the trial was held in a wrong district is no ground for setting aside the conviction unless it appears that the error has in fact occasioned a failure of justice.⁴ Where the place where the breach of peace was apprehended was within the Magistrate's jurisdiction, but the accused resided outside it and no question of jurisdiction was raised at the trial Court and the Magistrate passed the order under Section 107, *held*, the irregularity was cured by this section.⁵ Though the accused is tried at a place in contravention of Section 181 (4) but there is no prejudice, the trial is not vitiated.⁶ The conviction of an accused under Section 418 I. P. C. outside the jurisdiction of the Magistrate is a mere irregularity curable in the absence of prejudice.⁷ Where the charge under Section 6 Merchandise Marks Act is not tried at the place where the offence of applying the false trade description has been committed the defect is curable under this section.⁸

The Court having jurisdiction to try the offence of conspiracy has also jurisdiction to try an offence constituted by the overt acts which are committed in pursuance of the conspiracy beyond its jurisdiction. The Delhi Court had jurisdiction to try the accused of the offence under Section 409 I. P. C. committed at Bombay, as the offence was committed in pursuance of the conspiracy with which he and the other accused were charged.⁹

5. Irregularity is curable.—A mere objection to the jurisdiction of the Court is no proof of prejudice in the absence of which the High Court will not interfere.¹⁰ An order of a criminal Court will not be set aside because the proceedings took place in a wrong Court unless there has been a failure of justice.¹¹

Failure of justice.—Whether there has been a failure of justice depends on the facts of each case.¹²

There is nothing in Section 10 of the Criminal Law Amendment Act which led to the non-applicability of Section 531 to a case where under Section 7 of that Act the offence is exclusively triable by a Special Judge who having no territorial jurisdiction convicted the accused and the mere formal forwarding of the case at Manbhum and of a formal order to transfer it to the Court of the Special Judge had not prejudiced the accused.¹³

2. *Gangapatty Chetty*, (1919) 42 M 791; *Achraj Singh*, A 1936 P 410; *Lakhan Singh*, A 1934 Oudh 200; *Fazal Karim* 17 A 26 FB.

3. *Assistant Sessions Judge, North Arcot v. Rammal*, (1911) 36 M 387; *Radharani v. Rahim Sardar*, 50 CWN 552; 47 Cr LJ 1020; *Pylloth*, A 1956 TC 29; A 1956 Cr LJ 114 (Commitment made to a Court of Sessions which has no jurisdiction).

4. *Harendra Chandra*, A 1947 C 290; 48 Cr LJ 118; *Govindrajalu*, A 1962 Mys 275; *Ramgappa*, A 1955 Mys 134; 1955 Cr LJ 1311.

5. *Ramdeo Singh*, A 1928 A 767; 27 Cr LJ 1132.

6. *Badlu Shah*, 46 A 138; A 1924 A 545.

7. *Kalicharan*, A 1921 C 114; 22 Cr LJ 666.

8. *A. K. Sen v. Madan*, A 1940 C 583; 43 Cr LJ 384.

9. *R. K. Dalmia v. Delhi Administration*, A 1962 SC 1821 following *Puroshottam Das Dalmiya v. State of West Bengal*, A 1961 SC 1589; 1961 (2) Cr LJ 728.

10. *Kalicharan Kundu*, (1921) 34 CLJ 200; 22 Cr LJ 666.

11. *Mithami*, 9 ALJ 448; 13 Cr LJ 203; 14 IC 203; *Badlu Shah*, (1923) 21 ALJ 912; 46 A 138.

12. *Lalit Chandra Chander*, 39 C 119; *Birju Marwari*, (1921) 44 A 157.

13. *Ram Chandra v. State of Bihar*, 1961 (2) Cr LJ 811; A 1961 SC 1629.

An objection that the Magistrate had no territorial jurisdiction to try the case can not be taken in appeal, even if it is an appeal against acquittal.¹⁴

532. When irregular commitments may be validated.—

(1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.

1. Corresponding sections in former Codes.—This section corresponds to Section 33 of 1872, Section 25 of Act X of 1875 and is the same as Section 532 of the Code of 1882.

2. Scope.—The fact of a commitment being made by a Joint Magistrate, who is an officer exercising the powers of a Magistrate is sufficient to enable the Sessions Judge to proceed with the trial, and *it lies with the party impugning the correctness of the proceedings to show that there was no jurisdiction.*¹⁵

Section 532 does not enable the Judge to quash a commitment.¹⁶ This section does not deal with cases in which the defect in the committal order arises from want of territorial jurisdiction.¹⁷

This section has no reference to a case in which a Magistrate who has general powers to commit an accused person to the High Court commits an accused over whom he has no jurisdiction or commits him for an offence which upon the construction of the Code is not triable by a Court of Session or High Court.¹⁸

533. Non-compliance with provisions of Section 164 or 364.—(1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Ma-

14. *Abdul Hamid*, A 1957 Punj 86 : 1957 Cr LJ 537.

15. *Komuroodee Sikhdar*, (1870) 13 WR (Cr) 17.

16. *Madhab Laxman*, (1918) 43 B 147 ; *Desaibhai*, A 1938 B 50. See *Ajit Singh*,

A 1961 Raj 139.

17. *In re Rathinam Pillai*, (1918) 20 Cr LJ 416 : 51 IC 176.

18. *Girish Chandra*, 57 C 1042 ; 34 GWN 18 ; 31 Cr LJ 586 (FB).

Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded ; and, notwithstanding anything contained in the Indian Evidence Act, 1872, Section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. Certificate of voluntariness of confession omitted. |
| 2. Scope. | 5. Examination of the Magistrate. |
| 3. Purporting to be recorded. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 346, last paragraph, of the Code of 1872 and is the same as that of the Code of 1882.

2. Scope.—This section completely cures any formal defects which might have been made in the recording of the confession.¹⁹ This section applies to omissions to comply with the law as well as to infractions of the law²⁰, but it has no application to a case where no record whatever has been made of a confession.²¹

3. 'Purporting to be recorded'.—Where in taking a confession the Magistrate purported to have acted under Sections 164 and 364, *held*, that there would be grave doubt if a defect in recording the answers in a different language could be cured by Section 533.²²

4. Certificate of voluntariness of confession omitted.—The Allahabad High Court has held in the case of *Ram Sankhi*²³ that the omission to certify the voluntariness of a confession can be cured by the evidence of the Magistrate.

5. Examination of the Magistrate.—When it was argued that the prosecution has not examined the Magistrate who had recorded the confession, the Supreme Court held that it was an improper and undesirable practice to examine Magistrates as witnesses in such cases.²⁴

See notes under Section 164 *supra* pp. 522, 523, 528.

534. [Omission to give information under Section 447.] *Rep by the Criminal Law (Removal of Racial Discriminations) Act, 1949 (17 of 1949), Section 3 (with effect from the 6th April, 1949).*

535. Effect of omission to prepare charge.—(1) No

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| 19. <i>Dev Dutt</i> , (1922) 45 A 166 : 20 ALJ 915 : 24 Cr LJ 6 ; <i>Prag</i> , A 1930 Oudh 449 ; 32 Cr LJ 97 ; <i>Mt. Bakat Banu</i> , A 1949 L 235 ; <i>Rangappa</i> , A 1954 B 285. | 22. <i>Nilmadhub Mitter</i> , 15 C 595 ; see <i>Jainarain Rao</i> , 17 C 862 (FB). |
| 20. <i>Raghu</i> , (1898) 23 B 221, following <i>Visram Babaji</i> , (1896) 21 B 495 and dissenting from <i>Jai Narayan Rai</i> , (1890) 17 C 862. | 23. (1911) 12 Cr LJ 15 : 9 IC 148 ; <i>Khudiram Bose</i> , (1908) 9 CLJ 55 ; <i>Dubai</i> , A 1943 P 118 ; 43 Cr LJ 90. |
| 21. <i>Sulabu</i> , (1913) 35 A 260 : 11 ALJ 286 : 19 IC 307. | 24. <i>Kashmira Singh</i> , 1952 SCR 526 : A 1952 SC 159 : 1952 Cr LJ 839 where <i>Nazir Ahmed</i> , 63 IA 372 ; 40 CWN 1221 ; 47 Cr LJ 897 (PC) endorsed. |

finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 4. "A failure of justice has in fact been occasioned". |
| 2. Scope. | 5. Sub-section (2). |
| 3. Omission to frame a Charge. | |

1. Corresponding sections in former Codes.—This section corresponds to explanation 1 of Section 216 of the Code of 1872 and is similar to that of 1882.

2. Scope.—A proceeding for contempt of Court is of a criminal nature. For the sake of justice the contemnor must know all the facts alleged against him before he is called upon to meet them and to defend himself. So long as the contemnor is informed of the case which he has to meet, even if an order or notice does not contain particulars of the kind of a formal charge. Sections 535 and 537 will cure the defect.²⁵

Undue emphasis is on mere technicalities in respect of matters which are not of vital or important significance in a criminal trial may sometimes frustrate the ends of justice. Where the provisions prescribed by the law of procedure are intended to be mandatory the legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves, but where the provisions made by the law of procedure are not of vital importance, but are nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. This position is made clear by Sections 535 and 537.^{25a}

3. Omission to frame a charge.—The contention that this section only applies to a trial where no charge at all has been framed is not correct. The section is applicable to a case in which no charge has been framed of the offence of which the appellant has been convicted.²⁶ The words "merely on the ground that no charge was framed" mean a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all. But where the Court frames a charge then the conviction can not be invalid on the ground that no charge was framed. Such a case does not come under Section 537, nor Section 236 applies.²⁷ See commentry on Section 237 *supra*, p. 832. The omission to frame a charge is not *per se* fatal.

25. *Tribhuvan Nath*, A 1959 P 262 : 1959 Cr LJ 754.

25a. *Chittaranjan Das v. State of West Bengal*, A 1963 SC 1696.

26. *Abdul Rahim*, A 1925 C 926 : 26 Cr LJ

1270 ; *Nani Gopal Biswas v. Municipality of Howrah*, A 1958 SC 141.

27. *Situ Ahir*, 40 C 168 : 13 Cr LJ 503 ; *Rajendra Singh*, A 1960 A 387.

Thus the failure to frame a charge under Section 304 Part II or Section 326 Penal Code would not make the conviction under either section illegal without reference to prejudice.²⁸

Where a conviction under Section 395 I. P. C. was altered to one under Section 148 I. P. C. it was held that the accused was prejudiced and the principle laid down in this section did not apply.²⁹ If there is any irregularity in the matter of recording what the Magistrate stated to the accused in explaining the offence under Section 242 but that he had orally explained to the accused what the offence was, the irregularity is curable,³⁰ but non-compliance with Section 242 vitiates the trial.³¹ In a summons case it is not illegal to convict accused of an offence not specified in the charge sheet.³² Omission to frame a charge is no ground for setting aside the conviction. Retrial may be ordered.³³

4. "A failure of justice has in fact been occasioned".—In adjudging the question of prejudice the fact that the absence of a charge or a substantial mistake in it is a serious *lacuna* will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was or was reasonably likely to have been misled in the circumstances of a particular case he is as much entitled to the benefit of it here as elsewhere but if on a careful consideration of all the facts, prejudice, or a reasonable substantial likelihood of it is not disclosed must stand, also it will always be material to consider whether objection to the nature of the charge or a trial want of one, was taken at an early stage.³⁴

5. Sub-section (2)—applies where the omission to frame a charge in the opinion of the Appellate Court or Revisional Court is that a failure of Justice has been occasioned and a retrial would be ordered. See the case of *Ambika Prasad*,³³ noted under sub-section (1).

536. Trial without jury of offences triable by jury.—If an offence triable by a jury is tried without a jury, the trial shall not on that ground only be invalid, unless the objection is taken before the Court proceeds to record evidence in the case.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Scope. |
| 2. Legislative Changes (1955). | 4. Sub-section (2). |

1. Corresponding sections in former Codes.—This section corresponds to the explanation of Section 233 of the Code of 1872 and is the same as Section 536 of the Code of 1882.

28. *Durgeweswar Datta*, A 1958 Ass 44 : 1958 Cr LJ 742. *William Slaney*, A 1956 SC 116 ; *Mubarat Ali Ahmad v. State of Bombay*, A 1957 SC 857.
29. *Gijo Gope*, A 1945 P 876 : 47 Cr LJ 691. See *Mahendra Singh* A 1959 MP 6.
30. *Jagannath Singh*, A 1934 N 258 : 36 Cr LJ 361 ; *Golam Ahia v. Lutful Huda*, A 1955 C 558 : 1955 Cr LJ 1357.
31. *Gopal*, 54 C 359 ; *Express Diary*, A 1950 C 61 ; *Ashita*, 48 Cr LJ 92. *Contra Luhani v. Khaslal*, A 1932 N

127 : 33 Cr LJ 938 ; *Rajeswar Prasad*, A 1949 P 323 followed in *Bikhyadhar v. Daitrai Rama*, A 1959 Or 121.

32. *In re Ganapata*, A 1942 M 354 : 43 Cr LJ 851.

33. *Ambika Prasad*, A 1931 A 7 : 32 Cr LJ 318 ; *Nanak*, A 1953 Raj 133 : 1953 Cr LJ 1031.

34. *William Slaney*, A 1956 SC 116 : 1956 Cr LJ 29. See *Surajpal*, A 1955 S.C. 419.

2. Legislative Changes (1955).—With the abolition of trial with the aid of assessors the amendment is a consequential amendment. Sub-section (1) of the old section has been deleted by Act 26 of 1955 and in sub-section (2) the words “Tried without a jury” have been substituted for the words “tried with the aid of assessors”.

3. Scope.—This section merely raises an admitted irregularity. It does not say anything about the validity of a trial. In any case the section does not and can not affect the right of appeal which is governed by Section 418 (1) read with Section 410 ; where the trial ends in an acquittal and there is or is not an appeal there will be no prejudice but where it ends in conviction and the accused appeals and the accused is sought to be shut out of the appeal on facts he will certainly be prejudiced and on strict reading of Section 536 (1) the trial will be incurably bad. To render the trial valid in such a case, the right of appeal on facts would indeed have to be conceded.³⁵

4. Sub-section (2).—Omission to take the *objection* at the trial is fatal to the contention before the High Court that the trial was invalid.³⁶

537. Finding or sentence when reversible by reason of error or omission in charge or other proceedings — Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

- (a) of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or
- (b) of any error, omission or irregularity in the charge, including any misjoinder of charges, or
- (c) of the omission to revise any list of jurors in accordance with Section 324, or
- (d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 3. Effect of 1923 and 1955 Amendments. |
| 2. Legislative Changes—1923 and 1955. | 4. Validity of the section. |
| | 5. Object. |
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35. *Goloke Bihari*, 42 CWN 129 ; 39 Cr LJ 161. See *Chandi Prasad v. State of Uttar Pradesh*, A 1956 SC 149.
36. *Ganapatti Vannianar*, (1900) 23 M 662.

6. Scope.
7. Time for correction.
8. Does the section apply to a case under Clause 26 of the Letters Patent.
9. Does the section apply to orders made in Appeal or Revision.
10. Applicability to summary trial in warrant cases.
11. Does the section apply to the provisions of Section 342?
12. Section applicable to Section 360.
13. Applicability to summary trial.
14. Admission of a Pleader.
15. What is the test of an irregularity curable by this section?
16. Plea as to want of Jurisdiction unaffected by this section—Plea may be taken at any time.
—Does consent of the accused give jurisdiction.
—Counsel's consent.
17. "Subject to the provisions hereinbefore contained."
18. "Finding, sentence or order".
19. "Court of competent Jurisdiction".
20. Clause (a)—Error, omission or irregularity".
21. Absence of complaint is not cured.
22. Omission to take the signature of the complainant in examination under Section 200.
- 22a. Police investigation.
- 22b. "Summons, Warrant."
—Signing warrants by initials.
23. Clause (a) Irregularity in proclamation, order, Judgment or other proceedings.....under this Code.
—Judgment not pronounced—Record lost.
—Judgment at variance with directions given by law—defect not cured.
24. Recording of Evidence in the absence of accused.
25. "Or other proceedings".
—Irregularities in proceedings for compensation under Section 250.
—Recording of evidence in the form of indirect narration.
26. Irregularities in Local Investigation.
27. Irregularities in Sessions Trial.
—Irregularities in commitment.
28. Clause (b)—Charge: "of any error, omission or irregularity in the charge".
—Effect of 1955 Amendment.
—Effect of Misjoinder of Charges.
29. Irregularities curable—Instances.
—Irregularities not curable.
30. Clause (c)—of the omission to revise any list of jurors.
31. Clause (d)—of any misdirection in the charge to the jury.
—Judge questioning the foreman of the Jury.
—Reception of Inadmissible Evidence.
—Failure of Justice.
—Failure to raise objection.
32. Explanation.

1. Corresponding sections in former Codes.—This section corresponds to Sections 426 and 439 of the Code of 1861, Section 203 paragraph 3, Section 283, paragraphs 1 and 2; Sections 300, 464 paragraphs 6 and 7; Sections 31, 117, 177, 178 of the Presidency Magistrate's Act (IV of 1877).

2. Legislative Changes (1923).—The section was amended by Section 148 of Act XVIII of 1923. The explanation and the illustration were inserted for the first time in the Code of 1898. The Criminal Procedure (Amendment) Act XVIII of 1923 has deleted sub-section (b) and the *Illustration*.

Legislative Changes (1955).—The word "charge" which occurred in clause (a) after the word "warrant" has been deleted, sub-section (b) has been added and the words "or assessors" which occurred in clause (c) after the word 'jurors' have been deleted by Act 26 of 1955.

3. Effect of Amendment (1923).—"The legislation in this matter is of long standing.....The variations are not important. The chief thing to note being rather a trivial *illustration* which appeared in the Code of 1898 has disappeared from the present Code".³⁷ The Amending Act XVIII of 1923 having deleted clause (b) the following decisions³⁸ which turned upon the clause and held that *want of sanction* does not vitiate a trial or commitment as

37. *Abdul Rahman*, (1927) 31 CWN 271 (PC).

38. *Khetra Mohan Das*, (1920) 48 C 867 (FB); *Pursottam Ishwar*, (1920) 45 B

834 (FB); *Ismal Rowther v. Shunmugavelu Nadan*, (1905) 29 M 149; *Maula Bux v. Lal Chand*, (1916) 23 PR 1916 Cr : 37 IC 473.

well as the following cases,³⁹ which held that a commitment for want of sanction was bad need not be considered. The deletion is consequential upon the amendment of Section 195. The case of *Lilan Singh*⁴⁰ need not be considered. The legislature has, it seems, regarded proceedings initiated under Section 476 as being in the nature of complaints and has not accepted the contrary view of the Allahabad High Court in *Ram Piari Rai's* case.⁴¹ The attention of the learned Judges who decided the full bench case of *Colin Mackenzie Mackay*⁴² does not seem to have been drawn to *illustration (b)* which had been omitted by the amendment, the effect of which is that irregularity in proceedings under Section 476 will come under Section 537 (a)—“complaint”, although as observed by Rankin, J., illegality will not be cured.

Effect of Amendment (1955).—The amendment of clause (c) is a consequential Amendment after the abolition of the trial with the aid of assessors. The insertion of clause (b) has rendered a large number of cases under the previous Code which held that misjoinder of charges or of persons vitiated the trial obsolete. Under the section as amended such misjoinder of charges or of persons will not be of any avail to the accused unless the error, omission or irregularity in the charge or misjoinder has in fact prejudiced the party affected and resulted in a failure of justice. See *Brich Bhusan*, A 1963 S. C. 1120.

4. Validity of Section 537.—Section 537 of the Code is not *ultra vires* of the Constitution as being in conflict with Article 21.⁴³

It has been held by the Madras High Court in *Munnuswami Naidu*^{43a} that this section does not apply to Sections 476 and 195 (1) (a) and (b).

The Judicial Committee in *Subramaniya Ayyar's* case⁴⁴ observed that “the Illustration of the section itself sufficiently shows what was meant”. The *illustration* has been now deleted by the recent amendment but that has not taken away the effect of the said Privy Council decision as what their Lordships meant by the said observation was to convey the intention of the Legislature *viz.*, that the Legislature cured by Section 537 “irregularity” of a most trivial nature.

5. Object.—“The object of the section is to remedy mere irregularities and not to excuse total disregard to the plain commands of the law”.⁴⁵

6. Scope.—In the leading case of *Subramaniya Ayyar*⁴⁴ their Lordships of the Judicial Committee held: “Their Lordships are unable to regard the disobedience of an express provision as to a *mode of trial* as a mere irregularity”, and further held: “the remedying of mere irregularities is familiar in most system of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code *positively enacts* that *such a trial* as that which has taken place *shall not be permit-*

39. *Gur Baksh Singh v. Kashi Ram*, (1915) 37 A 283; *Sankaralinga Tevan v. Avudai Ammal*, (1918) 17 Cr LJ 394; 35 IC 826. *In re Manj Nath Shivanath*, (1908) 10 Bom LR 1053; 9 Cr LJ 183; see *Juggan*, (1921) ALJ 942 (case under the Municipat Act).

40. (1912) 40 C 360; see also *Babu Ram*, (1919) 17 ALJ 833.

41. (1912) 10 ALJ 247; 13 Cr LJ 707; see *Balgangadhar Tilak*, (1902) 4 Bom LR 750.

42. 30 CWN 276.

43. *R. R. Chari*, A 1959 A 149; 1959 Cr

LJ 268.

43a. (1928) MWN 229 following *Rajani Kanta Kyel v. Bistoo Mani Dassi*, (1927) 28 CLJ 840.

44. *Subramaniya Ayyar*, (1901) 25 M 61 PC; *Allu*, (1923) 4 L 376.

45. *Nawab Khaja Solemonut Bahadur v. Ishan Chandra Das Sarkar*, (1905) 9 CWN 909; 2 Cr LJ 569; *Subramania Ayyar*, (1901) 28 IA 257; 25 M 61 (PC); 5 CWN 866; 3 Bom LR 540; see *Chandi*, 14 C 395; *Mahim Chandra Chakraverty*, (1869) 3 Beng. LR App. Cr 6.

ted that the contravention of the Code comes within the description of *error, omission or irregularity*."

See commentary on Section 225 *supra* where this case⁴⁴ has been followed or distinguished.

Their Lordships of the Judicial Committee in the case⁴⁶ on non-compliance with the provisions of Section 360, distinguished *Subramaniya Ayyar's* case on the ground that there "the procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused" and not a "mere omission or irregularity as occurred in the case under appeal."

Section 537 does not apply to the non-compliance with the provisions of Section 250.⁴⁷ Sanderson, C. J., in *Suresh's* case⁴⁷ at p. 129 observed: "I think, it is desirable that we should make it clear that the provisions of the Criminal Procedure Code should be observed by the Magistrates in Subordinate Courts." Rankin, J., in a dissentient judgment in *Colin Mackenzie Mackay*⁴⁸ held that Section 537 to use Lord Halsbury's words, in *Subramania Ayyar*, provides for "the remedying of mere irregularities" and cannot cure "the proceedings which from beginning to end were illegal in the sense that the statute had expressly forbidden them to be bad. The same view has been adopted by the Patna High Court in *Harnarain Halwai v. Kariman Ahir*⁴⁹ and by the Madras High Court⁵⁰ and by the Allahabad High Court.⁵¹ The Allahabad High Court in a later decision has held that the test is "Does error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure?" Section 537 has no application in such cases.⁵²

This section applies not only to cases of irregularities but errors and omissions as well.⁵³ The Privy Council used the language "omission or irregularity" in *Abdul Rahman's* case, 54 I. A. 96. Section 537 as amended widened the scope of Section 537 in that it covers cases of misjoinder of charges as well.^{53a}

Section 537 as amended widened the scope of Section 537 in that it covers cases of misjoinder of charges as well^{53a}.

Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned.⁵⁴

46. *V. M. Abdul Rahman*, (1926) 54 IA 96 : 5 R 53 : 31 CWN 271 : 52 MLJ 585 (PC) followed in *Ahi*, (1927) 50 A 457 : 26 ALJ 176.

47. *Suresh Chandra Gupta*, (1924) 29 CWN 124.

48. (1925) 30 CWN 276.

49. (1919) 5 PLJ 61 : 1 PLT 609 : 59 IC 285.

50. *per* Sheshagiri Ayyar, J., in *Makalakati*, (1915) 28 MLJ 381 : 16 MLJ 298 : 28 IC 522.

51. *Zahir Singh*, (1915) 13 ALJ 345.

52. *Bechu Chaube*, 45 A 124 : 20 ALJ 874 : 71 IC 115.

53. *Occhhan*, 13 ALJ 809 : 14 Cr LJ 607 : 21 IC 479.

53a. *Banwari v. State of Uttar Pradesh*, A 1962 SC 1198.

54. *William Staney*, (1956) SCA 183 : A 1956 SC 116 ; *Narayan Rao v. State of A. P.*, (1958) SCR 283 followed in *Chiadamilal Jain*, (1960) SCJ 901 : A 1960 SC 41 ; *Kathi Umad Ranning*, A 1955 Sau 10 ; *Chitranjan Das v. State of West Bengal*, A 1963 SC 1196.

Distinction between illegality and irregularity is one of degree.⁵⁵

The distinction between an 'illegality' and 'irregularity' is one of degree. In all such cases the point that arises for decision is whether the infringement of the provisions of the Code is such as to render the provisions of the Code nugatory or whether the infringement is such as has in fact occasioned a failure of justice. Contravention of a mandatory provision of the Code does not vitiate the trial if no prejudice occurs or is likely to occur.⁵⁶ A defect in the jurisdiction of the Court can never be cured under Section 537.⁵⁷ Reasons for dismissal of complaint under Section 203 go to the root of the matter and cannot be cured under Section 537.^{57a} What has to be considered in each case is whether the illegality or irregularity complained of affected the competency of the Court or whether it had occasioned a failure of justice. The test is: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature then the proceedings are vitiated in their inception and Section 537 has no application but the mere fact that a certain provision of the Code is imperative does not itself indicate that on breach of the provision the whole proceedings are vitiated.⁵⁸ In the instant case⁵⁸ omission to examine the complainant on oath before calling a report from police under Section 202 amounted to an illegality which vitiated the trial.

It is necessary that the accused should know when the Magistrate makes up his mind to commit before the Sessions Court. If the accused is denied the opportunity of leading evidence which he has a right to do under Section 208, the denial of such right would cause prejudice to the accused and Section 537 would have no application to such a case.⁵⁹

Where the Magistrate has dismissed the complaint without giving reasons as required by Section 203 the error is of a kind which goes to the root of the matter. Even assuming, however, that the rule laid down in *William Slaney v. State of Madhya Pradesh*, A 1956 SC 116 : 1955—2 SCR 1140 applies to such a case, prejudice is writ large on the face of the order.^{59a}

7. Time for correction.—The section cannot be applied at an intermediate stage of the case so as to allow the error to remain uncorrected, whether the proceedings of the Magistrate were irregular or illegal for want of sanction of the State Government.⁶⁰

Where objection is taken at an earlier stage of the trial there is time to rectify the error. Merely because accused persons have been charged with a number of offences and convicted is no ground for setting aside the con-

55. *William Slaney*, A 1956 SC 116 ; *Kapoor Chand*, A 1933 A 264 FB ; *Garu Charan Samal*, A 1953 Or 258 : 1953 Cr LJ 1557 ; *Asha Das*, A 1953 Ass 1 ; *Nehter Dharwa*, A 1940 N 375 ; 42 Cr LJ 37 ; *Munshilal*, A 1948 A 278 ; *Kotayya*, 51 CWN 474 (479) PC : A 1947 PC 67.

56. *Krishna Kumar*, A 1955 Punj 151 : 1955 Cr LJ 1101 (FB) ; *Raghunath*, A 1963 Raj 85—case on Ss. 173(4) and 251(7).

57. *Saiyed Ahmed Agha*, A 1957 MB 115 ; 1957 Cr LJ 449.

57a. *Chandra Das v. Prakash Chandra*, A

1963 SC 1430—case under scope of S. 202, Cr. P. C.

58. *In re Subramaniya Achari*, A 1955 M 129 : 1955 Cr LJ 514.

59. *Chhadaimilal Jain*, (1960) 1 SCR 736 : A 1960 SC 41 : 1960 Cr LJ 145.

59a. *Chandra Deo v. Prakash Chandra Bose*, A 1963 SC 1430—See also for scope and object of inquiry under Section 202 (1) See *Chittaranjan Das v. State of West Bengal*, A 1963 SC 1696.

60. *Chedu Ram Naraindas*, (1912) 6 SLR 260 : 14 Cr LJ 298 : 19 I 954.

viction unless it has in fact come to the conclusion that the accused were embarrassed and there has been a failure of justice^{60a}.

8. Does the section apply to a case under clause 26 of the Letters Patent (Calcutta)?—In a full bench decision of the Calcutta High Court,⁶¹ Rankin, J., held that Section 537 is applicable under clause 26 of the Letters Patent though in *Fateh Chand Agarwalla*,⁶² an earlier full bench decision, Sir Ashutosh Mookherjee, J., held that Section 537 has no application to a case reviewed under clause 26 of the Letters Patent. It does not appear from the report whether the attention of Judges was drawn to *Fateh Chand Agarwalla*⁶² where Mookherjee, J., held that the proceeding was not either by way of appeal, which is expressly excluded by clause 25, or by way of revision, which is created by clause 28 and it does not fall within Chapter XXVII (confirmation of sentences of death), but Rankin, J., held:—"It matters nothing in my opinion whether the Bench is sitting on appeal or revision within the exact meaning of Section 537, but the leading case of *Subramaniya Ayyar* seems sufficient to show that Section 537 is applicable."

True, the said leading case before it went up to the Privy Council was twice heard by the Madras High Court before the full court of six Judges and there the appeal was under clause 26 of the Letters Patent. There Sir Arnold White, C. J., at 25 M 61 (73) held the same view as was held by Mookherjee, J., in *Fateh Chand Agarwalla*⁶² and the Privy Council decided on the applicability of Section 537 on appeal. Hence it is submitted with great respect that the view of Rankin, J., seems to be wrong.

9. Does the section apply to orders made in Appeal or Revision?—Though Section 537 does not apply in terms to orders made in appeal or revision the principles contained therein should guide Courts in dealing with applications under Section 215.⁶³

Section 537 applies where the irregularity has already been committed in the lower Court and it is detected by the Court of appeal or revision.⁶⁴

The Privy Council in *Abdul Rahman's* case⁴⁶ held in appeal that the omission or irregularity was cured by this section.

10. Applicability to summary trial in warrant cases.—In a case tried summarily, the omission by the Magistrate to follow the procedure laid down in Section 256 is not an illegality vitiating trial.⁶⁵ A contrary view was held in *Umaji Krishnaji*.⁶⁶

From the language of the section "no finding, sentence or order," it is quite clear that the section has no application before the case is finally disposed of. See *Nilratan*⁶⁷ and see also the observations of Mookherjee, J., in *Fatehchand Agarwalla*,⁶² viz., that the proceeding must be either under Chapter XXVII or an appeal or revision. It follows also from the words

60a. *State of Andhra Pradesh v. Ganeswara Rai*, A 1963 SC 1850—See also scope of S. 239 decided in this case; *Mathew*, A 1956 SC 241.

61. *Colin Mackenzie Mackay*, (1925) 30 CWN 276 (FB).

62. (1916) 44 C 477 (FB); 21 CWN 33; 24 CLJ 400; 38 IC 945.

63. *Chella Ram Naraindas*, (1912) 6 SLR

260.

64. *Ram Verman*, A 1956 A 466 (FB); 1956 Cr LJ 959.

65. *Jhamnadas*, 12 Cr LJ 320; 10 IC 616; *Appa Subhana*, (1884) 8 B 200 (211).

66. (1925) 28 Bom LR 95. *Amaresh Chandra Sinha*, A 1948 C 110.

67. *Nilratan*, (1896) 23 C 983.

“passed by a Court of competent jurisdiction” that the section does not apply if the finding, order etc., is not passed by a Court of competent jurisdiction. Then one has to turn to the clauses (a) to (d) and the *Explanation*.

The Allahabad High Court has held that failure to follow procedure under Section 137 (1) is not a mere irregularity curable under this section.⁶⁸ Section 537 is not applicable to non-compliance with the mandatory provisions of Section 137.⁶⁹ Non-compliance with the provisions of Section 112 has been held to be an irregularity.⁷⁰ See *contra Nihal's case*.⁷¹

11. Does the Section apply to the provisions of Section 342 ?—Omission to examine the accused properly under Section 342 is curable under this section if there was no prejudice caused to the accused.⁷²

See notes under Section 342 *Supra*.

12. Section applicable to Section 360.—The Privy Council in *Abdul Rahman's case* (54 I. A. 96) has held that non-compliance with Section 360 is an irregularity and it follows that Section 537 is applicable.

13. Applicability to summary trial.—The omission to comply with the provisions of clause (h) of Section 263, on the part of a bench of Magistrates, amounts merely to an irregularity which can be cured under Section 537.⁷³

14. Admission of a Pleader.—“Even assuming that the Judge should not have acted upon the admission of the pleader of the appellant, such action on his part is an irregularity curable under Section 537”.⁷⁴

15. What is the test of an irregularity curable under this section. ?—The mere use of the word “shall” is not the criterion as to whether the provision is mandatory or directory. See the decision of the Allahabad High Court in *Bechu Chaube*.⁷⁵ It was held in that case that this section has no application where the error is of such a nature as to vitiate the proceedings in their inception. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding.

The learned Judges who regard illegalities as irregularities curable under this section, possibly base their decision on *Abdul Rahman's case*⁷⁶ and *Kotayya's case*⁷⁷ and on *William Slaney's case*.^{77a} See cases⁷⁸ noted under “Scope”. Their Lordships of the Judicial Committee in the leading case of *Subramaniya Ayyar*^{76a} observed :—“With all respect to Sir Francis Maclean and the other Judges who agreed with him in the matter of *Abdul Rahman*⁷⁶ he appears to have fallen into a very manifest logical error in arguing that

68. *Trikha v. Manah*, (1927) 49 A 485 (477) : 25 ALJ 377 : 28 Cr LJ 291.

69. *Bhora v. Tara Singh*, (1926) 25 ALJ 155 following *Ram Mandal v. Chandra Mandal* 21 CWN 926.

70. *Ramdeo Singh*, (1926) 49 A 228 : 25 ALJ 44 following *Suleman*, 11 Bom LR 740 ; *Zahir Ahmad v. Ganga Prasad*, A 1963 A 4.

71. (1926) 49 A 5 following *Rajbanshi*, (1920) 42 A 646.

72. *Kaki Bejoy*, A 1961 SC 967 ; *Masib Kaka Chowdhury*, (1956) SC A 754 : A 1956 SC 536 followed in *Madanlal*, A 1961 C 240 ; *Sitaram*, A 1958 P 462 :

1958 Cr LJ 1082 ; *Pagla Baba*, A 1957 Or 136 ; *Ram Singh*, A 1957 Punj 75.

73. *Mamdeo Lakhman*, (1924) 26 Bom LR 1236 ; *Mahera Shetty*, A 1963 Mys 77 following *A. Joseph*, A 1959 Ker 10.

74. *Bansilal Gangaram Vani*, (1923) 30 Bom LR 646 : AIR (1928) B 241.

75. (1922) 45 A 124 : 20 ALJ 874 : 71 IC 115.

76. 54 IA 96.

76a. (1902) 25 M 61 (98) PC.

77. 51 CWN 474 (479) PC : 49 Cr LJ 533.

77a. A 1956 SC 116.

78. A 1957 MB 115 : 1957 Cr LJ 449.

because all *irregularities are illegal as he says* in a sense and this trial was illegal that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike."

16. Plea as to want of jurisdiction unaffected by this section—may be taken at any time.—See Section 530 which states that the proceedings shall be void on account of irregularities mentioned therein. See *Saiyad Ahmad Agha's case*.⁷⁸

In *practice* sometimes one meets with an observation from the Bench: "You had not raised this point before the trial Court or the Appellate Court, we would not listen to it at this stage." It has been held in *Husen Gaibu*^{78a} that the proceedings are void under Section 530 where an offence is tried by a Court without jurisdiction.

See in this connexion *Bijan Singh*^{78b} where a point under Section 342 was not allowed to be taken for the first time in revision inasmuch as the consideration of the point as to whether the provisions of Section 342 had been complied with turns on a consideration of fact.

Does consent of the accused give jurisdiction?—No, the accused cannot consent to anything.⁷⁹

Counsel's consent.—The Privy Council in *Abdul Rahman's case*⁸⁰ has held that "no serious defect in the mode of trial can be justified or cured by the consent of the advocate of the accused."

17. "Subject to the provisions hereinbefore contained."—These words obviously mean that in applying Section 537 reference may also be made to analogous sections of the Code dealing with irregularities, *e. g.*, Sections 225, 232, 236 (3), 366 (4), 423 (2) and 529 to 536.

The Madras High Court held in *Perumalla Nayedu*,⁸¹ "the words 'subject to the provisions hereinbefore contained' which occur at the beginning of Section 537, cannot be construed in such a way as to nullify the express provision of the latter part of the section, which in clause (b) enacts that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal for want of sanction required by Section 195". The Calcutta High Court in a full bench decision in *Khetra Mohan Das*⁸² adopted this view and added to it the words "unless such want has in fact occasioned a failure of justice", although no opinion was expressed as to whether these words refer to the provisions contained in any previous part of the Code or whether they refer only to the provisions contained in Chapter XIV. Beachcroft, J. (Sharfudin, J., agreeing) held that the effect of the opening words of the section, "subject to the provisions hereinbefore contained," cannot be that the section is to have no application if there has been any departure from any of the provisions of the Code. These words must be read as having reference only to Sections 529 to 536 and do not refer to the entire Code that precedes

78a. (1884) 8 B 317.

78b. (1927) 6 P 691; *Radha Kishan v. State of U. P.*, A 1963 SC 822.

79. *Allen*, 4 L 376: 25 Cr LJ 68; *Kottammal*, 23 Cr LJ 748.

80. (1926) 54 IA 96; followed in *Sukhai Ahir*, (1927) 50 A 457 see *Bholanath Sen*,

(1876) 2 C 23: (Cr) 57 and *Bishwanath Pal*, 12 WR (Cr) 3; *Nusserwanjee v. Meer Mynodeen*, 6 Moore IA 134 (161).

81. (1907) 31 M 80.

82. (1920) 48 C 867 (872) FB.

that section. Fletcher, J., to whom the case was referred on a difference of opinion held, at p. 974 of 19 C.W.N., "The whole of the section is governed by the words 'subject to the provisions hereinbefore contained.' This includes amongst other provisions the provisions contained in Section 233 and a neglect of the provisions contained in that section is not, I think, cured by Section 537".⁸³ See Commentary on Section 233, p. 806.

18. 'Finding, sentence or order'.—It is obvious that the section has no application to original proceedings but is applicable to a superior Court curing errors in procedure mentioned in clauses (a) to (d) and the test further is as is laid down in the *Explanation* (1) whether such error has occasioned a failure of justice and if so (2) whether such objection could and should have been raised at an earlier stage of the proceedings. See the case of *Perumalla Nayedu*⁸⁴ which held that Section 537 is not intended to cover a case which had not been finally disposed of. It does not seem possible to read Section 537 as giving a legal effect to validate a finding, sentence or order which is defective for an antecedent defect in procedure.⁸⁵

It has been observed *supra* that the section cannot cure illegalities or where the trial is void.⁸⁶

19. "Court of competent Jurisdiction".—The words "a Court of competent jurisdiction" in Section 537 must be taken to mean "a Court of competent jurisdiction in respect of the particular offence charged".⁸⁷ Section 537 cannot cure illegality but cures irregularity committed by "Courts of competent jurisdiction".⁸⁸ The words "competent jurisdiction" in the section mean "jurisdiction which would be competent but for the defect in question".⁸⁹ A Magistrate who in consequence of a personal disqualification is forbidden by law to try a particular case, though he may be authorised generally to try cases of the same class, cannot be said with respect to that case to be a Court of competent jurisdiction.⁹⁰

20. Clause (a) : "Error, omission or irregularity".—These words convey almost the same meaning and Section 537 cures errors, omissions or irregularities as opposed to illegalities. In *Abdul Rahman's* case (54 I. A. 96) "the omission or irregularity" has been used in the same sense. Every error or omission or irregularity is not taken into consideration.

Irregularity which materially prejudices an accused, so as to occasion a miscarriage of justice although not illegal has the effect of altering or reversing the 'finding, sentence or order'. We generally use 'irregularity' in connection with Section 537 and not 'errors or omissions'.

Now these words govern the whole clause (a).

Reasons for dismissal of complaint under Section 203.—Where the Magistrate has dismissed the complaint without giving reasons as required by Section 203 the error is of a kind which goes to the root of the matter. It is possible to say that the giving of reasons is a pre-requisite for

83. *Ramsubhang Singh*, (1915) 19 CWN 972 : 16 Cr LJ 641 : 30 IC 465.

84. 31 M 80.

85. *Rashbehary*, 35 C 1076 (1082).

86. *Appa Subbana Mendre*, 8 B 307 ;
William Slaney, A 1956 SC 116 ;
Saiyad Ahmed Agha, A 1957 MB 116 :

1957 Cr LJ 449.

87. *Krishna Bhat*, (1885) 10 B 319 (325).

88. *Rashu Singh*, (1896) 23 C 442 (446).

89. *Swami Dayal*, PR No. 8 of 1908 Cr.

90. *Sudhama Upadhyaya*, (1895) 23 C 328 (335).

making an order of dismissal of a complaint under Section 203 and absence of the reasons would make the order a nullity. Even assuming, however, that the rule laid down in *William Slaney v. State of Madhya Pradesh*, A 1956 SC 116; 1955-2 SCR 1140 applies to such a case, prejudice is writ large on the face of the order.^{90a}

21. Absence of complaint is not cured.—This section only covers errors, omissions or irregularities in a complaint but does not refer to a *total absence of complaint*.⁹¹ Similarly it has been held that Section 537 (a) does not apply to a case where accused is charged with one offence but is convicted of another totally different offence.⁹² The consolidation of more than one similar complaints into one and the recording of evidence in one of them by consent is only an irregularity cured by Section 537.⁹³

Omission to examine the complainant under Section 200.—See Commentary *supra* under Section 200. It has been held in *Narain* and other cases⁹⁴ that an omission to examine the complainant on oath is an irregularity which is curable under Section 537 (a) unless there is prejudice. The view in these cases and *Phagu Singh* and other cases⁹⁵ cannot be supported as it is not an error, omission or irregularity in ‘complaint’, but an omission as to the ‘mode of trial’. As has been rightly pointed out in *Mahim*⁹⁶ the omission affects the jurisdiction of the Court and if carried to this extent ‘Magistrates might altogether desert the Code of Criminal Procedure.’

Omission to record statement of complainant on oath is an illegality.⁹⁷

22. Omission to take the signature of the complainant on the record of complainant’s examination under Section 200.—When the law says that the record of the examination of the complainant shall be signed by the complainant as also by the Magistrate, it cannot be used as evidence of the statement made by the complainant and such defect is not curable under Section 537.⁹⁸

22-A. Police investigation.—Investigation is certainly not an inquiry or trial before the Court and the fact that there is no specific provision in Chapter XLV with respect to omissions or mistakes committed during the course of investigation except with regard to the holding of an inquest is a sufficient indication that the Legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate any infirmity in the inquiry or trial.^{98a}

90a. *Chandra Deo v. Prakash Chandra*, A 1963 SC 1430. See also for scope and object of enquiry under S. 202 (1).

91. *Ahmed Din*, (1916) 4 PR Cr 1917 : 18 Cr LJ 511.

92. *Dilan Singh*, (1912) 40 C 360.

93. *Harjivan Valji*, (1925) 28 Bom LR 115.

94. (1870) 14 WR (Cr) 341; *Eastern Bengal Railway*, (1875) 23 WR (Cr) 631; *Manu*, (1888) 11 M 443; *In re Vellu Natham*, 35 M 606; *Devdhar*, A 1958 P 51.

95. (1916) 1 PLR 592 : 18 Cr LJ 366 : 38 IC 750; *In re S. Ramaswami Aiyanger*, (1922) 43 MLJ 710 : (1922) MWN 681 : 23 Cr LJ 691.

96. 3 Beng. LR App. Cr 67.

97. *In re Subramania Achari*, A 1955 M 129; 1955 Cr LJ 514; *P. W. S. Aiyar v. K. J. Natham*, A 1948 M 424; *Akshoy Kumar v. Jogesh Chandra*, A 1956 C 76 (naraji petition), *Contra, Baldeva*, 56 A 33; *Bhagwant Kishore*, A 1964 SC 221 (225, 226)—case under S. 5A of the Prevention of Corruption Act, 1947.

98. *Baijoo Mandal*, (1902) 6 CWN 840; *Anath v. Bankim*, 54 CWN (2 DR) 134; 49 Cr LJ 587; *Ramjas Marwari*, A 1936 P 145. *Maffilla Samji v. Muthuswami*, A 1949 M 76.

98a. *Niranjan Singh*, 1956 SCR 734 : A 1957 SC 142 : 1957 Cr LJ 294.

22-B. "Summons, Warrant".—The error of a Deputy Magistrate in proceeding by warrant instead of summons furnishes no ground for quashing his proceedings.⁹⁹ Omission to insert in a summons under Section 492 of the Code of 1872 the amount of the recognizance and security required will not invalidate any subsequent proceedings binding over the parties to keep the peace.¹

"It does not seem to be possible to read Section 537 as giving legal effect to a defective warrant, as its highest effect is to validate a finding, sentence or order, which is defective for an antecedent defect in procedure".^{1a}

Signing warrants by initials.—Although the "Illustration" has been deleted the decisions which held that the error in such cases is a pure irregularity which does not affect the validity of the proceedings are still good law. See the cases under 'Effect of Amendment' on omission of the 'Illustration' noted *supra*. An omission to date and sign a judgment in open Court amounts to a mere irregularity.²

Joint trial etc.—See commentary on Section 225, p. 785, Section 232, p. 797, Section 535, p. 1591 under the heading "Omission to frame a charge". See also *State of A. P. v. Gandeswara Rao*, A 1963 SC 1850 and *Kishan Singh*, A 1961 B 124.

Omission in charge—common intention of the assembly.—Where there is ample evidence of the common intention of an assembly the mere omission to mention it in the charge is curable under Section 537.^{2a}

Alternative charges.—When a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, it is not open to the complainant to alter his election and start a fresh charge on an alternative section which does not require sanction. *Misjoinder* of charges cannot be validated by striking out charges.^{2b}

The vagueness of the charge is only an irregularity not vitiating the trial unless the accused has been materially prejudiced thereby.^{2c}

Misjoinder of parties.—A full bench of the Calcutta High Court has held that it is a question for the Court in the exercise of its *judicial discretion* to say whether there should be a joint trial or not where a number of persons are tried for offences committed in the same transaction. An objection as to '*misjoinder of parties*' can be taken in the High Court, even if the same was not taken before the Sessions Judge.^{2d}

Joint trial—of different persons charged with separately different articles of stolen properties which are proceeds of the same theft is illegal and is not saved by the operation of Section 537.^{2e}

See also Commentary on Section 239 *supra*.

23. Clause (a) "Irregularity in proclamation, order, Judgment or other proceedings . . . under this Code".—The words 'proclamations' and 'order' were new in the Code of 1898.

99. *Aneel Putuey v. Ramsoonder Chuckerburtly*, (1864) 1 WR (Cr) 16; *Revappa v. Gurusanthawa*, A 1960 Mys 196.

1. *Abasee Begum v. Umda Khaiyam*, (1882) 8 C 724.

1a. *Rash Behary Lal Mandal*, (1908) 35 C 1076 (1082); 12 CWN 1075; *Anil Ranjan Sen*, A 1960 Tripura 26.

2. *Mohammed Hayet Molla*, 7 R 376. See *Lalji*, A 1948 A 428.

2a. *Lachay Singh*, 18 Cr LJ 382 (P); 38 Cu 766.

2b. *Manavala Chetty*, (1906) 29 M 569; 5 Cr LJ 496.

2c. *Chittaranjan Das v. State of West Bengal*, A 1963 SC 1696.

2d. *Virupana Gowal*, 28 MLJ 397.

2e. *Abdul Majid*, (1906) 33 C 1256; 10 CWN 512.

For 'judgment' *see* Chapter XXVI.

See Section 366 (4) which says that there is nothing in S. 366 to limit the provisions of Section 537.

In the following cases³ it has been held that the legality or illegality of a judgment delivered after sentence had been passed, depends on the circumstances of each case and if no material prejudice and injustice has been caused, the *omission* to write a judgment at the time of the passing of the sentence is not an illegality but an irregularity.

Order under Section 118 or Section 123.—The Amendment of 1923 has introduced sub-section (6) in Section 367 whereby such orders shall be deemed to be a judgment.

Judgment not pronounced—Record lost.—Where a judgment has been lost the appropriate course is for the Sessions Judge to re-write from memory, and from the materials before him and place it on record.⁴

Judgment at variance with directions given by law—defect not cured.—Section 537 does not cure the defects in a judgment which is clearly at variance with the directions given in Sections 367 and 424 of the Code and which materially prejudices the accused in the trial of their appeal.⁵

24. Recording of evidence in the absence of accused.—The recording of defence evidence in the absence of the accused is an irregularity which cannot be cured under Section 537.⁶

25. 'Or other proceedings'.—Those words seem to be "*ejusdem generis*" with words that precede.

Offence triable as summons case is a curable irregularity.⁷

Irregularities in proceedings for compensation under Section 250.—Failure on the part of a Magistrate to make the record required by proviso (a) to Section 250 when passing an order of compensation under that section, thereby giving no opportunity to the complainant to urge his objections against the order was held to be cured by Section 537.⁸ The decision⁸ is no longer good law.

Recording of evidence in the form of indirect narration.—When in a case falling under Section 362 the Magistrate recorded the evidence in the form of an indirect narration, *held* that it was an irregularity covered by Section 537 and did not vitiate the trial when no failure of justice was occasioned thereby.⁹ But the Lahore High Court held that in a case where witnesses were not examined but their previous statements in a former hearing read over to them and same witnesses were not even sworn that the procedure was an illegality.¹⁰

26. Irregularities in local investigation.—*See* Commentary on Section 539-B. Sending out of the Sub-Deputy Magistrate to hold a local investigation may amount to an irregularity.¹¹

3. *Thaver Issaji Boree*, (1911) 13 Bom LR 635 : 12 Cr LJ 457 : 11 IC 993 referred to in *Mohideen Batcha Sahib*, 25 MLJ 484 : 21 IC 688.

4. *Kamashamma*, 38 M 498 : (1913) MWN 862 : 14 Cr LJ 595.

5. *Kanhai Singh*, (1912) 10 ALJ 435 : 13 Cr LJ 859 : 17 IC 795.

6. *Nga Po Shein*, (1912) 19 IC 719 : UBR (1912) 152.

7. *Gapaldas v. State of Assam*, A 1961 SC 986 ; *Mordy*, 45 CWN 53.

8. (1895) 2 Weir 711.

9. *In re Gulabchand*, (1916) 18 Cr LJ 336 (M).

10. *John Thomas*, 4 L 382 : 77 IC 425 : AIR (1924) L 17. *See Madan Mohan Das*, 60 CWN 36.

11. *Radhamadhab Pakra*, (1910) 15 CWN 414 : 12 Cr LJ 7 : 9 IC 46.

27. Irregularities in Sessions Trial.—Non-compliance with the mandatory provisions of Section 276 *supra* is an illegality. See also *Bradshaw*.¹²

*Sessions trial without commitment is ultra vires.*¹³

Irregularities in the Commitment.—Where the trial before the Sessions Judge is held, no irregularity in the commitment can vitiate the trial, unless there is a failure of justice.¹⁴

Where the order of commitment is made without a charge, the Sessions Judge may frame a charge, the omission to frame the charge by the committing Court is an irregularity curable under this section.¹⁵

28. Clause (b)—“Charge”.—For definition of ‘Charge’ see Section 4 (c) and see Chapter XIX and Commentary Sections 221—240 *supra*.

Section 537 (a) dealing with ‘errors, omissions or irregularities’ in ‘charge’ should be read with Sections 232 and 535. Section 232 applies at any stage of the trial, but Section 535 like Section 537 cannot be applied before a finding on sentence is pronounced or passed. See Commentary *supra* under Chapter XIX, particularly the Joinder of Charges, Joinder of Parties, Joint Trial, *etc.*

Clause (b)—inserted by Act 26 of 1955. It cannot be laid down as a proposition of law that when Section 34 I. P. C. is not specifically mentioned in the charge conviction for a substantive charge read with Section 34 cannot stand.^{15a}

Where although Section 149 I. P. C. was mentioned in the charge it was not expressly stated therein that the members of the assembly knew that an offence under Section 307 I. P. C. was likely to be committed in prosecution of the common object, *held*, as the accused knew the case they had to meet the aforesaid defect in the charge, is in fact no failure of justice.^{15b}

Where the accused was charged under Sections 307/149 I. P. C. but there was no express mention in the charge drawn up with respect to Section 149 I. P. C., *held*, the defect in charge was cured under Section 537 as it did not occasion a failure of justice.¹⁶

Where accused persons were charged under Section 5 (1) (a) of the Prevention of Corruption Act but some of the accused were not public servants and the accused who was a public servant was convicted under Section 5 (2) of that Act instead of Section 5 (2) read with Section 34 I. P. C., *held*, that Section 537 cured the defect.¹⁷

In view of the insertion of clause (b) by Act 26 of 1955 misjoinder of charges or of persons is now an irregularity curable under Section 537 unless

12. (1911) 33 A 385 ; *Kedarnath Mahto*, 55 C 371 FB, *Monir Shinh*, 60 C 725.

13. *Rama Thevan*, (1892) 15 M 352. *Reddi*, (1903) 26 M 598 : 2 Weir 333.

14. *Bajnath*, A 1953 A 191 ; *Abdul Rahman*, A 1953 C 792 : 1953 Cr LJ 1797 ; *Chadimalal Jain*, A 1960 SC 41 followed in *Banwari v. State of Uttar Pradesh*, A 1962 SC 1198.

15. *Basdeo*, A 1945 A 340 (irregular commitment in disregard of S. 193).

15a. *Vagua Lakha*, A 1955 Kutch 1 ; *B. N. Srikantiah*, A 1958 SC 672 : 1958 Cr LJ 1251 ; *Rawalpatiah V. Venkalu v. State of*

Hyderabad, A 1956 SC 171 : 1956 Cr LJ 338.

15b. *Tekka v. State of U. P.*, (1961) Cr LJ 859 : A 1961 SC 803 ; *Om Prakash v. State of U. P.*, A 1960 SC 409 ; 1960 Cr LJ 514 (alteration of Charge under S. 165 A IPC to one under S. 161/109 IPC). See *Nanak Chand* A 1955 SC 274.

16. *Vagua Lakha*, A 1955 Kutch 1 ; *B. W. Srikantiah* A 1958 SC 672 : 1958 Cr LJ 1251.

17. *Major E. Q. Barsay v. State of Bombay*, A 1961 SC 1762 : 1961 (2) Cr LJ 828.

prejudice is caused to the accused^{17a}; see also.¹⁸ See notes under Sections 233, 234, 239, *supra*.

After the amendment in 1955 misjoinder of charges is saved by Section 537, unless it has occasioned a failure of justice. Sections 234 to 236 permit joinder of charges and trial of different offences against a single accused in the circumstances mentioned in those sections and Section 239 provides for the trial of several persons. If the joinder of such charges is made in contravention of the said provisions it will be misjoinder of charges.^{18a}

Effect of Amendment—Section 537, clause (b).—By Amending Act 26 of 1955 the word 'charge' is deleted from clause (a) of Section 537 and a new clause (b) is enacted. In substance by the amendment it is provided that a misjoinder of charges is to be regarded merely as an irregularity and not an illegality. To that extent the cases decided before the amendment may be regarded as superseded.¹⁹ The rule enunciated in *Subramaniya's* case 25 M 61 P. C. has been modified.

It cannot be said that Section 537 is applicable only to misjoinder of offences and not to misjoinder of both offences and accused persons. The words used in Section 537 are not misjoinder of offences or accused persons. They are misjoinder of charges. These words clearly include misjoinder of offences or of accused persons.²⁰ Even in cases of misjoinder where the contravention of the provisions of Section 234 is involved, it is not denied by the defence counsel that even prior to the amendment misjoinder itself would not have vitiated the trial unless prejudice to the accused had been proved. In the instant case there being no misjoinder, the argument that the breach of the proviso to Section 222 (2) necessarily vitiated the trial was negatived.²¹

See Commentary on Section 233 pp. 805, 806, 807, Commentary on Section 235, p. 825 and Commentary on Section 239, p. 845.

Where the charge is wrongly framed the conviction is not liable to be quashed unless prejudice has been caused to accused.²²

Effect of Misjoinder of charges.—Where objection is taken at an early stage of the trial there is time to rectify the error. Merely because accused persons have been charged with a number of offences and convicted is no ground for setting aside the conviction unless it has in fact come to the conclusion that the accused were embarrassed and there has been a failure of justice.^{22a}

29. Irregularities curable—Instances.—Where there was no material non-compliance with the provisions of Section 139A and a written state-

17a. *K. Damodaran v. The State of Travancore* A 1953 SC 462.

18. *Sri Ramverma*, A 1956 A 466 : 1956 Cr LJ 959 (F B). *Kottaya* 51 CWN 474 PC : A 1947 PC 67 ; *Bhawad Mepa Dana v. State of Bombay* 1960 SCR 172 : A 1960 SC 289 : 1960 Cr LJ 398. *State of Maharashtra v. Jagat Singh*, A 1964 SC 492.

18a. *Brich Bhusan v. State of Bihar*, A 1963 SC 1120 where *Subramanya Ayyer*, 28 IA 257 : 25 M 61; *Abdur Rahman*, 54 IA 96 : A 1927 PC 46, *Pukary Kottay* ILR (1948) M 1 : A 1947 PC 67 considered.

19. *Umar Saheb*, A 1960 B 205: 1960 Cr LJ 573 ; *State of Andhra Pradesh, v. Gandeswara Row*, A 1963 SC 1850.

20. *Ramhrishen* 1956 ALJ 748 : A 1956 A

462 ; *Deshraj Dhanpat Mal*, A 1958 Punj 254.

21. *Kudri Kunharmal*, A 1960 SC 661 : 1960 Cr LJ 1013 ; *R. K. Dalmia v. Delhi Administration*, A 1962 SC 1820 ; *Brich Bhusan v. State of Bihar*, A 1963 SC 1120 ; *Kisan Singh*, A 1961 B 124 : 1961 (1) Cr LJ 628 ; *Sunil Chandra Roy*, A 1954 C 305.

22. *Madanlal*, A 1961 C 241 following *Binchar Pradhan*, (1957) SCA 857 : A 1956 SC 469 ; *State of Andhra Pradesh v. Gandeswara Rao*, A 1963 SC 1850 ; *Moti Das v. State of Bihar*, A 1954 SC 657 ; *Damodar*, A 1953 Raj 127.

22a. *State of A. P. v. Gandeswara Rao*, A 1963 SC 1850 ; *State of A. P. v. Venugopal*, A 1964 SC 33.

ment was filed and an inquiry was held by the Magistrate, the failure, if any, to strictly and meticulously comply with the technicalities of Section 139A would be curable under Section 537.²³ Non-compliance with the provisions of Section 173 (4) are not mandatory and a failure to comply with them will not *per se* vitiate the trial in the absence of prejudice.²⁴ The failure to comply with the provisions of Section 161 (3) in the absence of prejudice is curable.²⁵ Breach of Section 162^{25a} and Section 172^{25b} is also curable under this section. Similarly, irregularity in search and seizure will not vitiate the trial.²⁶

The standing order 145 which was not issued under Section 9 of the Madras District Police Act but was issued under a Government order of Home Department has no standing authority. Non-compliance with the provisions of that order therefore does not make the investigation illegal.^{26a}

Where accused persons were charged under Sections 307/149 Penal Code and there was no express statement in the charge under Section 149, *held*, the defect is cured if there is no prejudice.^{26b}

Where the falsification of accounts was made to cover up defalcation it is curable under the provisions of this section.^{26c}

Where there was a charge under Section 409 I. P. C. which stated that in pursuance of the conspiracy criminal breach of trust was committed it could not be said that the four offences against the accused could be split up into distinct offences. In the instant case, it was complained that the charge was vague, the Supreme Court held that the vagueness of the charge would not make the trial illegal especially when no prejudice was caused to the accused.²⁷

Omission to make a memorandum of local inspection under Section 539 is curable.²⁸ A contrary view has been held in.²⁹

The trial of a summons case as a warrant case is only an irregularity curable under this section,³⁰ but trial of a warrant case as a summons case is an irregularity which would vitiate the trial only if the accused is prejudiced.³¹

Where the prosecution evidence has been held to be true and where the accused had full say in the matter, the conviction cannot be set aside on the ground of some irregularity or illegality in the matter of investigation, *e. g.*, where a police officer below the rank of Deputy Superintendent of Police

23. *Sukh Ram v. Manohar Lal*, 1960 Cr LJ 993.

24. *Narayan Ray v. State of A. P.*, 1958 SCR 283; A 1957 SC 737; *K. R. Sharma*, A 1958 Punj 27; *Noor Khan v. State of Rajasthan*, A 1964 SC 286.

25. *In re Asservadam*, A 1956 AP 199; 1956 Cr LJ 1183.

25a. *Nur Dewan*, A 1950 P 549; *Surendra*, A 1949 C 514; *Kotaya*, 51 CWN 474; A 1947 PC 67; *Zahiruddin*, 74 IA 480; A 1947 PC 75; *Gajanand v. State of Uttar Pradesh*, A 1954 SC 695.

25b. *Dharam Vir*, A 1933 L 488; *Budul*, 1957 ALJ 963.

26. *Chunilal Sarogi*, A 1958 Manipur 45; 1958 Cr LJ 1487; *Kisan Narayan*, A 1951 B 186; 52 Cr LJ 41.

26a. *State of Andhra Pradesh v. Venugopal*, A

1964 SC 33.

26b. *Tikka*, A 1961 SC 803.

26c. *Dinkar Rai Raghunath*, A 1963 Guj 15.

27. *R. K. Dalmia v. Delhi Administration*, A 1962 SC 1821; *Damodaram*, A 1953 SC 462.

28. *Raghunandan Prasad*, 53 A 706; A 1931 A 433; *Todar Mal*, A 1931 A 14; *Ramsarup* A 1948 A 141; *Khushal Jeran* 50 B 680. *Forbes v. Ali Hyder Khan*, 53 C 46.

29. *Hriday Govind Sao*, 52 C 148 followed in *Lalu*, 64 CWN 671.

30. *Munshilal* A 1948 A 278; 49 Cr LJ 345; *Gopal Das v. State of Assam*, A 1961 SC 989.

31. *G. Adinarayan*, A 1957 Or 229; 1957 Cr LJ 1155; *Maluk*, A 1930 S 53; 31 Cr LJ 123.

conducted investigation in a case under the Prevention of Corruption Act, 1947^{31a}.

Where the second examination under Section 342 was much too scrappy and fragmentary *held* it was a mere irregularity which could be cured by Section 537.³²

Irregularities not curable.—Where the Magistrate has not complied with the mandatory requirements of Section 145 (4) it follows that *ex facie* the order must be held to be improper and from the failure of the Magistrate to take into consideration large portions of the material evidence the natural inference must be that there has been a miscarriage of justice.³³ Where the charge under Section 304 I. P. C. included two distinct offences of murdering two distinct persons the judge did not tell the jury that it was a rolled up charge, the failure caused a failure of justice and could not be cured by Section 537.³⁴ An Additional Sessions Judge has no jurisdiction to transfer an appeal from the file of the Court of Sessions to himself, judgment is a nullity.³⁵

The verdict of the jury is not to be set aside unless there is in fact a failure of justice^{35a}.

30. Clause (c).—Provides that the omission to revise any list of jurors is curable unless prejudice can be shown.

31. Clause (d)—Irregularity in charge to Jury.—In drawing up a ground of appeal in jury trials in view of this clause it is essential to set out that the misdirection has occasioned a failure of justice.

Section 537 (d) covers the case of misdirection where there is no failure of justice.³⁶ On 'Misdirection' see Commentary on Sections 297 and 298 *supra*.

Judge questioning foreman of Jury.—See *Bhubhan Chandra Prodhan's* case.³⁷

Reception of inadmissible evidence—verdict of the jury.—See *Harendra Nath Shaha*.³⁸

The Court of appeal has to see whether the reception of inadmissible evidence has in fact occasioned a failure of justice and whether if it is excluded there is sufficient evidence to justify the verdict of the jury.³⁹

31a. *State of Uttar Pradesh v. Bhagwant Kishore*, A 1964 SC 221 (225, 226) : 1963 ALJ 982 ; *State of Andhra Pradesh v. Venugopal*, A 1964 SC 33 following *N. N. Risbud*, 1955—1 SCR 1150 : A 1955 SC 196 where *Munnalal*, A 1963 SC 28 referred to ; *Sudhir Kumar*, A 1953 C 226 ; *Bhagirathi*, A 1955 N 204.
32. *Razak Teli*, A 1960 J & K 38 : 1960 Cr LJ 343.
33. *P. V. S. Ready*, A 1960 AP 500 : 1960 Cr LJ 1300.
34. *Kirtibas Das*, 64 CWN 232 : A 1960 C 269 ; 1960 Cr LJ 469.
35. *M. Narayanmal v. Satyanarayan*, A 1960

AP 425 ; 1960 Cr LJ 1070.
35a. *Mushtak Husain v. State of Bombay*, A 1953 SC 282 ; *Nagendra Bala Mitra v. Sunil Roy*, 1960—3 SCR 1 : A 1960 SC 706 followed in *K. M. Nanavati*, A 1962 SC 605.
36. *Hooper*, 12 ALJ 149 : 21 IC 686.
37. 31 CWN 828 ; *Eran Khan*, 50 C 658.
38. 40 CLJ 313.
39. *Dhiraji v. Akari*, (1926) 24 ALJ 506 (510) ; *Devendra Marrappa*, (1923) 25 Bom LR 251 ; *Shaukh*, (1922) 24 Bom LR 484 ; *Mangu Koeri*, (1919) 20 Cr LJ 481.

Misreceptions of evidence—Duty of Judge to ask the Jury to disregard it—Discharge of Jury.—Where improper questions have been admitted at a trial, it is for the Crown to show that their improper effect has been set right by the Court. Either the Jury should be told at once to disregard the statements, or else the charge should contain a similar warning to them, and they should be expressly told that they are not to consider the statements as involving a contradiction or otherwise damaging the evidence of the witness. If this cannot be done, it is duty of the Judge to discharge the Jury and begin his case *de novo*.⁴⁰

Failure of justice.—In the Code of 1872 the expressions used were as follows :—“Has occasioned a failure of justice, either by affecting the due conduct of the prosecution or by prejudicing the prisoner in his defence.” In the Code of 1882 the words were :—“Such error, omission or irregularity has occasioned a failure of justice.” The Code of 1898 introduced in clause (d) the words “in fact” before the word “occasioned a failure of justice” which has been kept in tact by Section 148 of Amending Act (XVIII of 1923). See *Deva Dayal*.⁴¹

In fact.—The “in fact” introduced by the last amendment (*i. e.* of the Code of 1898) emphasises the necessity of the requirement that a failure of justice has resulted.⁴²

In judging a question of prejudice as of guilt Courts must act with a broad vision and the main concern should be to see whether the accused had a fair trial.⁴³

In a jury trial the Court is entitled to go into evidence in order to determine whether there has been a failure of justice.⁴⁴ In an appeal in a case of a jury trial the Privy Council in *Abdul Rahim's* case,⁴⁵ held that the appellate Court in deciding whether there is sufficient ground for interfering with the verdict of the jury can enter into evidence, uphold the conviction or acquit or direct a retrial. Section 537 was referred to and held that the High Court clearly could substitute its judgment and see whether there has been in fact a failure of justice.⁴⁶

In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere ; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand, also it will always be material to consider whether objection to the nature of the charge or a total want of one, was taken at an early stage.^{46a}

Failure to raise objection.—If the accused does not object to the irregular procedure there can reasonably be no prejudice to him if he is

40. *Mahammad Sagiruddin*, (1927) AIR (1928) C 551.

41. 11 Bom HC 237.

42. *William Smither*, 26 M I.

43. *Gurbachan Singh of Punjab*, (1957) SCA 856 : A 1957 SC 623 : 1957 Cr LJ 1009.

44. *Mushtak Hussain*, A 1953 SC 282; *Kama-*

khyas Prasad, A 1957 Ass 39 : 1957 Cr LJ 353.

45. 73 IA 77 (93) : 50 CWN 692 (PC).

46. *Ramkishan v. State of Bombay*, A 1955 SC 104 : (1955) SC A 410 (438).

46a. *William Slaney v. State of M. P.*, A 1956 SC 116.

represented by counsel.⁴⁷ The failure of the accused to raise an objection in the trial Court that he had been deprived of the benefit of the trial by jury by being tried under Section 409 I. P. C. would preclude him from raising the objection in appeal to the Supreme Court.⁴⁸

If the objection which was raised in appeal could and should have been raised on behalf of the accused before the trial Judge and it was not done, that would be a further ground for holding that the defect had not occasioned a failure of justice.⁴⁹ In case the objection to the error, omission or irregularity could or should have been taken at an earlier stage and was not taken, the High Court is reluctant to interfere in its revisional power.⁵⁰

No principle of the nature of waiver, acquiescence or estoppel can arise against the accused in criminal case, and legal consequences must follow all actions and decisions of Courts whether the accused does or does not raise objection at an earlier stage.⁵¹

No serious defect in the mode of conducting a criminal trial can be cured by the consent of the advocate of the accused.⁵²

32. Explanation.—This is new in the Code of 1898. As observed in commentary on this section *supra* the object was to cure technical defects *i. e.* to avoid acquittals or prevent the escape of punishment of criminals owing to technical omissions or irregularities in procedure. The *explanation* enacts that in order to test whether there has been a failure of justice “the Court shall have regard to the fact whether the objections could and should have been raised at an earlier stage in the proceedings.” Perhaps the Legislature had in view that the error, omission or irregularity could be cured if the point had been taken earlier.

In practice *this clause* in the *Explanation* works as a great hardship. If it was the intention of the Legislature to dispense “substantial justice” why is this limitation put? Because of this many errors or irregularities will remain uncorrected and there will be a failure of justice and the Court will be rendered powerless to remedy the defect.

In a case under the Code of 1882⁵³ it was held that it would be unreasonable to hold that Section 537 intends that the error, omission or irregularity should be allowed to remain uncorrected, when an objection is taken before a case is finally disposed of, and while there is time to correct the same.

If the objection is not permitted to be taken before the revisional Court it will cause actual injustice or “occasion a failure of justice” which the Legislature was anxious to safeguard against.

47. *Chandi Prasad v. State of U. P.*, A 1956 SC 149 followed in *Dinkar Rai Raghunath*, A 1963 Guj 15.

48. *William Slaney*, A 1956 SC 116; *K. C. Mathews v. State of Trav. Co.*, A 1956 SC 241; 1950 Cr LJ 444; A 1926 B 231; *Munshi Lal*, A 1948 A 278; 48 Cr LJ 545; *Mustafa Yoosef* A 1947 B 325; 48 Cr LJ 621.

49. *Om Prakash v. State of U. P.*, A 1963 SC 469 appeal from *Om Prakash*, A 1957 A 388; 1957 Cr LJ 695; *Sheo Prasad*, A 1959 A 378; 1959 Cr LJ 683; *Bhagwan Singh v. The State of Punjab*, 1952 SCR 812; A

1952 SC 214; *Bimbahadur v. Orissa State*, 1956 SCR 206; A 1956 SC 469; *Mahendra Nath Das*, A 1929 C 428; 31 Cr LJ 497.

50. *Sheo Prasad*, A 1959 A 378; 1959 Cr LJ 683.

51. *Badami Lal Ramdhan*, A 1955 Bhopal 20; 1955 Cr LJ 1561; *Mustafa Joosab*, A 1947 B 325; 48 Cr LJ 621.

52. *Abdul Rahman*, 54 IA 96; 31 CWN 271; 28 Cr LJ 259 (p. c.) (non-appliance with S 360 be curable).

53. *Nilratan Sen v. Jagesh Chandra Bhattacharjee*, (1896) 23 C 983.

538. Attachment not illegal, person making same not trespasser for defect or want of form in proceedings.—No attachment made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of attachment or other proceeding relating thereto.

Legislative Changes.—The word ‘attachment’ was substituted by Section 149 of Act XVIII of 1923 for the word ‘distress’.

CHAPTER XLVI

MISCELLANEOUS

539. Courts and persons before whom affidavits may be sworn.—Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the State, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

SYNOPSIS

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|------------------------------------|--|
| 1. State Amendment.
—Madras. | Magistrate. |
| 2. Contents of Affidavit. | 4. Affidavits sworn before a Presidency
Magistrate. |
| 3. Affidavit sworn before a Deputy | |

1. State Amendment—

Madras.—The words “or the Clerk of the State” have been omitted by Madras Act 34 of 1955.

2. Contents of Affidavit.—Knox, J., held :—“The intention of the law is and it cannot be too often repeated that the affidavit must contain nothing but bare facts known to the person who makes the affidavit either personally or upon information from a source and one on which reliance can be placed. Further, as it is for human beings to make a mistake in reciting a fact the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct.”⁵⁴

3. Affidavit affirmed before a Deputy Magistrate.—A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit.⁵⁵ But the Calcutta High Court admitted an affidavit sworn in the mofussil before a Deputy Magistrate in a proceeding under Section 195 Cr. P. Code where it was contended that the proceeding was a civil proceeding.⁵⁶

Affidavit before the High Court in a transfer application under Section 526 must be sworn before the High Court or any Commissioner or other person appointed by the High Court.⁵⁷

54. *Mangal*, (1913) 36 A 13 : 11 ALJ 986 : 15 Cr LJ 164 : 22 IC 740.

55. *Iswar Chunder Guha*, (1887) 14 C 653.

56. *Dinobundhu Nundy v. Hurrymutty Dassee*,

(1903) 8 CWN xl.

57. *Ramchandra Modak*, A 1926 P 214 : 27 Cr LJ 400.

An affidavit sworn before a Magistrate cannot be used in the High Court. It is clear from Section 539A clause (2) that a Magistrate would not come within the meaning of the word "Judge" in Section 539.⁵⁸

Affidavit before the *Nazir* of a Subordinate Court is not authorised⁵⁹.

4. Affidavits sworn before a Presidency Magistrate—in Calcutta are not admissible in the Patna High Court.⁶⁰

As a Deputy Magistrate is a Judge within the meaning of Section 19 illustration (b), I. P. C., it may be contended that the affidavit sworn before a Magistrate can be used before the High Court.

539A. Affidavit in proof of conduct of public servant.—

(1) When any application is made to any Court in the course of any, inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

(2) Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

SYNOPSIS

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|---------------------------------------|--------------------|
| 1. Legislative Changes 1923 and 1955. | 3. Scope. |
| 2. Effect of 1955 Amendment. | 4. Sub-section (2) |

1. Legislative Changes (1923 and 1955).—Section 539A which was inserted by Section 150 of the Criminal Procedure Amendment Act 18 of 1923 was split up into two sections, Section 539A and Section 539AA by Act 26 of 1955, sub-section (1) and paragraph 3 of the old section has been renumbered as Section 539A and paragraph 3 of the old section has been renumbered as paragraph 2 of Section 539A. Paragraph 2 of sub-section (1) and sub-section (2) of old Section 539 have been renumbered as Section 539A.

2. Effect of the 1955 Amendment.—Section 539A having been inserted by Act 26 of 1955 the present amendment by splitting up the old section was thought necessary.

3. Scope.—This section applies to any person including an accused person who chooses to make false allegations respecting a public servant and in support of those allegations swears an affidavit and an accused person who does so in an affidavit supporting his application for the transfer of a case is liable to punishment for the offence.⁶¹ One of the purposes of section 539A is to discourage the making of false and scandalous statements.⁶²

58. *Ramchandra Modak*, (1925) 5 P 110.
59. *Gangat Devaji Patil*, (1928) 31 Bom LR 144.
60. *B. N. Roy & Co. v. Sk. Makbul*, A 1925 P 755 : 27 Cr LJ 318.

61. *Badri Prasad*, A 1933 A 47 : 34 Cr LJ 457.
62. *Ganwar Bagal*, A 1944 S 155 : 46 Cr LJ 228.

4. Sub-section (2).—This sub-section provides how affidavits are to be sworn and how they should be confirmed.

Where accused falsely stated in affidavit that the statement made by the Magistrate that he was previously convicted is wrong, accused can be convicted under Section 199 I. P. C.⁶³ Where a deponent while swearing an affidavit swears to his personal knowledge of the truth of allegations and the allegations are ultimately found to be false, he is guilty under Section 199 I. P. C.⁶⁴

539AA. Authorities before whom affidavits may be sworn.—(1) An affidavit to be used before any Court other than a High Court under Section 510A or Section 539A may be sworn or affirmed in the manner prescribed in Section 539 or before any Magistrate.

(2) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

Legislative Changes (1955).—See notes under Section 539A. The words “under Section 510A or Section 539A” were added by Act 26 of 1955.

539B. Local inspection.—(1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost :

Provided that, in the case of trial by jury the Judge shall not act under this section, unless such jury are also allowed a view under Section 293.

SYNOPSIS

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|---|---|
| 1. Legislative Changes. | 5. Notice. |
| 2. State Amendment—Bombay. | 6. Memorandum of Local Inspection. |
| 3. Scope. | 7. Sub-section (2)—Omission to exhibit inspection note as part of the record. |
| 4. Local Inspection—Personal observation of Magistrate. | |

1. Legislative Changes.—This section was added by Section 150 of the Code of Criminal Procedure (Amendment) Act 1923 (XVIII of 1923).

The words “or with the aid of assessors” in the proviso to sub-section (2) have been omitted by Act 26 of 1955.

63. *Mahtab Singh*, A 1941 A 337 : 42 Cr LJ 883.

64. *Ramswarup*, A 1929 P 156.

2. State Amendment—

Bombay.—After Section 539B insert the following :—

“539C.—**Other powers of Magistrates.**—Any Magistrate shall be entitled to attest, verify or authenticate documents brought before him for the purpose of attestation, verification or authentication as the case may be, and to affix seals thereon, as may be prescribed by the Bombay Public Authorities Seals Act, 1883 or any other law for the time being in force”—Vide Bombay Act 78 of 1948.

“Section 539D.—**Attestations, etc. of documents and use of seal by Justices of the peace.**—Any Justice of the Peace (not being a legal practitioner) shall be entitled to attest, verify or authenticate documents brought before him for the purpose of attestation, verification or authentication as the case may be, and to affix such seal thereon as may be prescribed by the State Government by notification in the Official Gazette”—Vide Bombay Act 71 of 1954.

3. Scope.—A local inspection may be made for the purpose of properly appreciating the evidence given during trial. The Magistrate should not in making the local inspection do anything which could reduce him to the position of a witness.⁶⁵ Inspection must satisfy three conditions : (1) the inspection must be necessary to appreciate the evidence given at such inquiry or trial, (2) due notice of the inspection should be given to the parties and (3) a memorandum of relevant facts observed by the person making should be recorded by him without unnecessary delay.⁶⁶ It can be made only to understand the evidence.⁶⁷

Any premises may be inspected to clear any doubt about the sanction of the premises or for the purpose of appreciating evidence but the Magistrate has no right to entirely create evidence and to introduce it into the case for the purpose of finding persons guilty.⁶⁸

4. Local Inspection—Personal observation of Magistrate.—The magistrate is not entitled to allow the view of observations to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same. In the absence of such test having been applied and an explanation sought from the accused in regard to the same under Section 342, it is not open to the Judge to incorporate these observations of his in the judgment and base his conclusions on the same.⁶⁹

Local inspection is really meant for the purpose of understanding the evidence in a case. The Magistrate can utilise the results of his local inspection in coming to his conclusion from the evidence.⁷⁰ If the Magistrate on local inspection receives an impression which is favourable to one side he should give an opportunity to the side against whom he favours an impression.⁷¹ It is illegal to decide a case on local inspection.⁷² Judicial Officers are not legally permitted to find out for themselves the facts of a case they have to decide.⁷³

65. *Deva Setty*, A 1959 Mys 170 : 1959 Cr LJ 751; *Jawla*, 10 L 135; *Akhil Kishore*, A 1933 P 185 : 39 Cr LJ 442.
 66. *Md. Hussain*, 48 Cr LJ 428 (Lah); *Hriday Govinda Sur*, 52 C 148 : 25 Cr LJ 1375.
 67. *Mathura Prasad*, A 1953 VP 14 : 1953 Cr LJ 975; *Baboon Sheikh*, 37 C 340; *Nagendra Nath Sengupta*, 19 CWN 928 : 16 Cr LJ 576; *Faquri Lal*, A 1919 Oudh 97; *Lalo Mahto*, A 1942 P 150 : 43 Cr LJ 587.
 68. *Katapp, v. Serappa*, A 1955 Mys 131 : 1955 Cr LJ 1509.

69. *Pritam Singh v. State of Punjab*, A 1956 SC 415 : 1956 Cr LJ 805; *Katappa v. Serappa Sakalathi Ramgappa*, A 1955 Mys 131.
 70. *Lalo Mehto*, A 1942 P 150 : 43 Cr LJ 537; *Divisional Superintendent, Eastern Railway v. Surendranath*, A 1959 C 574.
 71. *Kadir Batcha Sahib*, A 1928 M 494.
 72. *Kunja Lal*, 54 CWN 186; *Tirkha v. Nanak*, A 1927 A 350; *ManikChand v. Bhubneswar*, A 1959 P 278; *Sk. Badal Ali*, A 1937 C 304.
 73. *Jailal Jha*, A 1923 P. 537.

Where the accused is not supplied with inspection report on request, conviction of accused based on inspection report can not be sustained.⁷⁴ No decision should be made on local inspection although there is some amount of latitude in Section 144 proceeding.⁷⁵

Unless a sketch map prepared by a Magistrate at the time of local inspection is proved in the witness box it is impossible to use it as evidence.⁷⁶

5. Notice.—Whenever a local inspection is made notice to the accused is indispensable.⁷⁷

6. Memorandum of local inspection.—Must be prepared without unreasonable delay.⁷⁸ It is dangerous to neglect to record memorandum when making local inspection.⁷⁹ Where a conviction by a bench of Magistrates was based on a report of local inspection signed by four Magistrates and one of the Magistrates did not take part in the local inspection, *held* that the conviction was invalid.⁸⁰

7. Sub-section (2)—Omission to exhibit inspection note as part of the record.—The omission to place on the record the memorandum of a local inspection is an *illegality* vitiating the conviction, and not an irregularity curable by the absence of any prejudice resulting from the default.⁸¹ In a later decision,⁸² Walmsley and B. B. Ghose, JJ., held that the principle enunciated in *Hridoy Gobinda Sur*,⁸¹ is too wide and that non-compliance is not an illegality which vitiates the proceeding or a trial but an irregularity which does not affect it in the absence of prejudice to the parties.

The Bombay High Court⁸³ adopted the view in *Forbes'* case⁸² and held that the non-compliance is covered by the provisions of Section 537. The Allahabad High Court has held that a local inspection by a Magistrate is only permitted by Section 539B of the Code for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself and that disregard of the provisions of Section 539B *viz.* omission to record a memorandum of relevant facts observed by the Magistrate at his local inspection is not cured by Section 537 *supra*.⁸⁴

540. Power to summon material witness, or examine person present.—Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person

74. *Jyoti Bhusan Das*, A 1953 C 457 : 1953 Cr LJ 1115.

75. *Harendra Nath*, A 1951 P 285 : 52 Cr LJ 10.

76. *Dalu Ghose*, 43 CWN 896 : 40 Cr LJ 795.

77. *Lalu*, 64 CWN 671 ; *Ajodhya Prasad*, 18 Nagpur LJ 329 : 37 Cr LJ 837.

78. *Jasim Shikh*, 50 CWN 799 : 47 Cr LJ 737 ; *Badal Ali*, 43 CNW 392 : 40 Cr LJ 621.

79. *Dalu Ghosh*, 43 CWN 896 ; 40 Cr LJ 795.

80. *Sebastian Lobo v. M. D. Souza*, A 1932 N 678.

81. *Hridoy Gobinda Sur*, (1924) 52 C 148 : 40 CLJ 149 ; followed in *Lalu*, 64

CWN 675 : A 1960 C 776 ; *Sarju*, A 1932 A 28 ; *Jasim Sheikh*, A 1946 C 537.

82. *Forbes v. Ali Haider Khan*, (1925) 53 C 46 ; *Musa*, A 1929 N 233 ; *Jagannath Rao*, A 1935 Or 23 : 1953 Cr LJ 111 ; *Mt. Sikera*, A 1938 Oudh 182 ; *Junna Prasad*, A 1938 Or 325.

83. *Khushal Jeram*, (1926) 50 B 680 : 28 Bom LR 1026, dissenting from *Hridoy Gobinda Sur*, (1924) 52 C 148 but following *Forbes v. Ali Haider Khan*, (1925) 53 C 46.

84. *Tirkha v. Nanak*, (1927) 49 A 475 (478) : (1927) 25 ALJ 377 : 28 Cr LJ 291 : 100 IC 371 : AIR (1927) A 350, following *Ramsahai Singh v. Dmarka Singh*, (1920) 61 IC 712.

already examined; and the Court shall summon and examine, or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

SYNOPSIS

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| <ol style="list-style-type: none"> 1. Corresponding sections in former Codes. 2. Scope. 3. Object. 4. "May at any stage". 5. "Of any enquiry or trial". 6. "Shall summon and examine"—Accused's Rights to summon defence witnesses.—Magistrate not to interfere with parties discretion. 7. Local inspection by a Magistrate. Re-examination of prosecution witnesses. 8. Accused's right of cross examination. | <ol style="list-style-type: none"> 9. Both parties have the right to cross examine Court witnesses. 10. Witnesses recalled after close of prosecution. 11. Prosecution evidence recorded after defence evidence closed. 12. Power to examine any person in attendance though not summoned as a witness. 13. Accused can not be examined as a Court witness. |
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1. Corresponding sections in former Codes.—This section corresponds to Sections 201, 249, 262 and 367 of the Code of 1861, Sections 192 and 351 of the Code of 1872 and is the same as that of 1882.

2. Scope.—The provisions of this section are very wide and a Judge may summon witnesses to the box and if the public prosecutor declines to examine them and the Judge may thereon acting on his own initiative cause them to be produced, such witness may be regarded as called under this section.⁸⁵ *Knox, J. held.*—"This section is a section which confers very wide powers upon a Court. But the wider the powers, the greater the exercise of discretion required of a Magistrate and if the Magistrate will, as he ought to do, read Section 252 along with Section 540, he will find that by Section 540 it was not intended that he should exercise his powers at the bidding of any person, but that the powers are given to prevent any danger of miscarriage of justice just because some particular witness has not been called."⁸⁶ The terms of Section 540 are very wide and any Court may at any stage of any inquiry, or trial or other proceeding summon any person as a witness, if his evidence appears to it, essential to the just decision of the case. In acting under the provisions of that section, the Court has to exercise a proper discretion.⁸⁷

This section consists of two parts; (1) giving a discretion to the Court to examine the witnesses at any stage and (2) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential for a just decision of the case. The discretion is very wide and the very width requires a corresponding caution in using the power given to a Court under this section.⁸⁸ In principle Section 540 is meant for both parties but in practice it is far more likely to be invoked for the benefit of the accused than for the prosecution.⁸⁹ There is nothing in this

85. *Satyendra Kumar Dutt Chaudury*, (1922) 37 CLJ 173 (177) : 24 Cr LJ 193 : 71 IC 657 : AIR (1923) C 463.

86. *Sital Singh*, 12 ALJ 15 (16) : 14 Cr LJ 682, followed in *Narayan Nasir*, (1926) 52 MLJ 118 : 100 IC 123 : AIR (1927) M 361 ; *Mani, K. v. R. S.*, A 1951 M 707 ; *Narayanan Nambiar*, A 1942 N 223 ; *Ram Sarup*, 6 CWN 98.

87. *In re Perumal*, (1923) 46 MLJ 325, where *Kali Prosanno Das*, (1896) 14

C 245 and *Natabar Ghosh v. Adya Nath Biswas*, (1922) 37 CLJ 415 : 27 CWN 675 were distinguished ; *Sagir Hossain*, A 1958 A 312 : 1958 Cr LJ 582 ; *Ibrahim*, A 1935 P. 95 : 36 Cr LJ 348.

88. *Mani, K. v. R. S.*, A 1951 M 707 : 52 Cr LJ 678 ; *Md. Shafi*, A 1953 A 867 : 1953 Cr LJ 1503.

89. *Arjune Das v. Basanti Lal*, A 1953 VP 16 : 1953 Cr LJ 980.

section itself to limit it to Court witnesses and it could apply also to witnesses for the prosecution as also for the defence.⁹⁰

3. Object.—The object of section 540 is to enable the Court to arrive at the truth. The Court examines that evidence neither to help the prosecution nor to help the accused.⁹¹ The Court is not empowered to compel either the prosecution or the defence to examine any particular witness or witnesses on their side, the Court has to act under Section 540,⁹² there is nothing in Section 139A which excludes the exercise of the Court's inherent power under this section.⁹³

4. 'May at any stage'.—Section 540 empowers the Court to examine any person as a witness at any stage of a trial.⁹⁴ It is not intended by section 540 of the Code of 1882 that a Judge shall reverse the order of a Sessions trial and call the witnesses summoned for the defence before the prosecution is closed.⁹⁵ It is perhaps irregular on the part of a Magistrate in calling for and examining a witness after the evidence on both sides have been taken and the case adjourned for judgment but the Magistrate was strictly within his rights under Section 540 in as much as the case was still a pending case when such evidence was taken.⁹⁶

A Magistrate or a Judge sitting alone is entitled to call fresh evidence upto the stage of delivery of judgment. Similarly a Judge sitting with a jury can take fresh evidence until the stage of his charge to the jury.⁹⁷

5. 'Of any inquiry'.—According to Sections 251 to 256, an accused cannot be called upon to enter upon his defence until the prosecution closes its case. No further evidence can be admitted against the accused except under Section 540 for which there must be valid reasons and which reasons must be recorded.⁹⁸

Trial.—For purposes of this section a trial terminates with the pronouncement of the judgment or the charge to the jury.⁹⁹

6. 'Shall summon and examine'.—Under Section 540, the Court is bound to summon and examine any witness whose evidence seems to be essential to the just decision of the case. A *post mortem* report cannot be used as evidence at the Sessions trial, except by way of refreshing the memory of the person who made it to contradict him.¹

Trevelyan, J., held.—"In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony Court could place confidence, I

90. *Hansraj Raj Harijiwan*, A 1940 N 390 : 42 Cr LJ 208.

91. *Inmayat*, A 1950 A 369 : 51 Cr LJ 1043.

92. *Kutumba Rao*, A 1957 AP 595 : 1957 Cr LJ 1069.

93. *Kishore v. Krishna Behari*, 58 C 461 : 32 Cr LJ 1187.

94. *Bhairab Charan Chakerbutty*, (1878) 2 CWN 702 (718).

95. *Hargobind Singh*, (1892) 14 A 242, referred to in *Shakir Ali*, (1897) 19 A 502.

96. *Ananda Chunder Singh v. Basu Mudh*, (1896) 24 C 167 ; *Inmayat*, A 1950 A 369 : 51 Cr LJ 1043 ; *Chammulal*, A 1949 A 692 *Contra Natabar Ghose v.*

Adyanath, 27 CWN 675 : 24 Cr LJ 957.

97. *Ramjeet*, A 1958 A 439 : 1958 Cr LJ 716.

98. *Ganga Singh*, (1912) 10 ALJ 383 (case under S. 110) ; *Rangaswami Daicker v. Muruga Naicken*, A 1954 N 169.

99. *Ramjeet*, A 1958 A 439 : 1958 Cr LJ 716 ; *Inayat*, A 1950 A 369 : 51 Cr LJ 1043.

1. *Ram Sarup Rai*, (1901) 6 CWN 98 ; *Narayana Nambiar*, A 1942 M 223 : 43 Cr LJ 557 ; *Kesava Pillai*, A 1929 M 837 : 31 Cr LJ 768 ; *Ram Bali*, A 1952 A 289 ; *Moni, K. v. R. S.*, A 1951 M 707 : 52 Cr LJ 673.

think I should call him, but I certainly should not call any witness on whose evidence I could not place reliance, at any rate in a case in which the prisoner is defended by counsel.^{1a}

The accused cannot make an application for summoning the defence witnesses for examining as defence witnesses but only for the purpose for cross examining them.² Summoning the Court witnesses is discretionary. And the Court cannot be forced to exercise them at the bidding of a party.³ Courts ought to remember that the purpose is not to enable one party to fill up gaps in his case and to improve it by new matter at a late stage but the court is to act in the interest of justice.⁴

Accused's right to summon defence witness exhausted—How should he proceed.—Where an accused person has exhausted his right of summoning witnesses for the defence, he cannot summon any other witness except by moving the Magistrate under the powers vested in the Magistrate under Section 540.⁵

Magistrate not to interfere with parties' discretion.—Magistrates should not take upon themselves the duty of deciding on behalf of the parties which witness should be examined.⁶

7. Local inspection by a Magistrate—Re-examination of prosecution witness with reference to result of local inspection, under Section 540.—It is open to a Magistrate to use the evidence of his own eyes to test the truth of what the witness had deposed to, that the Magistrate made no improper use of his local inspection when he had really embodied the result of his inspection in the examination of the prosecution witnesses on recall, and gave the accused a full opportunity of cross examining them with reference to the facts then elicited.⁷

8. Accused's Right of Cross Examination.—During the trial of a case the accused obtained a process for the attendance of a witness. Before the witness appeared the accused asked the Court to countermand the order for his attendance, but the Court refused to do so. When the witness attended, the accused declined to examine him. He was thereupon examined by the Court as a Court witness and upon the accused claiming the right to cross examine him, the Court refused, *held* that the witness could not be regarded as a defence witness and that the accused should have been given an opportunity to cross examine him.⁸

9. Both parties have the right to cross examine Court witness.—When witnesses are summoned by the appellate Court under Section 540, as Court witnesses both parties are equally entitled to a full examination of these witnesses on matters relevant to the enquiry.⁹ Witness summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination in order that the defence may have the opportunity of

1a. *Kali Prosanno Dass*, (1886) 14 C 245.

2. *Gabinda Reddy*, A 1958 Mys 150.

3. *Nur Mohammad v. Intiazahmad*, A 1942 Oudh 130; *Ghhotey Miayan*, A 1936 Or 250; 38 Cr LJ 482; *Narayanna Reddy*, A 1941 M 324.

4. *Ram Lasman Prasad*, A 1937 P 246; 38 Cr LJ 657 see *Md. Akbar*, A 1948 N 209; 49 Cr LJ 242 (Chalan) citing witnesses, only some examined prior to charge.

5. *Mangal*, (1913) 36 A 13; 11 ALJ 986;

15 Cr LJ 164; 22 IC 740.

6. *Duggirala Venkatappaya v. Mulppuri Venkataramanayya*, (1914) 28 MLJ 134; 16 Cr LJ 156; 27 IC 220.

7. *Thachroth Hydros*, (1923) 45 MLJ 279; 18 LW 113; 25 Cr LJ 7; 75 IC 695.

8. *Mohendra Nath Das Gupta*, (1902) 29 C 387; 6 CWN 550.

9. *Chintamon*, 35 C 243 (258); *Rangaswami Daicker v. Muruga Daicken*, A 1954 M 169; *Mahendranath Das Gupta*, 29 C 387.

exercising this right, and *a fortiori*, if such a witness is called and examined by the Court under Section 165 of the Evidence Act, the prisoner should be allowed to cross examine.¹⁰

"There is nothing in Section 165 of the (Indian) Evidence Act debar-ring or disqualifying a party to a proceeding from cross examining any wit-ness called by the Court."¹¹

10. Witness recalled on order of prosecuting officer—Trial with-out jurisdiction.—Where after the close of the case for the prosecution the Assistant Collector directed the Magistrate to re-call and re-examine two of the prosecution witnesses and at the same time interviewed these witnesses and ordered them to give evidence, *held* he abdicated his Magisterial function and became a mere delegate of the Assistant Collector who had initiated the prosecution.¹²

11. Prosecution evidence recorded after defence evidence closed.—The special powers conferred upon a Court by Section 540 may be ex-ercised under proper circumstances, but the recording of evidence on behalf of the prosecution after the defence evidence is closed cannot be justified. It is an irregularity which is condoned under Section 537 but which ought to be avoided.¹³ The Calcutta High Court condemned the practice of examining a witness for the prosecution after the defence is closed to bolster up the prose-cution where it appeared that the evidence was prejudicial. Section 540 should be taken recourse to where an expert, so to speak, is suddenly sprung upon the prosecution and they would have no opportunity of testing the expert's evidence.¹⁴ After both sides had closed their respective cases, after arguments had been heard and date had been fixed for delivery of judg-ment in a protracted hearing of the case, two witnesses who were named by the prosecution, were examined before the Magistrate—the Magistrate having acted under Section 540 *held* that the procedure adopted by the Magistrate was entirely unjustifiable.¹⁵

Under this section the Court has power to admit rebutting evidence for the purpose of contradicting evidence adduced on behalf of the defence, if the court thinks it essential to the just decision of the case.¹⁶ If after argu-ments had been heard the Court before delivery of judgment decides to take further evidence it would be proper for the Court to re-examine the accused with reference to the new evidence and to give the accused an opportunity to give such further evidence in defence as he may be advised.¹⁷ The defence can under this section apply before the Magistrate for summoning a defence witness who was not in the list of defence witnesses.¹⁸

12. Power to examine any person in attendance though not sum-moned as a witness.—There is no law or principle which prevents a person who has been suspected and charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a wit-

10. *Grish Chunder Taluqdar*, (1879) 5 C 614 : 5 CLR 364.

11. *Gopal Lall Seal v. Manick Lall Seal*, (1897) 24 C 288.

12. *Nabi Bux*, (1913) 7 SLR 82 : 15 Cr LJ 375 : 23 IC 743.

13. *Alex Pimento*, (1920) 22 Bom LR 1224 : 22 Cr LJ 58 : 59 IC 202.

14. *Radhamadhab Pakra*, (1914) 15 CWN 414 : 12 Cr LJ 7 : P IC 46.

15. *Natabar Ghose v. Adya Nath Biswas*,

(1922) 37 CLJ 415 : 27 CWN 675 : 24 Cr LJ 957 : 75 IC 541 : AIR (1923) C 690.

16. *Narayan Mondal*, 34 CWN 170 : A 1930 C 134.

17. *Channulal*, A 1949 A 692 : 51 Cr LJ 199 ; *Majizuddin*, 37 CWN 1186 (pro-secution witness allowed to produce a document).

18. *Bhupal*, A 1946 PG 43.

ness for the prosecution.¹⁹ A person apprehended by the police and brought before the Magistrate with the accused is, though not discharged by the Magistrate, a competent witness against the accused, provided he be not charged along with the accused.²⁰

The order of the Magistrate rejecting the application of the prosecution to examine witnesses who are present in Court on the sole ground that their names were not mentioned in the charge sheet is illegal.²¹ There is no rule that a witness who was produced in the committal proceedings cannot be examined in the session Courts, the sessions Court can examine him under Section 540. If he is examined as a prosecution witness instead of by the court itself it would be at best an irregularity curable by Section 537.²²

13. Accused cannot be examined as a Court witness.—"Sections 428 and 540 do not seem to us to authorise the examination of the accused as a witness".²³ When the Sessions Judge after a case was committed before him was satisfied that it was a material witness for the defence and ordered the Magistrate to summon that distinguished personage held that the order was right and that Section 540 was not the only provision in the Code which conferred on the Sessions Judge powers of the kind exercised by him.²⁴

540A. Provision for inquiries and trial being held in the absence of accused in certain cases.—(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

SYNOPSIS

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| 1. Legislative Changes—1923 and 1955. | 4. Incapable of remaining before the court. |
| 2. Effect of 1955 Amendment. | 5. Sub-section (2). |
| 3. Scope. | |

1. Legislative Changes.—This section is new and was added by Section 151 of the Code of Criminal Procedure (Amendment) Act, 1923.

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| 19. <i>Behary Lall Bose</i> , (1867) 7 WR (Cr) 44. | 22. <i>Bhagaban Singh v. State of Punjab</i> , 1952 SCR 812 : A 1952 SC 214 : 1952 CrLJ 1131. |
| 20. <i>Narayan Sundar</i> , (1868) 5 Bom HCRI (Cr). | 23. <i>Subbaya</i> , (1889) 12 M 451. |
| 21. <i>Coli Nanji Bhima</i> , 4 Sur LR 69 where <i>Bhupal</i> , A 1946 PC 43 distinguished. | 24. <i>Rajah of Kantit</i> , (1886) 8 A 668. |

Legislative Changes (1955).—In sub-section (1) the words “where two or more accused are before the Court” which accured after the words “under this Code” as also the words “any one or more of such occurred is or are incapable of remaining before the Court” which occurred after the words “to be recorded” have been omitted by Act 26 of 1955. The words “The personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate” have been inserted by the Amending Act 26 of 1955.

2. Effect of 1955 Amendment.—Under the former section trial could be held in the absence of an accused if there were more than one accused and one or more of them were incapable of remaining before the court which in capacity was held to be physical infirmity as in,²⁵ and the section did not apply to the case of an accused applying to be exempted from personal appearance without ever having appeared before Court.²⁶ Sections 205, 353 and 366 (2) were the only provisions for the trial being proceeded with and judgment delivered in the absence of an accused. The present amendment provides that the Court may dispense with the personal attendance of an accused at any stage of an enquiry trial, if the Court thinks that the personal attendance of the accused is not necessary in the interests of justice. The amendment is in keeping with the object of the amendment of the Code in 1955, *i. e.*, to provide for a speedy trial.

3. Scope.—The section applies whether the accused is in jail custody or whether he is on bail.²⁷

4. “Incapable of remaining before the Court.”—Illness or some other reason such as social ban or peculiar customs of the class to which the parties belong may be good reasons for dispensing with personal attendance.²⁸ Under the unamended section no discretion was given to Court to dispense with the attendance of the accused except on account of his own incapability of remaining before the Court.²⁹

The mere fact that the presence of the accused at the place where the trial was being held would be detrimental to Government work which the accused was contracted to execute does not make the accused incapable of remaining before the Court.³⁰ *If such accused is represented by pleader.* The Calcutta High Court in a full bench decision by a majority has held that where a Magistrate has permitted an accused to be represented by a pleader under Sections 205 and 540A (1) he is not bound to compel the appearance of the accused for examination under Section 342 of the Code, he may exercise his discretion in the matter.³¹

A pleader representing an accused either under Section 205 or 540A can be examined under Section 242 or 342 instead of the accused. The non-examination of the accused himself in person does not constitute an illegality so as to vitiate the trial or even an irregularity curable under Section 537.^{31a}

25. *Kalidas*, A 1954 C 576 ; *Chimalal v. Parashan Singh*, A 1957 N 101 : 1957 Cr LJ 1430.

26. *Indra Devi v. Sarnagat Singh*, A 1955 EP 81 : 1955 Cr LJ 698.

27. *Jagdish Narayan Bajpai*, A 1940 A 178 : 41 Cr LJ 500.

28. *Trilochan Misra*, A 1953 Or 81 : 1953 Cr LJ 652.

29. *Mst. Poesi v. Mandas*, 1951 Raj LW 27.

30. *Sultan Singh Jain*, A 1951 A 864 : 1952 Cr LJ 66 (F B). Overruling *M. G.*

Desai, A 1932 A 504.

31. *Prova Devi*, 66 CWN 577 (F B) : A 1962 C 203 overruling *Dudnath Shaw*, A 1958 C 431 and *Adeluddin*, 49 CW & 537 : A 1945 C 482 see cases referred to ; *Deolakhan*, A 1963 P 371 ; *Narain Lal Bansilal*, 1963 BLJR 88.

31a. *Deo Lakhan*, A 1963 Pat 371 following *Sm. Prova Debi v. Mrs. Fernandes*, A 1962 C 203 F B ; 1962 (1) Cr LJ 565 and *Narayan Lal Bansilal*, 1963 BLJR 88.

5. Sub-section (2).—Provides for the case where the accused is not represented by a pleader.

541. Power to appoint place of imprisonment.—(1) Unless when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

(2) **Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.**—If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section (2), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under Section 342 of the Code of Civil Procedure; or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under Section 341 of the Code of Civil Procedure.

SYNOPSIS

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| 1. Legislative Changes. | 3. Scope. |
| 2. Power to appoint place of imprisonment. | 4. Sub-section 3 (b). |

1. Legislative Changes.—In sub-section (3) the words “sub-section (2)” have been substituted for “sub-section (1)” by the Repeating and Amending Act VII of 1924 in order to correct a clerical error.

Sections 341 and 342 of the Code of Civil Procedure of 1882 are now Section 58 of Act V of 1908.

2. Power to appoint place of imprisonment.—A place so appointed is not a ‘prison’ within the meaning of Section 3 (1) (b) of the Prisons Act, 1894 (IX of 1894) as amended by Prisoner’s Act VII of 1900.

3. Scope.—Where ample provision has been made for the detention in jail or judicial lockup of persons liable to imprisonment or committed in custody the State Government has no power to issue a direction under sub-section (1) that an approver shall be kept in police custody.³²

32. *Kundan Lal*, A 1931 L 353 ; 32 Cr LJ 785 ; *Kharati Ram*, A 1931 L 476.

4. Sub-section 3 (b).—*Discharged under Section 341 of the Code of Civil Procedure.*—See now the Code of Civil Procedure, 1908 (V of 1908) Section 58, and the Provincial Insolvency Act, 1920 (V of 1920), Section 27.

542. Power of Presidency Magistrate to order prisoner in jail to be brought up for examination.—(1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869, any Presidency Magistrate desirous of examining as a witness or an accused person, in any case pending before him, any person confined in any jail within the local limits of his jurisdiction, may issue an order to the officer incharge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

For the Prisoner's Testimony Act, 1869 (XV of 1869) see now the Prisoner's Act, 1900 (III of 1900).

543. Interpreter to be bound to interpret truthfully.—When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.

1. Corresponding sections in former Codes.—This section corresponds to Section 431 of the Code of 1861, Section 422 of the Code of 1872 and is the same as Section 543 of the Code of 1882.

See Section 361 of the Civil Procedure Code and Section 5 of the Indian Oaths Act.

2. Scope.—It is now necessary that a statement made to a Court by an accused in a foreign language should be taken down in the words of that language. The language in which the statement is conveyed to the Court by the interpreter is the language in which it should be recorded.³³

A witness should not be appointed interpreter of his own evidence^{33a}. Where the complaint is by the Department of Land Customs it is not proper to appoint a person as an interpreter who is intimately connected with the office of the Land Customs Department.³⁴

The trial Court is the best Judge as to whether the services of an interpreter are required or not.³⁵

33. *Vaimbilee*, (1880) 5 C 826.

33a. *Ragzan*, A 1948 L 97 : 49 Cr LJ 438.

34. *Nazir Mohammad*, A 1953 EP 227 :

1953 Cr LJ 1542.

35. *Manbodh*, A 1955 N 97 : 1955 Cr LJ 728.

544. Expenses of complainants and witnesses.—Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Scope. |
| 2. Legislative Changes. | 6. Rules. |
| 3. Expenses of complainants and witnesses. | |
| 4. Payment of expenses of defence witnesses in a warrant case. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 421 of the Code of 1872.

2. Legislative Changes.—The words “with the previous sanction of the Governor-General-in-Council” after the words ‘Subject to any rules made by the State Government’ were omitted by Section 2 and Schedule I of the Devolution Act, 1920 (XXXVIII of 1920).

3. Expenses of complainants and witnesses.—Section 544 and Rule No. 11 made by the Government of Bombay under that section, regulating the payment, on the part of Government, of the expenses of complainants and witnesses in cases coming before the criminal Court, invest the Magistrate trying a warrant case with a discretionary power exercisable by him within the limits specified in the rule itself. Such discretion however, must be exercised according to sound judicial principles and reasonably.³⁶

4. Payment of expenses of defence witnesses in a warrant case.—which is neither non-bailable nor cognizable and which are not brought in public interest cannot be allowed by the court.³⁷ The section does not authorise payment of diet money to the witnesses by complainant. That order can be made by the rules framed by the High Court³⁸ according to rule 1 of the rules framed by the Government of Rajasthan *vide* Notification No. F 21 (250) Judicial 49 dated 24th February, 1951 the State is not bound to bear the expenses of the complainant's witnesses in a case instituted on a private complaint even though in a warrant case the witnesses are recalled for cross examination after the charge is framed.³⁹

5. Scope.—There is no rule of law authorising the payment of a professional fee to a lawyer summoned to give evidence in a criminal case. The case of a doctor is however different as he comes to Court to give his evidence, —expert medical opinion on the matter in issue.⁴⁰ All criminal prosecutions are at the instance of the State and all costs ought to be paid by the State for summoning a witness for the prosecution.⁴¹ In private prosecution the complainant must pay the reasonable expenses of the witnesses⁴² and the Court has a perfect right to insist upon those fees being paid in advance before the processes are issued and to refuse to issue processes unless the diet money and travelling expenses are deposited.⁴² Where a private complaint

36. *Ganesh*, (1907) 9 Bom LR 353 : 5 Cr LJ 329.

37. *Mokana v. Godfret*, A 1945 L 68 : 46 Cr LJ 596.

38. *Kamal*, 29 CWN 1033.

39. *Umed Singh*, A 1955 Raj 195 : 1955 Cr LJ 1518.

40. *Jadu Mani Mangraj, v. Sarat Ch. Das*, A 1956 Or 209 : 1956 Cr LJ 1419.

41. *Nanda Kishore Misra v. Kalika Misra*, A 1924 P. 695 : 25 Cr LJ 458.

42. *Ram Dulari*, A 1928 Oudh 226 : 29 Cr LJ 664.

was made in a non-cognizable case but the Court ordered the Inspector of the Court to prosecute the case and the complainant applied for a hand-writing expert, *held* after the Court's order the case ceased to be a private complaint.⁴³

The witnesses in this section include both prosecution and defence witnesses.⁴⁴

6. Rules.—For rules made in exercise of these powers, for—

- (1) Ajmere-Merwara, *see* Aj. R. and O. ;
- (2) Assam, *see* Assam R. and O. ;
- (3) Bombay, *see* Bom. R. and O. ;
- (4) Burma, *see* Bur. R. M. ;
- (5) Central Provinces, *see* C. P. R. and O. ;
- (6) Madras, *see* Mad. R. and O. ;
- (7) Punjab *see* Punj. R. and O. ;
- (8) United Provinces, *see* U. P. R. and O.

Rules of the High Court of Punjab which provide that ordinary expenses of defence witnesses are to be paid by the State in every warrant case are *ultra vires*.⁴⁵

545. Power of Court to pay expenses or compensation out of fine.—(1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(a) in defraying expenses properly incurred in the prosecution ;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court ;

(bb) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855, entitled to recover damages from the person sentenced for the loss resulting to them from such death ;

43. *Parshotam Das*, A 1936 L 919 : 38 Cr LJ 133.

44. *Vedanta*, A 1950 M 283.

45. *Manakchand v. Suraj Prakash*, A 1938 L 693 : 40 Cr LJ 68.

(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

SYNOPSIS

- | | |
|--|--------------------------|
| 1. Corresponding sections in former Codes. | 7. Sub-section (1) (a). |
| 2. Legislative Changes—1923 and 1955. | 8. Sub-section (1) (b). |
| 3. Effect of 1923 and 1955 amendments. | 9. Clause (bb). |
| 4. Court Fees Act. | 10. Sub-section 2. |
| 5. Scope. | —refund of compensation. |
| 6. Order when to be made. | 11. Appeal. |
| | —Notice to complainant. |

1. Corresponding sections in former Codes.—This section corresponds to Section 44 of the Code of 1861 and Section 308 of the Code of 1872, and the Code before its amendment was similarly worded as that of 1882.

See Section 386 *supra* for the mode of recovery of fine and Section 140 (2) *supra* which authorises a Magistrate to order attachment and sale of a property in order to abate a public nuisance.

In Upper Burma, the Court imposing a fine or confirming a sentence of an officer under Section 9 (4) of the Upper Burma Ruby Regulation, 1887 (XII of 1887), may presume, for the purposes of Section 545, that inquiry has been caused by the offence, and that substantial compensation is recoverable by civil suit in respect to the injury—see Section 9 (5) of that Regulation, Bur. Code.

2. Legislative Changes introduced in 1923.—Clause (b) was substituted by Section 152 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923) for the old clause (b) which stood as follows:—

“(b) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by Civil suit.”

Clause (c) has been added by the said Act.

The amendment was proposed by clause 133 of Bill III of 1914.

Legislative Changes 1955.—In sub-section (1) the words “including a sentence of death” and clause (bb) have been inserted by Act 26 of 1955.

3. Effect of the 1923 Amendment.—Clause (b) has been slightly amended. The amendment has made it much wider in its scope. Clause (c) provides for payment of compensation to innocent purchasers of stolen property. The Amending Act XVIII of 1923 by inserting clause (c) has superseded *Ram Chandra's* case^{45a} which held, "The order to pay a certain amount of the fine or compensation to the pledgee was outside the scope of Section 545 of Cr. P. Code 1898", is not longer good law in view of the amended Section 545. The basis of these decisions was that the sale to innocent purchasers was not an offence as the section contemplated compensation to be paid to the person who had suffered by the offence and the injury suffered by the innocent purchaser was not injury caused by the offence.

Sub-section (c) directs payment of compensation to innocent purchasers in the specific cases mentioned therein.

Effect of 1955 Amendment.—The words "including a sentence of death" make it clear that even in a case where death sentence is awarded the Court has power to direct expenses or compensation to be paid out of the fine imposed as an additional sentence. Clause (bb) has reference to compensation awardable under the Fatal Accident Act.

4. Court Fees Act.—Order passed under Section 545 of Cr. P. C. for payment of expenses incurred in the prosecution was unsustainable, and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it.⁴⁶

5. Scope.—A Magistrate who convicts and sentences an accused person to a fine has no power to award compensation to the complainant in addition to the fine, although he might direct that a part of the fine, if recovered, be paid to the complainant as compensation.⁴⁷ It is quite competent to a Court when ordering compensation to be paid out of the fine imposed to provide by its order for the proportionate distribution of the amount realised.⁴⁸ An order imposing fines on the convicts for the purpose of awarding compensation to the nearest heirs of the murdered person is bad, if no evidence is taken to show that the convicts can pay the fine imposed.⁴⁹ Compensation exceeding the loss incurred by the complainant cannot be awarded to him under Section 545 Cr. P. C.⁵⁰

An appellate Court which for the first time imposes a fine can make an order under this section.^{50a} The Court cannot award compensation to an acquitted accused out of the fine imposed on a convicted accused.^{50b}

6. Order when to be made—When passing Judgment.—The award of compensation referred to in Section 414 of the Cr. P. C. should be a part of the sentence and order made upon a conviction for an offence of the nature specified therein, and should be based upon a statement of loss, damage, expenses as the case may be ascertained at the trial.⁵¹

45a. (1922) 24 Bom LR 382 : 46 B 893 ; *Abdul Kadir*, (1901) 3 Bom LR 449 ; *Dhondur*, (1901) 3 Bom LR 764 ; 7 MHC (App. Anon. 13).

46. *Yamana Rao*, (1900) 24 M 305 ; *Tukaram Sadashiva*, (1902) 4 Bom LR 877, see 5 Bom LR 976.

47. *Manik Chandra Roy v. Ismail Kalu*, (1918) 23 CWN 387 : 20 Cr LJ 398 : 5 IC 1006.

48. *In re Khaddam Venkata Rao*, (1914) 2 LW 22 : 16 Cr LJ 58 : 26 IC 650.

49. *Chuha*, (1913) 18 PR 1913 Cr : 41 PWR 1913 Cr : 326 PLR 1913 : 14 Cr LJ 522 : 20 IC 1002.

50. *Shibdas*, (1913) 40 PWR 1913 Cr : 335 PLR 1913 : 14 Cr LJ 659 : 21 IC 899.

50a. *Tirumal Raju*, A 1947 N 368.

50b. *Doraiswami Naicker*, A 1956 M 281 : 1956 Cr LJ 773.

51. *Gour Chandra Dass*, (1869) 11 WR (Cr) 53.

7. Sub-section (1) (a).—When a complainant cannot recover substantial compensation in a Civil Court, compensation cannot be awarded to him under clause (b) of Section 545 Cr. P. C. but a sum may be awarded to him under clause (a) of the section to defray the expenses of the prosecution.⁵²

Two accused are found guilty of the same offence, the Court does not contemplate the giving of compensation by one accused to the other accused.⁵³

8. Sub-section (1) (b)—Compensation for injury caused by the offence to whom may be awarded.—This sub-section has been substituted for the old sub-section (1) (b).

See 'Legislative changes' *supra*. The amendment by the addition of 'any person' has made clause (b) wider in its application.

It would be pertinent here to note the alterations in the Code and their effect—

Act XXV 1861, Section 44 used the following words:—"order that the fine or any part thereof, not exceeding the loss appearing to be caused to the person who has suffered by such offence and any special damage of a pecuniary nature that may have resulted to such person by such offence....be paid to or for the benefit of such person....the amount awarded to the person injured."

Act VIII 1869 Section 4 (44) contained the expression :

"Such payment shall be made as the Court thinks fit, to or for the benefit of the complainant, or the person injured, or both."

Act X of 1872 (Section 308) same as Act VIII of 1869.

Act X of 1882 Section 545 same as that of Act V of 1898.

The Amending Act XVIII of 1923 by inserting "any person" and the consequential grammatical alteration "recoverable by such person in a Civil Court" for the words "recoverable by Civil Suit" has set at rest the conflicting decisions of the Calcutta High Court⁵⁴ which held that compensation could not be awarded to the heirs of the deceased and which decision under the Code of 1861 was followed in *Sivappa*⁵⁵ without considering the effect of the alteration in language and *Lutchmak*⁵⁶ where the matter was not argued at the bar. See *Yalla v. Mamdit*.⁵¹ The Calcutta High Court in a later decision⁵⁸ preferred to follow the view of Benson, J., in the order of reference in *Yalla v. Mamdi*,⁵⁷ and dissented from the said full bench decision.⁵⁷ Although the Amending Act XVIII of 1923 uses "when" in place of "where" the introduction of the expression "any person" makes clause (b) wider in its application. The Punjab Chief Court in *Saij Ali*⁵⁹ held that compensation could be awarded under this section to the widow where her husband had been killed by an act amounting to an offence of culpable homicide. Thus it will be seen that after the amendment the decisions,⁵⁵, ⁵⁶ and ⁵⁷ are no longer good law and the decision⁵⁹ has been modified to this extent that compensation

52. *Nga Fha Yin*, (1914) 15 Cr LJ 555 : 24 IC 963.

53. *Gobindan, In re*, A 1958 N 300 : 1958 Cr LJ 777.

54. *Rooplall*, 10 WR (Cr) 39.

55. 7 Bom HC 73.

56. 12 M 352, decision under the Code of

1882.

57. 21 M 74 (F B) : 2 Weir 719 following 12 M 352.

58. *Morgan*, 36 C 302 : 13 CWN 362 : 9 CLJ 204 : 9 Cr LJ 393.

59. 17 PR 1898 F B.

may now be awarded to 'any person' for the loss or injury caused by the offence. The old Code read only 'injury'. The amendment has introduced 'loss or injury'. Hence the section has been made wider in its application so as to cover 'loss' also caused by the offence.

The second part of the Section 545 Cr. P. C. which allows compensation as could be recovered by Civil suit is inapplicable, as substantial compensation was not recoverable by Civil suit for perjury.⁶⁰ Where a complainant cannot recover substantial compensation in a Civil Court, compensation cannot be awarded to him under clause (b), but a sum may be awarded to him under clause (a) to defray the expenses of prosecution.⁶¹

9. Clause (bb)—was inserted by Act 26 of 1955. It has accepted the Calcutta rule.⁵⁸

Sub-section (c)—is altogether new.

See Commentary *supra* heading 'Effect of Amendment', 'Legislative Changes'.

10. Sub-section (2)—Refund of Compensation.—The section as it stands does not provide for a refund of compensation even if illegally levied or realised. But since Section 423 (1) (d) was inserted for the first time in the Code of 1898 such an order can be passed by the Appellate Court or by the Revisional Court acting under Section 439 while quashing conviction. *Chogatta's case*⁶² which held: "we can find no section of the Code under which the accused can obtain summary redress in the Criminal Courts," being a decision before clause (d) to Section 423 was inserted is *no longer good law*. On a sentence being set aside in revision by an order of the High Court which directed that the fine should be refunded *held* that the sum which was paid to the complainant as compensation was recoverable under the order, as part of the original fine, and that it was recoverable by process under Section 547 Cr. P. C. and not by a suit in Civil Court.⁶³ Under Section 250 Cr. P. C. compensation cannot be awarded when the complaint having been made to the police, the Magistrate has taken cognisance of the case upon receiving a charge sheet against the accused sent in by the Police.⁶⁴

11. Appeal—notice to complainant.—Though there is no express provision of law with regard to notice to opposite parties, yet where compensation has been awarded to the complainant, notice must be given to him as it is a fundamental principle of law that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence and therefore a Court hearing an appeal would be exercising proper discretion to give notice to the complainant.⁶⁵ The complainant should be served with a notice of an appeal or revision application.⁶⁶ Where notice was sent to the state and not to the complainant who was awarded compensation there was no irregularity much less an illegality.⁶⁷ It seems the decision in⁶⁷ is not correct.

60. *Mangal Chand v. Mohan*, (1916) 14 NLR 131 : 19 Cr LJ 927 : 47 IC 443.

61. *Nga Fha Yin*, (1914) 15 Cr LJ 555.

62. 2 PR 1889.

63. *Ishri*, (1883) 6 A 96 ; *Mutasaddi v. Maria*, (1896) 19 A 112 : (1896) A WN 182.

64. *Polavarapu*, (1884) 7 M 563.

65. *Bharsa v. Sukdeo*, 53 C 989 : A 1926 C 1054; *Balwant Ganesh v. Motilal*, A 1936 N 144.

66. *Chunilal Bhagwanji*, A 1942 B 205 (1) : 43 Cr LJ 765.

67. *Maria Soosasi v. A. Rokkiam*, A 1942 M 405.

546. Payments to be taken into account in subsequent suit.—At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under Section 545.

SYNOPSIS

1. Corresponding sections in former Codes.
2. "Shall take into account."

1. Corresponding sections in former Codes.—This section corresponds to Section 308, last paragraph of the Code of 1872 and is the same as that of 1882.

2. 'Shall take into account.'—The expression 'take into account' in the Code of Cr. P. C. Section 308, means that the compensation awarded by the Magistrate is to be taken into consideration in a subsequent civil suit, not that it is to be afterwards deducted from the damage awarded.⁶⁸

546A. Order of payment of certain fees paid by complainant in non-cognizable cases.—(1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may in addition to the penalty imposed upon him, order him to pay to the complainant—

- (a) the fee (if any) paid on the petition of complaint or for the examination of the complainant, and
- (b) any fees paid by the complainant for serving processes on his witnesses or on the accused.

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court, when exercising its powers of revision.

SYNOPSIS

1. Legislative Changes.
2. Statement of Objects and Reasons.
3. Scope.
4. Payment of fees.

1. Legislative Changes.—This section is altogether new and was inserted by Section 153 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923).

2. Statement of Objects and Reasons.—"This section embodies the provisions of Section 31 of the Court Fees Act in order that greater prominence may be given to them".

3. Scope.—This section applies to a case of a non-cognizable offence. An order for payment of cost is not competent under this section when the case is one of a cognizable offence.⁶⁹

68. *Love v. Alinsworth*, (1874) 22 WR (Civ) 336.

69. *Nuruddin*, A 1925 Oudh 109 ; 25 Cr LJ 1161.

4. Payment of fees.—Where the complainant has not paid any process fee for the issue of process on his witnesses or on the accused or fee in the petition of complaint he is not entitled to recover such sums under clause (1).⁷⁰

547. Moneys ordered to be paid recoverable as fines.—Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for shall be recoverable as if it were a fine.

SYNOPSIS

1. Legislative Changes.
2. Scope.

3. Payable by virtue of any order made under this Court.

1. Legislative Changes.—The expression “*and the method of recovery which is not otherwise expressly provided for*” was inserted by Section 154 of the Code of Criminal Procedure (Amendment) Act (XVIII of 1923).

2. Scope.—These words are intended to cover cases under Section 250, 148 (3) and Section 546A. See Section 386 *supra* as to recovery of fines. See *Mutasaddi's case*.⁷¹

There is no provision in the Code under which the Court can order payment of diet money to a witness. That power is vested in the Court under the general rules of the High Court.⁷² According to the provision of Section 547 money ordered to be paid as compensation under Section 250 is recoverable as if it were a fine.⁷³ Fine paid by a stranger on behalf of an insolvent accused cannot be recovered from the State. His right is a gain to the insolvent's estate.⁷⁴

3. “Payable by virtue of any order made under this Court”.—The order of the Sub-Divisional Magistrate under this section directing the recovery of the amount under the Public Demand Recovery Act was not an order under the Criminal Procedure Code and was not a judicial order.⁷⁵

548. Copies of proceedings.—If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record he shall, on applying for such copy, be furnished therewith :

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

SYNOPSIS

1. Scope.
2. Inspection of record.
3. “Affected by judgment or order.”

4. Copies of proceedings.
—Proviso.

70. *Maung Tohla*, A 1935 R 208 : 36 Cr LJ 1048 (1).

71. 19 A 112.

72. *Kamal*, 29 CWL 1033 : A 1126 C 289.

73. *Ram Chandra Pandey*, A 1932 P 301 : 33

Cr LJ 958.

74. *Hiralal Jindani*, A 1937 M 191 : 38 Cr LJ 199.

75. *Baijnath Prosad Singh*, 1956 Pat LR 490 : 1957 Cr LJ 677.

1. Scope.—Section 548 is wider in its scope than Section 371 or Section 424 as it applies to “any person affected”.⁷⁶ The words “or other part of the record” have reference to other provisions of the Code *e. g.* Sections 173 (4), 210 (2).

2. Inspection of record.—In exercising the discretion a Magistrate or a Judge would be bound to have regard to the terms of this section and it would be difficult and generally improper for him to refuse inspection of any documents of which a party was entitled to a certified copy.⁷⁷ On general principles as well as under the rules prescribed by the High Court of Allahabad any member of the general public is entitled to inspect and have copies of the judgment of the subordinate Courts.⁷⁸

3. “Affected by judgment or order.”—The Bombay High Court has held that any member of the public is not entitled to apply for the copy of the judgment so as to proceed in revision. It is only the party affected by the judgment or order that is entitled to a copy of the judgment or order.⁷⁹

4. Copies of proceedings.—A judgment of a Court of law as distinguished from other parts of record is an act in which every member of public is *prima facie* interested and unless there is some specific reason to the contrary there can be no reason to refuse a copy of a judgment to one even though he is not a party to the proceeding in a criminal case.⁸⁰

Under Section 371 copy of the judgment is to be given to the accused on his application.

When a party applies for a copy of the order he will get it provided he pays and the Magistrate can not force him to pay for and take copies of other orders also.⁸¹

Proviso.—The Court has discretion to grant free copies of judgment of the High Court in its appellate or revisional side.⁸²

549. Delivery to military authorities of persons liable to be tried by Court-martial.—(1) The Central Government may make rules consistent with this Code and the Army Act, the Naval Discipline Act and the Indian Navy (Discipline) Act, 1934, and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air-force law, shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is

76. *Anil Kumar*, A 1953 C 29 : 1953 Cr LJ 1883.

77. *Puroshottam*, A 1942 B 26 : 43 Cr LJ 306.

78. *Ladli Prasad*, 53 A 724 : 32 Cr LJ 864.

79. *Panduram*, A 1942 B 636 : 34 Cr LJ 141. *Contra Ladli Prasad*, 53A 364 :

32 Cr LJ 864.

80. *Veerama Goud*, A 1959 Mys 52 : 1959 Cr LJ 342 ; *Ladli Prasad*, A 1931 A 364 : 32 Cr LJ 864.

81. *Amar Singh*, A 1925 L 361 : 26 Cr LJ 853.

82. *Anil Kumar*, A 1953 C 29 : 1953 Cr LJ 1883.

accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for the purpose of being tried by Court-martial.

(2) **Apprehension of such persons.**—Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes.—(i) The words “Army Act or” have been substituted by the words “Army Act and the Air Force Act and”; (ii) the words “military law” have been substituted by the words “military or air-force law”; the words and figures “or under the Air Force Act, Section 41” have been inserted after the words and figures “Section 41”; and (iv) the words “military or air-force station, as the case may be”, have been substituted for the words “military station” by the Repealing and Amending Act X of 1927. The words “Indian Navy Discipline Act” after the words “Army act” were inserted by the Amending act 1934 (35 of 1934) Section 2 and schedule. The word “navel” was added by *ibid.* The words “to be tried either by a Court to which this Code applies or by a Court Martial” were substituted for “Under the Army Act, Section 41 or under the Air Force Act, Section 41 or under the Air Force Act, Section 41 to be tried by Court Martial” by the Amending Act 35 of 1934.

2. Scope.—Under Regulation XX of 1825 the Military authorities can require a Magistrate to hand over to them any prisoner who may be apprehended and brought before him for an offence committed at a place several miles away from the presidency-town but the proceedings before a magistrate when taken at the request of, and assented to by the authorities are not absolutely void and a commitment so made is not an invalid commitment.⁸³

Section 101 of the Mutiny Act does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependant upon the sanction of the Commander-in-Chief. The section is only permissive of a Military trial being held.⁸⁴ For the applicability of Section 549 it is necessary that both the ordinary criminal court as well as the court martial functioning under the Army Act should have jurisdiction.⁸⁵

This section can have no application where a person is brought before a special tribunal under the West Bengal Criminal Law Amendment Act Ordinance of 1947.⁸⁶

Rule 3 of the rules made by the Central Government in exercise of the power conferred under this section obviously cannot apply to a case tried

83. *William Jackson*, (1874) 22 WR (Cr) 20 : 13 BLR 474.

84. *Felix Maquire*, 5 C 124 : 4 CLR 432.

85. *E. G. Barsay*, A 1958 B 354 : 1958

Cr LJ 1144.

86. *Capt. Blyth*, 53 CWN 887 : 51 Cr LJ 10.

by a Special judge constituted under the Criminal Law Amendment Act unless he is a Magistrate within the meaning of the rule.⁸⁷

The language of this section and Rule 105 of the criminal Rules of practice is clear and mandatory. When a person subject to the military law is brought before a Magistrate charged with an offence for which he is triable under the Army Act, the Magistrate is bound to follow this procedure and give notice to the commanding officer of the accused person as required under the rules.⁸⁸

Both Section 125 of the Army Act and Section 549 of the Code speak of concurrent jurisdiction in respect of an offence and do not suggest that in respect of factional offences the jurisdiction to try them by a court martial is postponed till a charge is investigated and framed.^{88a}

550. Powers to police to seize property suspected to be stolen.—Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer.

SYNOPSIS

1. Legislative Changes.
2. Object of the section.
3. Scope.

4. "Any offence".
5. "Shall forthwith report the seizure".

1. Legislative Changes.—This section was inserted for the first time in the Code of 1898.

2. Object of the section.—"We have inserted a new clause giving Police Officers express power to seize property which they suspect to have been stolen. This power is assumed in clause 523, which describes the procedure to be followed with respect to such property when seized but following the procedure of Section 81 of the Calcutta Police Act, 1866, we think it is better to give the power expressly".⁸⁹

3. Scope.—Where property is seized by the Police under Section 550 on suspicion of its being stolen property it is not incumbent on the Magistrate to satisfy himself as to the claim of the person in whose possession it was found before issuing a proclamation, because such person can make good his claim even after the issue of the proclamation.⁹⁰

The word "Seizure" has been used in this section in its ordinary dictionary meaning and means the act of taking actual physical possession of movable property. An order passed by a police-officer prohibiting a Bank with which the accused had an account not to pay any amount out of

87. *E. G. Barsay v. The State of Bombay*, A 1961 SC 1752 : 1961 (2) Cr LJ 848.

88. *Major F. K. Mistry*, 1949—2 MLJ 14 where *H. N. Stellery, Mundy*, A 1945 M 280 : 47 Cr LJ 192 referred to.

88a. *Major Gopinatham*, A 1963 MP 249 referring to *E. G. Barsay v. State of*

Bombay, A 1960 SC 1762 : 1961 (2) Cr LJ 828.

89. *Sada*, (1909) 14 PWR 1909 (Cr) : 11 Cr LJ 99 : 4 IC 980.

90. *Imperator*, (1908) 2 SLR 32 : 10 Cr LJ 198.

the account of the accused till further order cannot be passed under this section and must be quashed.⁹¹

4. "Any offence".—The words "any offence" show that even though the offence is a non-cognizable one the police may seize any property which is found under suspicious circumstances.⁹² Where an accused is convicted for an offence under Rule 121 read with Rule 99 (2) (a) of the Defence of India Act for selling rupees and small coins at a higher rate, the Court has power to confiscate the coins.⁹³

5. "Shall forthwith report the seizure".—Seizure of property under this section must be reported at once to a Magistrate, who, is bound to pass order for its disposal. It is open to the police to seek direction from a Magistrate and if the Magistrate chooses to give certain directions, he does not act under the Code and the directions given by him are not open to challenge in any Superior Court.⁹⁴

551. Powers of superior officers of police.—Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

SYNOPSIS

1. Corresponding sections in former Codes.
2. Scope.
3. "May".

1. Corresponding sections in former Codes.—This section corresponds Section 550 of the Code of 1882 (Act X of 1882).

2. Scope.—The Police Officers entitled to investigate an offence include also Police-Officers superior in rank of an officer-in-charge of a Police station (*vide* Section 551).⁹⁵

It is declared that the jurisdiction of Police-Officer of Vigilance Branch of and above the rank of Deputy Superintendent of Police extends throughout the State of Orissa—Orissa Gazette, dated 18th October, 1963, Part III, Page 1921.

Where the search is made by the sub-inspector of police who was not in charge of the police-station but under the supervision of the Circle inspector, the search is not illegal.^{95a}

Where police submitted final report under Section 173, direction by the Superintendent of police for further investigation is a step towards investigation of the case.^{95b}

3. "May".—The word "may" does not mean must.^{95c}

552. Power to compel restoration of abducted females.—Upon complaint made to a Presidency Magistrate or

91. *Textile Traders Syndicate*, A 1960 A 405 : 1960 Cr LJ 371.

92. *Babulal*, A 1954 Or 225.

93. *Bhumji*, A 1944 N 366.

94. *Ramnal*, 1956 ALJ 727.

95. *Nilakanta*, (1911) 35 M 247.

95a. *Shyam Lal*, A 1927 A 516 : 26 Cr LJ 652.

95b. *Raghunath Sarma*, A 1963 P 268.

95c. *Mathuranath Das*, A 1932 C 850 : 33 Cr LJ 657 ; *Chittaranjan Das*, A 1963 C 191.

District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of eighteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | 5. Demand of wife from her father. |
| 2. Scope. | 6. Restriction on personal liberty of the abducted woman. |
| 3. Object. | 7. Procedure. |
| 4. Unlawful purpose. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 551 of Act X of 1882.

2. Scope.—Section 551 applying only as it does to women and female children must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose whether entertained towards a woman or a female child must be in itself unlawful.⁹⁶

The natural mother is the legal guardian of the child. The detention of the child by the step-mother is therefore unlawful within the meaning of this section.^{96a}

3. Object.—The purpose contemplated by Section 552 Cr. P. C. must be in itself unlawful and must not be construed so as to include purposes which although not unlawful in themselves might only become so when entertained towards a child in opposition to the wishes of his guardian.⁹⁷ See Sections 100, 491 *supra*.

The main purpose of Section 552 is to protect women and girls from detention for immoral purpose, although the section would be appropriate to cases where the detention is unlawful only.⁹⁸

4. Unlawful purpose.—Where there has been no suggestion that a girl was being confined under such circumstances as would amount to an offence or was being detained for immoral purposes, no order could be passed under this section.⁹⁹

Before passing an order under this section the Magistrate should be satisfied that the detention of the minor girl was both unlawful and for unlawful purpose.¹

5. Demand of wife from her father.—Provisions of Section 552 Cr. P. C. would not apply in a case in the absence of an allegation that the wife was detained contrary to her own wish and in the absence of any enquiry into the matter of the complaint by the Magistrate.^{1a}

96. *Mahtabo*, (1839) 16 C 487 (502).
 96a. *Subbammal*, A 1943 M 225.
 97. *Thakoredas Munchilaram*, (1902) 4 Bom LR 609.
 98. *Om Radh*, A 1939 Sind 152.
 99. *Godai Shaha*, (1904) 9 CWN 1030; followed in *Ghittaranjan Das*, A 1963 C 191.

1. *Shrinivas v. Badrilal*, A 1955 NB 142; 1955 Cr LJ 1191; *Dhapu v. Purilal*, A 1959 MP 356; *Umbaji v. Limbaji*, A 1955 Hyd 153; *Billi*, A 1953 N 128; 1953 Cr LJ 743.
 1a. *Nathu Mistry v. Nari Lal*, (1914) 15 Cr LJ 712 (C); 26 IC 160.

6. Restriction on personal liberty of the abducted woman.—No restriction could be imposed on her personal liberty on the absolute opinion of the abducted woman to go any where she liked. In proceeding under this section the Magistrate has no jurisdiction to decide the respective rights of the father and the husband of the abducted woman.²

The civil right of the husband's male relations and the remarriage of the mother of the minor child does not entitle the applicant to an order under Section 552 for custody of the child.³

7. Procedure.—Search warrant should not be issued at the initial stage but an order directing the production of the girl and to show cause why an order should not be made under this section is bad.⁴ A woman unlawfully detained can under this section be set at liberty. To issue under this section a warrant for her arrest is illegal such a warrant can, however be issued under Section 100.⁵ An order for restoration of the girl on furnishing a guarantee that she would be properly looked after is illegal.⁶ Under this section the District Magistrate can pass order for the immediate restoration of the woman unlawfully detained to her liberty but an order directing the police to produce the woman before him is not an order under this section.⁷ The District Magistrate cannot order a preliminary inquiry by the Sub-Divisional Magistrate as Section 202 does not apply.⁸

553. Compensation to persons groundlessly given in charge in presidency-town.—(1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

SYNOPSIS

1. Corresponding sections in former Codes.

2. Scope.

2. *Dhapu v. Purilal*, A 1959 MP 356.

3. *Secy. S. P. C. I.*, 43 CWN 302 ; *Umbaji v. Limbaji*, A 1955 Hyd 153 ; *Gadai*, 9 CWN 1030 ; *Parambath*, A 1941 M 625 : 42 Cr LJ 688.

4. *Umbaji v. Limbaji*, A 1955 Hyd 153 : 1955 Cr LJ 957.

5. *Khudabux*, A 1951 A 687 : 1952 Cr LJ 1912 (2).

6. *Secy. S. P. C. I.*, 43 CWN 362.

7. *Abdul Jalil Khan*, A 1936 A 354 : 37 Cr LJ 713.

8. *Tulsi Das v. Chetan Das*, A 1933 N 374 : 35 Cr LJ 304 (2).

1. Corresponding sections in former Codes.—This section corresponds to Section 560, Act X of 1882.

“The distinction pointed out by the Deputy Magistrate between Section 250, now repealed, and Section 560, that is at present in force, does no doubt exist”.⁹ The operation of Section 500 Cr. P. C. is restricted to cases instituted by “complaint” as defined in the Code or upon information given to a Police-officer or a Magistrate; consequently that section has no application to a case instituted on Police report or on information given by a Police.¹⁰ The order for payment of compensation can be set aside on the ground that Section 560 Cr. P. Code operates only when there was a complete discharge or acquittal.¹¹ *Held*, that if the Magistrate thought that this was a case in which prosecution under Sections 221 and 193 I. P. C. should be sanctioned he ought not to have taken action under the provisions of Section 560 Cr. P. C.¹²

2. Scope.—This section applies to a presidency town and provides that the Magistrate can award compensation to a person who has been arrested at the instance of the complainant without any sufficient ground for his arrest. Under sub-section (2) the Magistrate may award to each person, if the arrested persons are more than one, compensation not exceeding fifty rupees and sub-section (3) provides that such compensation shall be levied as a fine and in default the Magistrate may pass order of simple imprisonment for a period not exceeding thirty days unless such a sum is paid.

554. Power of High Courts for Part A and Part B States to make rules for inspection of records of subordinate Courts.—(1) With the previous sanction of the State Government, any High Court for a Part A State or Part B State may, from time to time, make rules for the inspection of the records of subordinate Courts.

(2) **Power of other High Courts to make rules for other purposes.**—Every High Court, not being a High Court to which sub-section (1) applies may, from time to time, and with the previous sanction of the State Government,—

- (a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;
- (b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;
- (c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and

9. *Bharut Ghunder Nath*, (1892) 20 C 481.
 10. *Ramjeevan Koormi*, (1894) 21 C 979.
 11. *Mukti Bewa*, (1896) 24 C 53.

12. *Shibnath Chong*, (1895) 22 C 586 : 1 CWN 17.

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines :

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the Official Gazette.

SYNOPSIS

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|-------------------------|-----------|
| 1. Legislative changes. | —Bombay. |
| 2. State Amendment. | 3. Scope. |

1. Legislative changes.—The words “established by Royal Charter” which originally appeared after the words “High Court” in this section were omitted by A. O. 1948 and the section was amended by A. O. 1950 And A. O. 1951 and 1956.

2. State Amendment—

Bombay.—After sub-section (1) The following sub-section was inserted by Bombay Act 48 of 1948, namely :—

“(1-A) with the previous sanction of the State Government the High Court of Judicature at Bombay may also make rules for regulating the practice and proceedings of the Court of Sessions of Greater Bombay”.

3. Scope.—The rules framed by the High Court are subject to the proviso that the rules made and framed under this section shall not be inconsistent with the provisions of the Court or any other law in force for the time being.¹³ The expression “papers exhibited in the proceedings” in the rules framed by the Bombay High Court under this section (Criminal Circular no. 160) is intended to cover the whole record. It does not deprive the Court of the right of inspection to a party.¹⁴

555. Forms.—Subject to the power conferred by Section 554, and by Article 227 of the Constitution, the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

SYNOPSIS

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| 1. Scope. | 2. Forms mentioned in the Fifth Schedule. |
|-----------|---|

1. Scope.—An order under Section 144 Cr. P. C. is not bad because it does not state that its operation is confined to two months, or some shorter period from the making thereof unless there is something in the order which shows that it must be presumed that the order is to be in force for 2 months in accordance with clause (5) of the section.¹⁵ Where on an application made under Section 552 Cr. P. C. to a Magistrate of the 1st class, he examined the applicant on oath, recorded a statement of the facts alleging wrongful detention of his wife, and directed the issue of a search warrant

13. *Nathuram Godse*, A 1949 EP 321 : 50
Cr LJ 843.

14. *Parushuram Detaram*, A 1942 B 26 : 43
Cr LJ 306.

15. *Ramnath Chowdhury*, (1907) 34 C 897
(900) F B ; 6 CLJ 186 : 11 CWN 942 :
6 Cr LJ 194.

under Section 100. *Held*, that he had jurisdiction to do so.¹⁶ Notwithstanding anything contained in Section 555 Cr. P. C. a conviction for an offence against any Municipal Law or regulation, had before a Bench of Magistrate which includes officers of the Municipality is bad.¹⁷ Under Section 555 a Magistrate is competent to try a Municipal case if he is the Chairman of the Municipality.¹⁸ Section 555 Cr. P. C. has no application where a Magistrate had not initiated or directed proceedings against the accused person, nor taken an active part in the arrest or collection of evidence against such person.¹⁹ In a charge under Section 193 I. P. C. it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient to warrant a conviction for the offence of giving false evidence when an accused person has made one statement upon oath at one time, and a different and contradictory statement at another.²⁰ It is not in itself sufficient to warrant a conviction for giving false evidence that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue.²¹ A Magistrate in charge of the excise and opium administration of a district is not formally interested in the observance of the provisions of Act No. 1 of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the above amended act.²²

The interest which might disqualify a Court from trying or committing for trial a case having regard to Section 555 Cr. P. C. will not prevent an Appellate Court from giving the permission contemplated by that section.²³

2. Forms mentioned in the 5th Schedule.—The forms set forth in Schedule 5 must be regarded as part of the Code and the various sections of the Code should be so construed as to harmonise and not to come into conflict with the forms.²⁴ Printed forms of Charge should be used.²⁵ This section deals with the forms of the warrant itself and nothing more and the words of this section are not intended to supersede the provisions of Section 90.²⁶

555A. Power of High Court to make rules in respect of petition writers.—(1) Every High Court may, from time to time, and with the previous approval of the State Government, make rules—

(a) as to the persons who may be permitted to act as petition writers in the Criminal Courts subordinate to it;

(b) regulating the issue of licence to such persons, the conduct of business by them, and the scale of fees to be charged by them; and

16. *Gora Mian*, (1911) 39 C 403.
17. *Nobin Krishna Mookerjee*, (1883) 10 C 194.
18. *Nistarini Debi v. A. C. Ghose*, (1895) 23 C 44.
19. *Anarwa Chunder Singh*, (1896) 24 C 167.
20. *Ghulet*, (1884) 7 A 45, overruling *Niaz Ali*, (1882) 5 A 17.
21. *Palani*, 26 M 55.

22. *Ganeshi*, (1893) 15 A 192 (F B).
23. *Fateh Bahadur*, (1897) 20 A 181.
24. *Narayan Sahay*, A 1946 A 333 : 47 Cr LJ 757 ; *Bansi v. Hari Singh*, A 1956 A 297.
25. *District Magistrate v. Subbarna*, A 1951 M 900 : 52 Cr LJ 1115.
26. *Government of Assam v. Shahedullah*, 27 CWN 857 : A 1924 C 1.

- (c) providing a penalty for a contravention of any of the rules so made and determining the authority by which such contravention may be investigated and the penalties imposed :

Provided that the rules made under this section shall not be inconsistent with this Code or any other law in force for the time being.

(2) All rules made under this section shall be published in the Official Gazette.

556. Case in which Judge or Magistrate is personally interested.—No Judge or magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.

SYNOPSIS

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| 1. Corresponding sections in former Codes. | —Personally interested. |
| 2. Scope. | —Pecuniary interest. |
| 3. Transfer. | 7. Disqualified. |
| 4. Illness of Presiding Judge. | 8. Not disqualified. |
| 5. Explanation. | 9. Judge or Magistrate shall not hear appeal from his own Judgment. |
| —“Concerned in a public capacity.” | 10. Permission of Appellate Court. |
| 6. A party or personally interested. | |

1. Corresponding sections in former Codes.—This section corresponds to Section 555 of the Code of 1882 and the explanation was amended by the addition of the words “or otherwise concerned.....with the case” and by the substitution of the expression ‘by reason only that’ before the words ‘Municipal Commissioner’, for the words ‘merely because.’

2. Scope.—The words “try any case” in this section are comprehensive enough to include the hearing of an appeal.²⁷

27. *Nistarini Debi v. A. C. Ghose*, (1895) 23 C 44 (47), followed in *Mamoon*, (1922)

This section embodies the principle that no man should be Judge in his own cause. Section 487 however makes an exception in favour of "a Judge of a High Court".

The expression 'try any case' in this section is wide enough to include any stage of a judicial proceeding in which the question of the guilt or innocence of an accused is finally adjudicated upon; consequently the section applies to proceedings under Section 437, (now Section 436) of the Code.²⁸

The consent of a party concerned cannot affect the absolute disqualification imposed by this section.²⁹

Section 556 has no application to summary proceedings taken for punishing contempts as the provisions of the Code are not applicable.³⁰ The law never had contemplated the same officer conducting both the commitment proceedings and the trial consequent upon such commitment.³¹ The mere fact of issuing a warrant³² or a preliminary inquiry³³ does not make a Magistrate interested. Section 556 does not apply to a preliminary order passed under Section 133 by a Magistrate.³⁴

3. Transfer.—The accused is entitled to a decision both in the trial Court and on appeal from a Judge who approaches his case with an absolutely open mind, and the order of Sessions Judge was set aside on the ground that he could not be allowed to be both complainant and Judge in the same case.³⁵

4. Illness of presiding Judge.—Where in a trial before the High Court after the Jury has been sworn, and charges read over and counsel for the prosecution has opened the case by reading the sections and stating a few of the main facts, the presiding Judge falls ill and his place is taken by another Judge, the trial can proceed further before such new Judge. It need not commence *de novo*.³⁶

Magistrate issuing search warrant prior to institution of case—when not disqualified from trying the case.—The mere fact that the Magistrate had issued a search warrant prior to the institution of the case does not disqualify him from trying the case within the meaning of Section 556.³⁷

5. Explanation—"Concerned in a public capacity".—A Magistrate granting sanction in one capacity is not disqualified for trying the case himself. The explanation to the section shows that to be connected with a case in a public capacity is not by itself enough to render the person incompetent to try. Even if he had made inquiry it would not matter. The explanation and the illustration lend some support to the view that there is a distinction between a passive interest and an active interest and it is only in the latter stage that the disqualification arises or intervenes.³⁸ See the cases of *Gundur*³⁹ and⁴⁰ noted under the heading "A Party or personally interested".

28. *Bhojraj Chellaram*, (1911) 13 Cr LJ 30.

29. *Mamoon*, (1922) 23 Cr LJ 446 (L), following *Bisheshar Bhattacharjee*, 32 A 635 : 7 ALJ 749; *Venkaderi Thipayya*, A 1947 M 118.

30. *In re K. L. Gaube*, A 1942 L 105 : 43 Cr LJ 599.

31. *Peary Mohanlal*, A 1953 A 694 : 1953 Cr LJ 1546.

32. *Chinna Swami*, A 1955 M 535 ; *Nimana Gadda*, A 1953 M 243.

33. *Mrs. Bond Ville*, A 1923 R 65 (1).

34. *Md. Ayub*, A 1952 A 215 : 1952 Cr LJ 407.

35. *Sai*, (1926) 8 L 496 : ALR (1927) 671.

36. *Dorabji Pestonji Gora*, (1926) 29 Bom LR 204.

37. *Muhammad Ali Khan*, (1926) 24 ALJ 568.

38. *Rameshware*, 1952 SCR 126 : A 1952 SC 405 : 1953 Cr LJ 163.

39. (1921) 23 Bom LR 842.

40. 18 B 442 ; *Acchar*, A 1947 L 238.

6. A party or personally interested.—The Bombay High Court has held in *Gundo's case*³⁹ under the explanation to Section 556 a Magistrate or a Judge who is merely concerned with a case by reason of his discharging some other public function or being concerned with it in some public capacity is not, on that ground alone, to be deemed to be personally interested. This explanation does not apply when the Magistrate himself has directed the prosecution. For a Magistrate cannot be both a prosecutor and a Judge and the principle is embodied in the illustration to the section. The distinction is made clear in *Pheroza Pantonji*⁴⁰ and *Bisheswar Bhattacharjee*.⁴¹

A Magistrate of a district was not, on account of his being the head of the police of the district, debarred by reason of Section 556 from trying a person accused under Section 29 of the Police Act, 1861.⁴² So also a District Magistrate representing the Court of Wards as a Collector is not disqualified from trying a case in which the Court of Wards is interested when he has had nothing to do with the initiation of the proceedings.⁴³ But where a Deputy Magistrate in his capacity as manager of the Court of Wards reported to the then Sub-Divisional Officer about apprehension of a breach of peace and ultimately he being appointed Sub-Divisional Officer drew up a proceeding under Section 145, held that his final order under Section 145 in disregard of Section 556 was illegal and set aside by the High Court.⁴⁴ The mere circumstance that a trying Magistrate is the master of the complainant does not deprive the Magistrate of his jurisdiction though it is expedient that such a complaint should be referred to another Magistrate.⁴⁵ A Magistrate himself ordering the prosecution of an accused in the capacity of a *Tahsildar* and further ordering search on the report of an opium contractor is incompetent to try the offence.⁴⁶

When a prosecution is ordered by a Cantonment Magistrate in his capacity as secretary of the Cantonment Committee, it is advisable that the case should be tried by some other Magistrate.⁴⁷

The word "personally" in Section 555 of the Code of 1882 does not mean "privately interested" or "interested as a private individual", but includes such an interest as the District Magistrate initiating and directing the whole proceeding may have as a prosecutor.⁴⁸

Merely because a trial Judge had previously as legal Remembrancer settled the draft of the order according sanction or merely because he had some part in allotting the case for the purpose of previous trial to some other tribunal or merely because he had arranged for the accommodation of the tribunal, it cannot be said that he had become personally interested in the sense of becoming interested in the success of the prosecution.⁴⁹

In the instant case⁴⁰ it was a trial by a Jury. The mere fact that the trial was by a jury does not make all questions of personal interest in the trial Judge irrelevant.

The fact that the Magistrate who recorded the statement of the accused under Section 208, had previously in his official capacity recorded the con-

41. 32 A 635.

42. *Narain Singh*, (1900) 22 A 340.

43. *Amrit Majhi*, (1916) 46 C 854.

44. *Asghar Raza*, 9 CWN ccxxvi.

45. *Basapa*, (1884) 9 B 172.

46. *Mangal*, (1910) 5 PWR 1912 Cr : 13 Cr LJ 294.

47. *Hira Lal*, (1922) 24 Cr LJ 128.

48. *Girish Chander Ghose*, (1893) 20 C 857 (865), followed in *Sudhama Upadhaya*, (1895) 23 C 328.

49. *Sudhinomnath Dutt*, 62 CWN 1 : A 1957 C 677.

fession of an accused under Section 164 would not make him personally interested in the case within the meaning of this section but it is desirable that the case should be tried by some other Court.⁵⁰ The question whether a Magistrate is personally interested or not is essentially to be decided on the facts in each case. Pecuniary interest, however small will be a disqualification, but as regards other kinds of interest, there is no measure of standard except that it should be a substantial one giving rise to a real bias or a reasonable apprehension on the part of the accused of such a bias. The maxim '*Nemo debet esse Judex in propria sua causa*' applies only when the interest attributed is such as to render the case his own cause.⁵¹ Whether a given case falls under this section is a question of fact to be decided on the fact of the case.⁵²

A magistrate giving evidence in the case is disqualified.^{52a}

Personally interested.—*Objection taken at commencement of trial and objection taken after trial*—A distinction ought to be made between a case where an objection under Section 556 on the ground of personal interest is taken to a particular Judge or Magistrate holding the trial. When the trial is about to commence and or is proceeding and a case where trial has already been held if an objection is taken at the commencement of the trial and in case it is turned down by the Trial Judge or the Magistrate the matter is taken before a Superior Court, it may be proper to direct that the trial ought not to be held by the Magistrate or the Judge, not because he is incompetent in law to hold the trial but because the appearance of a fair trial may be affected if he tries the accused but once the trial is held the position changes, after the trial has been held and has resulted in a conviction it can be held to have been invalid only if the trying Magistrate or the trial Judge was debarred by some provision of law from holding the trial or if it can be shown that he had exhibited some bias which had actually affected the fair conduct of the proceedings and prejudiced the accused.⁵³

Pecuniary interest.—Peacock C. J., observed: "Now the interest which disqualifies a Judge is not merely a pecuniary interest; that would be too limited a way of describing it, we ought rather to use the language of Norman, J., in the case of *Queen v. Mookta Singh*, 4 BLR Cr 15 : 13 WR 60, that is to say a personal or pecuniary interest".⁵⁴ See *Rodrigues*⁵⁵ where the Magistrate, being a share-holder of a company, the servant of which company was being tried by him, was disqualified.

A Barrister who had held brief for a party is not disqualified from trying the case as a Judge.⁵⁶

7. Disqualified.—The following are instances where the Magistrate has been held disqualified to try the case. Interest of a Magistrate giving rise to a real bias disqualifies him.⁵⁷ Magistrate presiding over a meeting and sanctioning the prosecution,⁵⁸ a magistrate who issued warrant under

50. *Lakshmi Narayan*, A 1956 Raj 34 : 1956 Cr LJ 286.

51. *Rameshware Dayal v. State of Assam*, 1953 SCR 126 : A 1952 SC 405 : 1953 Cr LJ 163.

52. *Abdul*, A 1945 303 ; *Nistarini Devi v. A. C. Ghosh*, 23 C 44.

52a. *Md. Hossain*, 48 Cr LJ 428 Lah Con-
tra *Jawad Hossain*, A 1927 Oudh 296 ;
Nanhay, 27A 33.

53. *Sudhindra Nath Dutta*, 62 CWN 1 : 1957 Cr LJ 1245.

54. *Govt. of Bengal v. Hiralal Das*, 17 WR (Cr) 39 ; *Rameshware* ; A 1952 SC 405. (1895) 20 B 502.

55. *Queen v. Garrod*, (1900) 4 CWN 243.

57. *Mg. Pokywe*, A 1939 R 152 R 152.

58. *Md. Baksh*, A 1929 L 718 ; *Hansraj*, A 1928 L 114.

Section 5 of the Bombay Gambling Act⁵⁹ and a Magistrate giving evidence in a case.⁶⁰

8. Not disqualified.—In the following cases it was held that the Magistrate or the Judge was not disqualified :—A District Judge hearing an appeal under Section 476A against the order of a Munsif merely considers that there are sufficient materials for the Munsif lodging the complaint, he cannot be said to be a party to the proceedings under Section 476. He can hear the same case as a Session Judge.⁶¹

9. Judge or Magistrate should not hear appeal from his own judgment.—It has been held in *Nistarini's* case, Section 23C 44 noted *Supra* that the words 'try any case' include the hearing of the appeal. It has been held however in⁶² that a Joint Magistrate who was incharge of criminal business could hear the appeal.

10. Permission of Appellate Court.—Pecuniary interest even to small extent is a sufficient disqualification independently of the question whether the Magistrate is really biassed is or likely to be biassed.⁶³

557. Practising pleader not to sit as Magistrate in certain Courts.—No pleader who practises in the Court of any Magistrate in a presidency-town or district, shall sit as a Magistrate in such Court or in any Court within the jurisdiction of such Court.

SYNOPSIS

1. Legislative Changes.

2. Scope.

1. Legislative Changes.—This section was introduced for the first time in the Code of 1898.

2. Scope.—The appointment of a pleader to act as a Magistrate is not forbidden by this section or any other provision of the Code.^{63a}

558. Power to decide language of Courts.—The State Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than a High Court for a Part A State or a Part B State.

Scope.—The State Government may determine what shall be the language of each Court.

See Article 43 of the Constitution which provides that the official language of the Union shall be Hindi and Debnagri script and English Language for 15 years after the commencement of the Constitution and see also Article 348 of the Constitution about the Language of the Supreme Court, High Court etc.

59. *Velli Mahomad*, A 1948 B 72 (1) : 48 Cr LJ 1001 ; *Sri Raja Ram*, A 1924 L 247 Contra *Nimuagadda*, A 1943 M 248.

60. *Md. Hassan*, 48 Cr LJ 428 (Lah) ; *Nanhe*, 27 A 33.

61. *Indri Kunhanad*, A 1942 M 758 ; 44

Cr LJ 404.

62. *Dasarath Rai*, 36 C 869 : 10 Cr LJ 857 ; *Gholam Rasul*, 1952 Cr LJ 49 FC (Pak).

63. *Syamdasani*, A 1929 B 404.

63a. *In re Jivanji Adamji*, (1898) 23 B 490 ; *NGA Thaswin*, A 1923 R 119.

559. Provision for powers of Judges and Magistrates being exercised by their successors in office.—(1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.

(2) When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a presidency-town, and the District Magistrate outside such towns, shall determine by order in writing the Magistrate who shall, for the purpose of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate.

(3) When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge.

SYNOPSIS

1. State Amendments—
—Bombay.

—Saurashtra.
2. Scope.

1. State Amendments—

Bombay.—In sub-section (2) for the words "The District Magistrate outside such town", the words "outside such towns the Sessions Judge in the case of judicial Magistrates and the District Magistrate in the case of Executive Magistrate" were substituted by Bombay Act 23 of 1951.

Saurashtra.—Same as in Bombay Amendment, *vide* Saurashtra Act 4 for 1952.

2. Scope.—A Sub-Divisional Magistrate has no power to transfer a case under Section 192 cognizance of which was taken by his predecessor in office.^{63b} But the same High Court in a later case has held that by virtue of his power under Section 559 (1) he can transfer the case.^{63c} The scope of this section is limited. Power of District Magistrate is not conferred to declare one Magistrate successor of another.^{63d} Whether the successor in office of a special Magistrate under an ordinance can be determined by an order under this section see case^{63e}.

560. Officers concerned in sales not to purchase or bid for property.—A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

561. Special provisions with respect to offence of rape by a husband.—(1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

63b. *Ram Krishna*, 42 CWN 248.

63c. *Bholanath*, 58 CWN 11 : 1953 Cr LJ 1782.

63d. *Ramjani*, A 1960 A 350.

63e. *Jadurendra*, 40 CWN 604.

- (a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or
- (b) commit the man for trial for the offence

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed either to make, or to take part in, the investigation.

SYNOPSIS

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|----------------------------------|--------------|
| 1. State Amendments.
—Bombay. | —Saurashtra. |
| | 2. Scope. |

1. State Amendments—

Bombay.—For the words “District Magistrate” wherever they occur the words, “A Magistrate of the 1st class” were substituted by Bombay Act 23 of 1951.

Saurashtra.—Same as in Bombay, *vide* Saurashtra Act 4 of 1952.

2. Scope.—This section provides for taking cognizance in cases of rape by a husband with his wife by the Chief Presidency Magistrate in the Presidency Town and by the District Magistrate in Muffussil towns and no other Magistrate can take cognizance of such cases.

See Section 198A *supra*.

561A. Saving of inherent power of High Court.—Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

SYNOPSIS

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|--|---|
| 1. Legislative Changes. | 7. Inherent power of the High Court. |
| 2. Scope. | —Case finally decided by the High Court. |
| 3. Expunging remarks from the judgment of the Lower Court. | —No power to alter or review. |
| 4. To give effect to any order under this Code. | —Power to direct delivery of goods. |
| 5. “To prevent abuse of the process of the Court.” | 8. Jail Appeal Dismissed. |
| —Quashing of Proceedings. | —Representative Appeal—if can be entertained. |
| —Quashing Commitment Proceedings. | 9. Property attached under Section 145. |
| 6. “Or otherwise to secure the ends of justice”. | —Handing over. |
| | 10. Power to stay. |
| | 11. Stay of Execution of death sentence. |

1. Legislative Changes.—This section was inserted by Section 156 of Act XVIII of 1923.

2. Scope.—The terms of the section are very wide. The High Court has power to interfere if in the circumstances of the case it appears that an accused person is being deprived of his right to see his legal adviser.^{63f}

63f. *In re Evans*, (1926) 50 B 741.

Under the section as amended the High Court has ample jurisdiction to vacate the order of enhancement of sentence passed without hearing the accused.^{63g}

This section confers no additional powers on the High Court, but is only a statutory recognition of the inherent power possessed by the Judges of the High Court.⁶⁴ This section is not intended to enable the High Court to order a Magistrate to do something which the Magistrate has no jurisdiction to do.⁶⁵ The High Court does not possess increased power. It cannot interfere with the statutory power of the Police to investigate into an offence.⁶⁷

In a cognizable offence High Court's function begins when a charge is preferred and not until then.⁶⁶ The section gives no new powers, it only provides that those which the Courts already inherently possess shall be preserved least it should be considered that the only powers conferred by the Code are those expressly conferred by the Code.⁶⁷

The statutory power of the police to investigate cannot be interfered with by the exercise of the power under Section 439 or under the inherent power of the Court under Section 561A.^{67a}

The powers possessed by the High Courts under Section 561A are very wide but the very plentitude of the power requires from the Court great caution in the exercise of it.⁶⁸ The powers of the High Court under Section 561A are very wide, but they can only be exercised in cases where there is such a palpable want of jurisdiction in the proceedings initiated as would result in unnecessary harassment and oppression to the accused concerned. Section 561A cannot normally be invoked to supplement the normal process and enquiries by tribunals prescribed in the Code.⁶⁹ In a criminal case the interpretation of the Rules or the provisions of the Act must at the initial Stage be left to the Magistrate concerned, and when the Magistrate gives his decision, the aggrieved party may move the Sessions Judge or the District Magistrate and thereafter move the High Court in revision and while such a procedure exists the High Court should not be called upon to exercise extraordinary power under Section 561A.⁷⁰ In order to seek interference under Section 561A three conditions should be fulfilled: (1) the injustice which comes to light should be of a grave character; (2) the injustice which is noted is of a clear and palpable character and not of a doubtful character and (3) there exists no other provision of the law by which the party aggrieved could have sought relief.⁷¹

3. Expunging remarks from the judgment of the Lower Court.—

The High Court has inherent power to order the deletion of objectionable

63g. *Ramesh Pada Mandal v. Kadambini Dasi*, (1927) 47 CLJ 358 : 31 CWN 960.

64. *In re State of U. P.*, A 1959 A 69 : 1959 Cr LJ 16.

65. *Delhi Cloth General Mills Ltd. v. Yograj Singh*, A 1957 A 797 : 1957 Cr LJ 1376; *Raja Gopal Rao*, A 1960 A P 181.

66. *Raja*, A 1928 L 462 : 29 Cr LJ 669.

67. *Nazir Ahmed*, A 1945 PC 18; *Jahengir*, A 1948 B 6 : 48 Cr LJ 929; *Narayan Swami Naidu*, A 1949 M 307 : 50 Cr LJ 405 (S B); *Bashiruddin Ahmed*, A 1937 N 181; *Akhil Bandhu Roy*, A 1938 C 258.

67a. *State of West Bengal v. S. N. Basak*,

A 1963 SC 447 following *Nazir Ahmed*, 71 IA 203 : A 1945 PC 18 : 46 Cr LJ 418.

68. *In re Ramchand*, A 1953 A 712 : 1953 Cr LJ 1610; *Rani Bai v. Nathu*, A 1961 MP 25 (Subordinate Court has inherent powers like S 151 (Civil P. C.)).

69. *Raja Gopala Rao*, A 1960 A P 184 : 1960 Cr LJ 455; *K. C. Sonrexa*, A 1963 A 33.

70. *Agra Electric Supply Co*, A 1960 A 176 : 1960 Cr LJ 390.

71. *Ram Narayan*, A 1960 A 296 : 1960 Cr LJ 552. See *King v. Joseph Antoney*, A 1961 Ker 35,

remarks against witnesses or accused persons from the judgment of a subordinate Court. Such jurisdiction however, can only be exercised when there is no foundation whatsoever for the remark objected to and not where it is a matter of inference from evidence.⁷²

It is only in rare cases that the High Court exercises its powers under this section to expunge remarks from its judgment or the judgment of the trial Court. It will only take such action when the words objected to are not relevant to the case or are not founded on any evidence and are made against a person who had no opportunity of meeting them.⁷³ Where the entire judgment of the lower Court has been quashed as being a nullity, there is no necessity for any separate order expunging the adverse remarks made against the witnesses.⁷⁴ In the absence of a person before the court it is fundamental that any prejudicial remarks against him should be scrupulously avoided. Where the remarks were likely to prejudice the reputation and character of the petitioner, it was only fair that they should be expunged.⁷⁵ A presiding officer made certain observations derogatory to the lawyer appearing on behalf of the prosecution charging him with unbecoming conduct with seeking an adjournment solely for dishonestly securing an extra days fee, *held* that the remarks were without justification and were ordered to be expunged.⁷⁶ To base remarks on mere conjecture in the absence of any evidence and without ever giving any opportunity to the person whom it affects is not proper.⁷⁷ The High Court has inherent jurisdiction to expunge irrelevant, objectionable and scandalous remarks or passages from the judgments of the subordinate Courts on the application of the person aggrieved, even though the matter has not come in appeal or revision. But expunction of remarks in some cases may not be feasible at all without affecting the Judgment which has become conclusive. As a rule it is necessary therefore that the objectionable matter sought to be expunged shall be separable and irrelevant. If they are inseparable or when expunging remarks would mutilate the judgment, it may then be sufficient to express the opinion that the remarks should not have been passed.⁷⁸ The Pana High Court has held that the matter must come in Appeal or Revision.⁷⁹

The State cannot come forward as the applicant under Section 561A for expunging remarks made by the Court against public servant.⁸⁰

High Court has inherent power to alter or review its appellate judgment on the principle that an erraneous act of the Court shall not prejudice any party.^{80a}

The Supreme Court has recently held that expunction of irrelevant remarks does not amount to the alteration or amendment of a judgment or order of a subordinate Court. Being an extraordinary power it will however, not be pressed in aid except for remedying a flagrant abuse by a subordinate

72. *Panchanan Benerji v. Upendranath Bhattacharji*, (1926) 25 ALJ 100 : 98 IC 718 ; *Buddu Khan*, AIR (1928) A 181, See 32 CWN XLVIII.

73. *Mercy L. B. Clive*, A 1961 A 288 : 1961 (1) Cr LJ 586.

74. *S. P. Dubey v. Narasingh Bahadur*, A 1961 A 447 : 1961 (2) Cr LJ 105.

75. *Ajoy Kumar*, A 1959 Ass 8 : 1959 Cr LJ 27 ; *Ram Sagar Singh v. Chandibar Singh*, A 1961 P 364 following *Daly*, A 1928 L 740.

76. *Lalit Kumar v. S. S. Bose*, A 1957 A 398 : 1957 Cr LJ 701.

77. *Barikali*, 1957 Cr LJ 279 (All).

78. *B. S. Davan*, A 1958 AP 70 : 1958 Cr LJ 148 ; *Nilkantha*, A 1954 B 65 (F B) followed in *Ram Sagar Singh v. Chandrika Singh*, A 1961 P 364 overruled in *Dr. Raghubir Saran v. State of Bihar*, A 1964 S C 1 ; *Chuman Mal*, A 1944 S 133 ; *Public Prosecutor*, A 1944 M 320 ; *Panchanan Banerjee*, 40A 254 ; *Dally*, A 1928 L 740.

79. *Bhutnath*, A 1941 P 544.

80. *Coranjit*, A 1940 L 42 ; *Harendra*, A 1951 P 285.

80a. *In re Biyamma*, A 1963 Mys 326 following *Rajnarain*, A 1959 A 315 FB contra *Devi Reddi*, A 1962 AP 479 (FB).

Court of its powers such as passing comments upon a matter not relevant to the controversy before it.^{80b}

4. **"To give effect to any order under this Code".**—No Legislature dealing with procedure can provide for all cases that may possibly arise. It is an obvious proposition that when a Court has authority to make an order it must also have power to carry that order into effect. The power to enforce obedience to mandates of the Court necessarily springs from the very existence of the authority to meet them and if the power is not expressly given it must be deemed to be an inherent power.⁸¹

5. **To prevent abuse of the process of the Court—Quashing proceedings.**—The inherent powers of the High Court under Section 561A cannot be exercised in regard to matters specifically covered by the other provisions of the Code. The inherent jurisdiction of the High Courts can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Some of the categories of cases where the inherent jurisdiction to quash proceedings should be exercised are (i) where it manifestly appears that there is a legal bar to the continuance of the proceedings *e. g.* absence of a sanction, (ii) where the allegations in the first information report or petition of complaint do not constitute an offence, (iii) where the allegations made against the accused person do constitute an offence but there is no legal evidence advanced in support of the case or the evidence adduced clearly or manifestly fails to prove charges. In exercising its jurisdiction the High Court will not embark upon an enquiry as to whether the evidence is reliable or not.⁸²

The filing of successive complaints without any intention to prosecute them amounts to an abuse of the process of the Court.⁸³ High Courts have got inherent power to interfere with proceedings of a subordinate Court at any stage of the proceeding if they find that an abuse of the process of law is being carried on in that case.⁸⁴ Where first trial for criminal misappropriation ends in conviction, second trial for the same offence but for another period is not barred.⁸⁵ Where beyond filing the complaint no steps were taken but the complaint was withdrawn because the Public Prosecutor apprehended that the sanction accorded under Section 198B was not proper, filing of a fresh complaint after obtaining proper sanction on the same facts cannot be said to be an abuse of the process of the Court.⁸⁶

Quashing Commitment proceedings.—*Absence of legal evidence and reliable evidence—Distinction.* Distinction must always be drawn between absence of legal evidence and absence of reliable evidence. If it could be said with justification that there was no legal evidence at all in support of the prosecution case it may lead to the inference that the commitment was bad

80b. *Raghubir Saran v. State of Bihar*, A 1964 SC 1.

81. *per Shadilal C. J.*, in *Sukdev*, 11 L 539 (544).

82. *K. N. Kapur v. State of Punjab*, A 1960 SC 866 following *Jagat*, 26 Cal 786; *Thinagan*, A, 1955 A 531 : 1955 Cr LJ 1310; *Dhapu v. Purilal*, A 1959 MP 356 : 1959 Cr LJ 1184; *Krishnamurthy Iyer v. State of Madras*, A 1954 SC 406 (Quashing of charge); *Sripad Chandra Vetiiah*, 1928 B 184; *Md. Abdul Sattar*,

A 1958 AP 555 : 1958 Cr LJ 144; *DP Halwar Siya*, A 1953 A 45 : 1953 Cr LJ 211; *Bir Singh*, A 1952 All 610.

83. *Khusiram v. Hashim*, A 1959 SC 542.

84. *Dhapu v. Purilal*, A 1959 MP 356 : 1959 Cr LJ 1184.

85. *Satyanarayan Singh*, A 1959 A 703 : 1959 Cr LJ 1265.

86. *Irishna Pillai*, A 1960 Ker 291 : 1960 Cr LJ 1210 following *Baiznath Prasad v. State of Bhopal*, A 1959 SC 494.

in that it was not based on any legal evidence at all. Therefore when the Judgment of the High Court quashing the commitment discusses only that there was no reliable evidence and not even a trace of point of law it would be impossible to hold that the order of commitment could or should have been set aside by the High Court.⁸⁷

6. "Or otherwise to secure the ends of justice".—These words can only mean that such other inherent power as the High Court possesses is likewise preserved.⁸⁸ Section 561A was enacted to emphasise the fact that the High Court has the widest jurisdiction to pass orders to secure the ends of justice. Section 561A must give the power to the High Court to entertain applications which are not contemplated by the Criminal Procedure Code.⁸⁹

A Magistrate while passing an order under Section 488 should not pass a consolidated order of maintenance for the wife and children. Even assuming that a consolidated order in favour of several dependants becomes void on the death of one of the dependants, the High Court in exercise of its power under Section 561A can rectify the order.⁹⁰

Where an appeal under Section 411A is being heard by the High Court it can exercise jurisdiction under the revisional powers under Section 439 and if there is any doubt about the exercise of powers under Section 439; there is no doubt that in the absence of any direct provision in the Code, there is the inherent power to adopt a procedure to secure the ends of justice.⁹¹

7. Inherent Power of the High Court.—The High Court has no inherent power to admit an approver to bail even if he is able to produce facts at the hearing sufficient to entitle him to bail. Further the inherent power, if any, has been expressly taken away by the enactment of sub-section (3) of Section 337.⁹² It is not proper to exercise the inherent power of the High Court under this section to compel witnesses to go a certain place merely for attending an identification parade; nor can a commission be issued to a Magistrate of such place for arranging an identification parade.⁹³ This section is not meant to obtain the opinion of the High Court on points which are already a subject matter of contest between the parties in competent Civil Courts.⁹⁴ Where the prosecution fails to establish its case against the accused who have appealed as well as against the accused who have not appealed, in the interest of justice it is necessary that the order passed against the latter should also be set aside.⁹⁵ Since there are specific provisions in the Code for dispensing with personal attendance of accused persons Section 561A ought not to be applied.⁹⁶ Section 561A does not apply to inherent power to grant bail apart from Chapter XXXIX. It was held however that the High Court can admit to bail a convicted person whose appeal has been admitted by the Privy Council.^{96a}

87. *Khushiram v. Hashim*, A 1959 SC 542 : 1959 Cr LJ 658.

88. *Raja*, A 1928 L 462.

89. *Nilkantha*, A 1954 B 65 (F B) followed in *Ram Sagar Singh v. Chandrika Singh*, A 1961 P 364; overruled in *Dr. Raghubir Saran v. State of Bihar*, A 1964 SC 1; *Bhagwan Das v. Dhannulal*, A 1951 MB 9.

90. *In re Kalavantibai*, A 1953 B 366.

91. *Parbti Debi*, A 1952 C 835.

92. *A. L. Mehra*, A 1958 Pnnj 73 : 1958

Cr LJ 413.

93. *Surajbhan*, 1957 AWR (HC) 262.

94. *Delhi Cloth and General Mills Ltd. v. Yograj Singh*, A 1957 All 797 : 1957 Cr LJ 1376 (All).

95. *Bechu*, 1957 Cr LJ 113 (All).

96. *Indra Debi v. Sarunagat Singh*, A 1955 Pun 72 : 1955 Cr LJ 968.

96a. *Jairam Das*, 72 IA 120 : A 1945 PC 94 distinguished in *Taleb Hussain*, (1958) SCR 1226 : 1959 SCA 321.

The High Court has got power to order retrial of accused under Section 561A.⁹⁷

Case finally decided by the High Court. No power to alter or review.—Application for restoration of a criminal revision petition heard on notice to opposite party is not maintainable,⁹⁸ or a case finally decided by the High Court cannot be reopened,^{98a} but where the mandatory provisions of the law have been overlooked the Court has power to correct such error even though the case has already been dedided.⁹⁹

There is no inherent jurisdiction in the High Court under Section 561A to alter or review its judgment once it is pronounced excepting cases where it was passed without jurisdiction in default of appearance *i. e.* without affording an opportunity to the accused to appear.¹

Power to direct delivery of goods.—"I think though Section 561A of the Code empowers me, with a view to secure the ends of justice, to direct the opposite party to re-deliver the register and the goods to the applicant, and this must be done by the opposite party within a fortnight from the date that my order is communicated to the opposite party".^{1a}

8. Jail Appeal Dismissed—Representative appeal—If can be entertained.—Where the appellants filed a jail appeal which was admitted and after hearing the State counsel was dismissed and the represented appeal was not placed in the list by mistake of office, *held*, the High Court should invoke its powers conferred by Section 561A, Section 369 would be no bar.²

9. Property attached under Section 145—Handing over.—There is no specific provision in the Code as to whom the Magistrate is to hand over the property which has been attached under Section 145, if he is satisfied that there is no longer a likelihood of the breach of the peace. The Magistrate can pass such orders as appears to him to be proper with regard to the handing over of the property.³

10. Power to Stay.—Section 561A recognises the inherent powers of the High Court to interfere in matters and make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the powers of any Court or otherwise to secure the ends of justice.⁴

Apart from its revisional powers under Sections 435 and 439 the High Court has powers under this section to interfere with a proceeding under Section 176,⁵ or an order under the Indian Extradition Act, 1903⁶.

A stay of proceedings for an indefinite period is not contemplated by Section 344 but the High Court has inherent powers to stay criminal proceedings till the final hearing of the Civil Suit.⁷ See commentary on Section 344 *supra*.

97. *R. C. Pollard v. Satya Gopal Maxumdar*, A 1943 Cal 594 : 45 Cr LJ 224 (S B).

98. *Kalipada Jana v. Sarbeshwar Panda*, A 1958 C 568.

98a. *Hosiar Singh*, A 1958 Punj 312 : 1958 Cr LJ 1093 ; *Jodha*, A 1940 Oudh 369 ; *Luxman Rao*, A 1938 N 74.

99. *Bati*, A 1950 A 625 ; *Md. Yasi*, A 1951 A 441 ; *Venkatwyadu*, 1955 Andh WR 477.

1. *Public Prosecutor v. Devi Veddi*, A 1962 AP 479 (F B) : 1962 (2) Cr LJ 727 ;

1a. *Per Iqbal Ahmad, J., Hafizuddin v.*

Laborde, (1927) 50 A 414 : 26 ALJ 83 : 105 IC 815 ; *Hosiar Singh*, A 1958 Punj 312 : 1958 Cr LJ 1093.

2. *Vijai Pal*, A 1959 All 559 : 1959 Cr LJ 1040.

3. *Sovanlal*, A 1955 v. P 45 : 1955 Cr LJ 1641.

4. *Jehangir v. Framji*, (1928) 30 Bom LR 962.

5. *In re Luxminarayan Karki*, (1928) 30 Bom LR 1050.

6. *In re Bai Amba*, (1928) 31 Bom LR 62.

7. *Dharoneswar Kolita*, A 1952 Ass 78.

11. Stay of Execution of Death Sentence.—It will be proper to apply the provisions embodied in this section to suspend the execution of death sentence till the petitioner gets a stay order from the Supreme Court before which he intends to file an appeal.⁸

First offenders

562. Power of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment.—(1) When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour :

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the State Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(1A) Conviction and release with admonition.—In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

8. *Bhagwan Singh*, A 1956 MB 129 : 1956 Cr LJ 618.

(2) An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision.

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law :

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) The provisions of Sections 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

SYNOPSIS

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| 1. Legislative Changes. | 7. Order under Section 250. |
| 2. State Amendments. | 8. Sub-section (1). |
| —Bombay. | —Release on Probation. |
| —Uttar Pradesh. | 9. Offence not punishable with death or imprisonment for life. |
| —West Bengal. | 10. Instead of sentencing him to any punishment. |
| —Saurashtra. | 11. Proviso to sub-section (1). |
| —Madras. | 12. Sub-section (1A). |
| —Madhya Pradesh. | 13. Sub-section (2). |
| —Punjab. | 14. Sub-section (3). |
| —Hyderabad. | 15. Sub-section (4). |
| 3. Scope. | 16. Appeal. |
| 4. Discretion of Court. | 17. Revision. |
| 5. Applicability. | |
| —Instances. | |
| 6. Previous character. | |

1. Legislative Changes.—The principle embodied in Section 562 as substituted by Section 157 of Act XVIII of 1923 applies not only to persons who are convicted of an offence punishable under the Indian Penal Code, but also to those who are found guilty of an offence punishable under a special or a local Act, and can be reasonably invoked by a person convicted of an offence which not only implies previous preparation but often escapes detection.⁹

2. State Amendments—

Bombay.—In Section 562, in the proviso to sub-section (1), the words “or Sub-Divisional Magistrate were deleted by Bombay act 23 of 1923 (1). In any area in the Bombay State where the Probation of Offenders Act (19 of 1938) has been extended no Court shall make order under Section 562.

Uttar Pradesh.—Section 562 has been repealed by the U. P. Act 6 of 1952 Sections 562-564 have been repealed by the U. P. First Offenders’ Probation Act (6 of 1938).

West Bengal.—Under Section 14 of the West Bengal Offenders (Released on admission and Probation Act, Act 38 of 1954) it has been provided that Section 562 shall cease to apply to areas in which the West Bengal Act or any provision thereof are brought into force.

By Notification No. 11-H-J, dated 2nd May, 1960, in exercise of the power conferred by sub-section (3) of Section 1 of the Probation of Offenders Act, 1958 the Governor appointed 2nd May as the date of the commencement of the Act in the town of Calcutta as

9. *Piara Singh*, (1925) 7 L 32.

defined in Section 3 of the Calcutta Police Act, and in the Suburbs of the Town of Calcutta as defined by notification under Section 1 of Calcutta Suburban Police Act, 1866 and the remainder of the District of 24 Parganas and in the District of Nadia, Howrah, Hooghly, Burdwan and Midnapore and by sub-rule 1 of rule 2 of the W. B. Probation of Offenders' Rules 1960 fixed the number of Probation Officers as seventeen.

Saurashtra.—In the proviso to sub-section (1) after the words “in this behalf”, the words “in consultation with the High Court” were inserted and the words “or Sub-Divisional Magistrate” omitted by Saurashtra Act 4 of 1952.

Madras.—Section 562 is to be read subject to the provision of the Madras Probation of Offenders Act (3 of 1937). Under Section 15 of the Act nothing shall be deemed to affect in any way or derogate from the jurisdiction of the High Court.

Madhya Pradesh.—The C. P. and Berar Probation of Offenders Act (1 of 1936) shall be construed with and deem to be part of the Criminal Procedure Code in its application to Madhya Pradesh.

Punjab.—Section 50 of the Punjab Gram Panchayat's Act (4 of 1958) provides that no conviction under the said Act shall be deemed to be previous conviction for the purposes of Section 75 of the Indian Penal Code or Section 562 or Section 565 of the Code of Criminal Procedure.

Hyderabad.—Hyderabad Probation of Offenders Act, 1953 (12 of 1953) extends to the whole State of Hyderabad.

3. Scope.—Section 562 is intended to be used to prevent young persons from being committed to jail where they may associate with hardened criminals. Punishment would be a greater evil if instead of reforming the offender, it is likely to harden the offender to repetition of the crime with the possibility of irreparable injury to him.¹⁰ Before passing an order under this section the trial Court should guard against two things, (i) the danger to the public and (ii) and danger to the accused himself.¹¹

Where the Court entertains a reasonable doubt about the guilt of the accused, that cannot be a ground for applying the provision of section.¹² The mere fact that the accused comes of a respectable family cannot be a justification for imposing a lighter sentence.¹³

This section applies only to the case of first offender and so the accused who has already spent two periods in Borstal School cannot be treated under this section. This section is ordinarily intended for persons led astray for the first time by force of circumstances or bad company.¹⁴ Where the act constituting the offence is an act of daring or reprehensible nature involving previous well planned preparation and deliberate effort, action under this section would amount to displaced sympathy and unjust leniency, more so where the accused is otherwise mature enough in appreciate action and its consequences.¹⁵

The examination of an accused who had been dealt with under this section was not warranted by law.—See Dullu.¹⁶

Before passing order Magistrate should satisfy himself.—Before passing an order under Section 562 directing an accused to be released on his entering into a bond with sureties, the Magistrate must satisfy himself that the accused is in a position to furnish security.¹⁷

10. *B. Tital*, A 1941 M 720 : 43 Cr LJ 3.

11. *Allaha Dino*, A 1934 S 93 : 35 Cr LJ 1149 (F B).

12. *In re, Kunda Pepana*, A 1953 M 877 : 1953 Cr LJ 1646.

13. *In re, Mehboob Sheikh*, A 1942 M 582 :

43 Cr LJ 772.

14. *Surendra Chandra Das*, A 1930 P 216.

15. *Lekhraj*, A 1960 Punj 482.

16. 7L 148.

17. *Nasu Meah*, (1924) 2 R 360.

4. Discretion of Court.—In applying the provisions of Section 562 the number of previous convictions is one matter to be looked at; the interval of time which has elapsed between one conviction and another and particularly since the last conviction is important and so is the nature of the offence previously proved.¹⁸

5. Applicability.—In an offence calling for deterrent punishment this section should not be applied.¹⁹ When a case is submitted under Section 562 a conviction had first of all to made.²⁰ A Magistrate cannot at the same time release the accused under Section 562 (1) and direct that in default of his furnishing the security he would suffer rigorous imprisonment for two years.²¹ The section does not apply to the case of an offence under the Motor Vehicles Act.²²

Instances.—Section 562 cannot be applied to a case under Section 411 I. P. C.²³ nor to a case under Section 381 I. P. C.²⁴ The section does not apply to a conviction under the Gambling Act.²⁵ This section does not cover a case of cheating under Section 420 I. P. C.²⁶ A lad of 17 years convicted of rape should not be dealt with under Section 562.²⁷ Section 562 (1) should not be applied to first offences of drunkenness under the Prohibition Act,²⁸ nor should it be applied to a case where the accused has been convicted under Section 307 I. P. C.,²⁹ or under Section 457 I. P. C.³⁰ The section cannot apply to a conviction under Section 326 I. P. C.³¹ Or under Section 409 I. P. C.³² or under Section 304 I. P. C.³³

This section does not apply where the accused after conviction can be dealt with under the Probation of Offenders Act.

Section 562—Probation of Offenders Act 20 of 1958. The Courts mentioned in Section 11 must be the trial Courts exercising appellate or revisional jurisdiction and are thereby empowered to exercise the jurisdiction conferred on Courts not only under Sections 3 and 4 and the consequential provisions but also under Section 6.^{33a}

6. Previous character.—Section 562 suggests more strongly that the previous character of an accused person and therefore any previous convictions—can be rightly taken into account in assessing sentence.³⁴

7. Order under Section 250.—A person released under Section 562 cannot be ordered to pay compensation to the complainant.³⁵

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18. *Md. Hannif*, A 1942 B 215 : 43 Cr LJ 754.
 19. *Public Prosecutor*, A 1942 M 415 : 43 Cr LJ 671 (case under S. 304 I. P. C.).
 20. *Gurutta Naidu*, A 1933 M 728 : 34 Cr LJ 1045.
 21. *Abdul Sattar*, A 1949 L 5.
 22. *Pandu Ranji*, A 1926 B 280 : 27 Cr LJ 528.
 23. *Kabir Sha*, A 1927 P 297 : 26 Cr LJ 409 ; *Bangra Barman*, 38 CWN 362.
 24. *Nga Thaug*, A 924 R 12.
 25. *Sankar Dayal*, A 1922 Oudh 224.
 26. *Harnam Singh*, 16 PR 1911 Cr : 12 Cr LJ 218.
 27. *Sardha Ram*, A 1929 L 198 ; *Koligsga*, 2 Sau LR 48 (Sentenced to transporta-

- tion).
 28. *In re Kunda Pepana*, A 1953 M 877 ; 1953 Cr LJ 1646.
 29. *Jalan Singh*, A 1950 Raj 28 : 51 Cr LJ 1332.
 30. *Abdul Sattar*, A 1949 L 51.
 31. *In re Eshavan Velapan*, A 1943 M 681.
 32. *Paneswawara*, A 1946 M 173.
 33. *Public Prosecutor v. Medathi*, A 1942 M 415.
 33a. *Ramji Missir v. State of Bihar*, A 1963 SC 1088.
 34. *per Carr J.*, in *Nga Bashein*, (1928) 6 R 391 (F B) (407).
 35. *Mohammad Zaman*, (1927) 29 Cr LJ 38 : 100 IC 454 : AIR (1928) L 134 (1).

8. Sub-section (1)—Release on Probation.—Section 562 (1) applies to a person convicted of an offence punishable with imprisonment of not more than a certain period and this sub-section which only applies in the case of convictions under particular sections of the Criminal Code cover the case of a conviction under any law.³⁶ It is undesirable to send a youth of 16 or 17 to prison for a first offence unless it be a serious one.³⁷ The section has no application to the case of a youth who grapples with another and when separated turns back and inflicts a heavy lathi blow on him.³⁸

A youth enticing away a young widow for the honourable purpose of marrying her is fit to be dealt with under Section 562.³⁹

Where the accused was a widow of over forty-five and in committing an offence of forgery she was a puppet in the hands of other accused, *held* she should be released on her entering into a bond under this section.⁴⁰

9. Offence not punishable with death or imprisonment for life.—The words 'punishable with death or transportation for life (now imprisonment for life) must be interpreted disjunctively and women sentenced to transportation for life are ineligible for release on probation under Section 562.⁴¹ When an accused who was a Government servant of 19 years of age was convicted of an offence under Section 409 I. P. C. and sentence to transportation for life and was released under Section 562, *held* that he could not be dealt with under this section but in view of his youth and the fact that he returned the money and had lost the chance of getting Government service in future, sentence till the rising of the Court was sufficient.⁴²

10. Instead of sentencing him to any punishment.—Under Section 562 an offender can be released on probation only before he is sentenced to any punishment. Once the Magistrate does not exercise his power under Section 562 but sentences him to imprisonment his power to make an alternative order is exhausted.⁴³

The language of this section makes it clear that a sentence of imprisonment passed while the accused is being released on probation is illegal.⁴⁴

11. Proviso.—The proviso governs what goes before it and does not affect what follows after it. Hence proviso to Section 562 (1) cannot be read as governing Section 562 (1) (a) and therefore all Magistrates of whatever class they might be, can exercise the power under Section 562 (1A).⁴⁵ The proviso in sub-section (1) governs sub-section (1A).⁴⁶

There is a fundamental difference between the position of the accused persons dealt with under Section 349 and 562.⁴⁷

Where a second or third class Magistrate who has convicted more than one accused considers that only one or some of the accused should be dealt

36. *Chhotun Hasmatali*, A 1935 B 188 : 36 Cr LJ 1376.

37. *Bangru*, 38 CWN 362.

38. *Alia*, A 1930 L 259 : 31 Cr LJ P 48.

39. *Mukhram*, A 1929 A 930.

40. *Kiran Bala Dasi*, 30 CWN 678 : 27 Cr LJ 409.

41. *Janki*, A 1932 N 130 : 33 Cr LJ 844.

42. *Paneshwar Rao*, A 1946 M 173.

43. *In re Adapa Hanumantha Rao*, A 1957 AP 413 : 1957 Cr LJ 925 (1).

44. *Mt. Barkat*, A 1934 L 514 : 36 Cr LJ 662.

45. *Maung Thain Aung*, A 1940 R 280 : 42 Cr LJ 220 ; *Syed Jalal*, 53 Mys MCR 490 ; *Waman Ranu*, A 1937 B 481 : 39 Cr LJ (F B) ; *Waman*, A 1938 B 58 : 30 Cr LJ 81 (F B).

46. *Daulat Singh*, A 1928 N 348 : 30 Cr LJ 220.

47. *Permanayaga*, A 1943 M 390.

with under Section 562 there is nothing which prohibits the Magistrate from sending up all the accused to the Superior Magistrate.⁴⁸

12. Sub-section (1A).—The operation of Section 562 (1A) of the Code is confined to offences under the Indian Penal Code.^{48a}

Perjury—Release under this section.—It is not desirable to apply the proviso to this section to a person found guilty of deliberately committing perjury to secure an offender.^{48b}

A Magistrate of the 2nd Class is competent to pass orders under Section 562 (*Vide* Punjab Government Notification No. 431, dated 18th April 1910).⁴⁹

Sub-section (1A) applies to the case of theft (Section 379 I. P. C.), theft in a building (Section 380 I. P. C.), dishonest misappropriation (Section 403 I. P. C.), cheating (Section 417 I. P. C.) and aggravated punishment exceeding 2 years, as in the case of Section 409 I. P. C. or Section 420 I. P. C. *see* commentary under the heading "Instances".

The proper course in the case of youthful offenders convicted under Section 330 I. P. C. is to admonish him for an offence under Section 389 I. P. C.⁵⁰

13. Sub-section (2)—it specifically confers powers on the Appellate Court or the High Court to pass orders under this section.

14. Sub-section (3)—empowers the High Court to set aside in revision an order under Section 562 and substitute a sentence of imprisonment.⁵¹ The High Court was not disposed to treat a law-student belonging to a respectable family as a first offender under this section when he possessed fire-arms without a license.^{51a}

15. Sub-section (4)—provides that the sureties who executed bonds for, the persons bound over to keep the peace under Section 107 or for good behaviour under Section 108—110 Cr. P. Code may be released under Section 562.

16. Appeal.—Appeal lies against a conviction and order under this Section (*vide* Section 408)⁵² but where a Presidency Magistrate convicts an accused under Section 411 I. P. C. and sentences him to undergo rigorous imprisonment for six months and passes an order under Section 562 against the co-accused, no appeal lies.⁵³

A convicted person has a right of appeal from an order, passed against him under clause (1). By the operation of Section 415A there is a right of appeal by persons convicted with those under Section 562.⁵⁴ An appeal will

48. *In re Monisami*, A 1948 M 86 : 48 Cr LJ 361.

48a. *Merwanji M. Mistry*, (1928) 30 Bom LR 375 : AIR (1928) B 152.

48b. *Akabar*, (1927) 29 Cr LJ 219 : AIR (1928) L 296.

49. *Bakshan*, (1926) 8 L 38 overruling *Jawali*, (1923) 5 L 36.

50. *Md. Kulu Khan*, A 1930 Sind 280 : 41 Cr LJ 14.

51. *Kesar*, (1925) 24 ALJ 228.

51a. *Nirmal Chandra De*, (1925) 31 CWN 239 ; *M. Kesar*, A 1926 A 226 : 27 Cr LJ 308.

52. *Bahadur*, 29 CWN 151 : 26 Cr LJ 455 ; *Md. Khalik*, A 1940 R 257 : 42 Cr LJ 91 ; *Mayandi Nader*, A 1935 M 157 ; *Madhab*, A 1926 B 382 : *Hiralal*, A 1924 A 765.

53. *Kalikmar*, A 1937 C 413 : 35 Cr LJ 76 ; *H. Birks*, 36 CWN 459 : 33 Cr LJ 639.

54. *Bahadur Mollah*, (1924) 52 C 463 : 29 CWN 151 : 41 CLJ 45 : AIR (1928) C 329, followed in *Madhab Raghavendra Kalhrim*, (1926) 28 Bom LR 671 : 27 Cr LJ 873 : 96 IC 121 (B).

lie to the Sessions Judge from an order of a Magistrate under this section passed in a summary trial.⁵⁵

17. Revision.—When an accused is released under Section 562 (1) on probation of good conduct, no sentence is passed but when the case is referred to the High Court under sub-section (3) of this section that case is not one for enhancement of sentence within the meaning of Section 439 (6).⁵⁶ The High Court in revision can set aside the order under Section 562 and pass sentence;⁵⁷ unless it can be shown that the discretion of the Magistrate to pass an order under this section has been wrongly exercised High Court in revision will not interfere.⁵⁸

563. Provision in case of offender failing to observe conditions of his recognizances.—(1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

State Amendment—

Uttar Pradesh.—This section has been repealed by Section 15 of the U. P. First Offender's Prohibition Act 6 of 1938.

564. Conditions as to abode of offender.—(1) The Court, before directing the release of an offender under section 552, sub-section (1), shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in Sections 562 and 563 shall affect the provisions of Section 31 of the Reformatory Schools Act, 1897.

State Amendment—

Uttar Pradesh.—This section has been repealed by Section 15 of the U. P. First Offender's Prohibition Act 6 of 1938.

55. *Hiralal*, (1924) 46 A 828.

56. *Jelan Singh*, A 1950 Raj 28 : 51 Cr LJ 1332. *In re Vesaderaju Padayachi*, A 1942 M 521 : 44 Cr LJ 774.

57. *Md. Khan*, A 1934 L 36.

58. *Surendranath v. Dhirendranath*, A 1929 C 785 : 31 Cr LJ 618 ; *In re Kamasnhi Naidu*, A 1843 M 89 : 44 Cr LJ 604.

Previously convicted offenders

565. Order for notifying address of previously convicted offender.—(1) When any person having been convicted—

(a) by a Court in India of an offence punishable under Section 215, Section 489A, Section 489B, Section 489C, or Section 489D of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) before the 26th day of January, 1950, by a Court or Tribunal in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative of any offence which would, if committed in India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term,

is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The State Government may make rules to carry out the provisions of this section relating to the notification of residence or change of or absence from residence by released convicts.

(4) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.

(5) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.

SYNOPSIS

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|-------------------------|----------------------------------|
| 1. Legislative Changes. | 4. Notification as to residence. |
| 2. State Amendments. | —temporary absence. |
| —Bombay. | 5. Sub-section (4). |
| —Saurashtra. | 6. Rules. |
| 3. Scope. | |

1. Legislative Changes.—This section was substituted by Section 158 of Act XVIII of 1923 for the old section. Sub-sections (5) and (6) are altogether new. Sub-section (5) was repealed by Section 3 of Act 22 of 1939 and sub-section (6) was numbered as sub-section (5).

2. State Amendments—

Bombay.—In sub-section (1) the words “District Magistrate, Sub-Divisional Magistrate” have been omitted by Bombay Act 23 of 1951.

Saurashtra.—Same as in Bombay, *vide* Saurashtra Act 4 of 1952.

3. Scope.—This section provides that an order under its provisions may be passed when a person who has before been convicted of one of certain specified offences under the Penal Code is again convicted of one of those offences.⁵⁹

Section 565 must be construed strictly. The order contemplated by the section can only be made at the time of passing a sentence of transportation or imprisonment upon a convict. It cannot be made where the Court instead of passing that sentence, passes a sentence of whipping.⁶⁰

No order under this section can be passed against a first offender.⁶¹ The section does not apply where the conviction is for an attempt under Section 511 I. P. C.⁶²

4. Notification as to residence—Temporary absence—offence under Section 176 I. P. C.—A person against whom an order is passed under Section 565 of the Code, is merely bound to notify his residence or change of residence after his release. As long as he retains his residence in the same place, his temporary absence from home for a day or two does not require notification and the accused is not guilty of an offence under Section 171 I. P. C.⁶³

5. Sub-section (4).—The Appellate Court or the High Court may pass an order under this section.

6. Rules.—For rules as to the notification of residence by released convicts in—

- (1) Bombay, *see* Bom. R. and O. ;
- (2) Burma, *see* Bur. R. M. ;
- (3) Bengal, *see* Ben. R. and O. ;
- (4) Central Provinces, *see* C. P. R. and O. ;
- (5) Madras, *see* Mad. R. and O. ;
- (6) Punjab, *see* Punj. R. and O. ;
- (7) Assam, *see* Assam R. and O. ;
- (8) Coorg, *see* Coorg R. and O.

General Acts, Vol. I.

59. *Nga Po Than*, (1928) 3 R 156.

60. *Fulji Dittaya*, (1910) 35 B 137 : 6 Cr LJ 469.

61. *Bekkshu*, A 1934 L 675 : 36 Cr LJ 292 (1).

62. *In re Doraiswami Mudali*, A 1942 M 521, 44 Cr LJ 501 ; *Hernam*, 6 Cr LJ 379 (Punj b).

63. *Re Chengadu*, 40 M 789 ; *Hussain*, 31 M 548.

**SCHEDULE I.—[Enactments repealed.] Rep. by the
Repealing and Amending Act X of 1914.**

SCHEDULE II

(Schedule II.—Tabular Statement of Offences. Chapter V.—Abetment.)

SCHEDULE II
TABULAR STATEMENT OF OFFENCES

EXPLANATORY NOTE.—The entries in the second and seventh columns of this Schedule, headed respectively "Offence" and "Punishment under the Indian Penal Code", are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this Schedule applies also to the police in the towns of Calcutta and Bombay.¹

CHAPTER V.—ABETMENT

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence abetted.	The Court by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto . . .	Ditto . . .	Ditto . . .	Ditto . . .	Ditto . . .	Ditto
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Ditto . . .	Ditto . . .	Ditto . . .	Ditto . . .	The same punishment as for the offence intended to be abetted.	Ditto.
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto . . .	Ditto . . .	Ditto . . .	Ditto . . .	The same punishment as for the offence committed.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter V.—Abetment.)

114	Abetment of any offence, if abettor is present when offence is committed.	Ditto	Ditto	Ditto	Ditto	Ditto
115	Abetment of an offence, punishable with death or ² [imprisonment for life], if the offence be not committed in consequence of the abetment.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 7 years and fine.
	If an act which causes harm be done in consequence of the abetment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years and fine.
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	Ditto	According as the offence abetted is bailable or not.	Ditto	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.

1. The entire Criminal Procedure has now been made applicable to the police in the town of Bombay by Repeal of S. 1 (2)(a) by S. 167(3) and Sch. III of the Bombay Police Act, 22 of 1951.

2. Subs. by Act 26 of 1955, s. 114, for "transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter V. Abetment.)

SCHEDULE II—contd.
CHAPTER V.—ABETMENT—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
118	Concealing a design to commit an offence punishable with death or ¹ [imprisonment for life], if the offence be committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Not bailable	According as the offence abetted is compoundable or not.	Imprisonment of either description for 7 years and fine.	The Court by which the offence abetted is triable.
	If the offence be not committed.	Ditto	Ditto	² [Bailable].	Ditto	Imprisonment of either description for 3 years and fine	Ditto.
119	A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.	Ditto	Ditto	According as the offence abetted is bailable or not.	Ditto	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.
	If the offence be punishable with death or ¹ [imprisonment for life].	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 10 years.	Ditto.
	If the offence be not committed.	Ditto	Ditto	² [Bailable]	Ditto	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter V.—Abetment.
Chapter VA.—Criminal Conspiracy.)

120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto	Ditto	² [According as the offence concealed is bailable or not.]	Ditto	Ditto	Ditto.
	If the offence be not committed.	Ditto	Ditto	² [Bailable]	Ditto	Imprisonment extending to one-eighth part of the longest term, and of the description, provided for the offence, or fine, or both.	Ditto.
³ [CHAPTER VA.—CRIMINAL CONSPIRACY]							
120B	Criminal conspiracy to commit an offence punishable with death, ⁴ [imprisonment for life] or rigorous imprisonment for a term of two years or upwards.	May arrest without warrant if the offence which is the object of the conspiracy may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence which is the object of the conspiracy.	According as the offence which is the object of the conspiracy is bailable or not.	Not punishable.	The same punishment as that provided for the offence which is the object of the conspiracy.	Court of Session when the offence which is the object of the conspiracy is triable exclusively by such Court; in the case of all other offences Court of Session, Presidency Magistrate or Magistrate of the first class.
	Any other criminal conspiracy.	Shall not arrest without a warrant.	Summons	Bailable	Ditto	Imprisonment of either description for six months and fine, or both.	Presidency Magistrate or Magistrate of the first class.

¹Subs. by Act 26 of 1955, s. 114, for "transportation for life".

²Subs. by Act 18 of 1923, s. 159, for the original entry.

³Ins. by Act 8 of 1913, s. 6 and Sch.

⁴Subs. by Act 26 of 1955, s. 114, for "transportation".

(Schedule II.—Tabular Statement of Offences. Chapter VI.—Offences against the State.)

CHAPTER VI.—OFFENCES AGAINST THE STATE

SCHEDULE II—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
121	Waging or attempting to wage war, or abetting the waging of war, against the ¹ [Government of India].	Shall not arrest without warrant.	Warrant	Not bailable	Not compoundable.	Death or ² [imprisonment for life], and ³ [fine].	Court of Session.
121A	Conspiring to commit certain offences against the State.	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life] ⁴ * * * or imprisonment of either description for 10 years ⁵ [and fine].	Ditto.
122	Collecting arms, etc., with the intention of waging war against the ¹ [Government of India].	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years, and ³ [fine].	Ditto.
123	Concealing with intent to facilitate a design to wage war.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto.
124	Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto.

(Schedule II.—Tabular Statement of Offences, Chapter VI.—Offences against the State.)

124A	Sedition	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life] ⁶ ** and fine, or imprisonment of either description for 3 years and fine, or fine.	Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered by the State Government in that behalf ⁷ .
125	Waging war against any Asiatic Power in alliance or at peace with the ¹ [Government of India], or abetting the waging of such war.	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life] and fine, or imprisonment of either description for 7 years and fine, or fine.	Court of Session.
126	Committing depredation on the territories of any Power in alliance or at peace with the ¹ [Government of India].	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Ditto.
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Ditto.

¹Subs. by the A.O. 1950 for "Queen".²Subs. by Act 26 of 1955, s. 114, for "transportation for life".³Subs. by Act 18 of 1923, s. 159, for "forfeiture of property."⁴The words "or any shorter term" omitted by Act 26 of 1955, s. 114.⁵Ins. by Act 18 of 1923, s. 159.⁶The words "or for any term" omitted by Act 26 of 1955, s. 114.⁷In Bombay omit the words "or District Magistrate" and after the words "in that behalf" read the words "in consultation with the High Court", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter VI.—Offences against the State. Chapter VII.—Offences relating to the Army and Navy.)

SCHEDULE II—*contd.*
CHAPTER VI.—OFFENCES AGAINST THE STATE—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
129	Public servant negligently suffering prisoner of State or war in his custody to escape.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Simple imprisonment for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner.	Ditto	Ditto	Not bailable	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Court of Session.

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY

Section	Offence	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Punishment	Court of Session.
131	Abetting mutiny, or attempting to seduce an officer, soldier, ² [sailor or airman] from his allegiance or duty.	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Ditto
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Ditto	Ditto	Ditto	Ditto	Death, or ¹ [imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto
133	Abetment of an assault by an officer, soldier, ² [sailor or airman] on his superior officer, when in the execution of his office.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

(Schedule II.—Tabular Statement of Offences. Chapter VII.—Offences relating to the Army and Navy.)

134	Abetment of such assault, if the assault is committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
135	Abetment of the desertion of an officer, soldier, ² [sailor or airman].	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
136	Harbouring such an officer, soldier, ² [sailor or airman], who has deserted.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant.	Summons	Ditto	Ditto	Fine of 500 rupees.	Ditto
138	Abetment of act of insubordination by an officer, soldier, ² [sailor or airman] if the offence be committed in consequence.	May arrest without warrant.	Warrant	Ditto	Ditto	Imprisonment of either description for 6 months, or fine or both.	Ditto
140	Wearing the dress or carrying any token used by a soldier, ³ [sailor or airman] with intent that it may be believed that he is such a soldier, ³ [sailor or airman].	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.

1. Subs. by Act 26 of 1955, s. 114, for "transportation for life".

2. Subs. by Act 10 of 1927, s. 2 and Sch. I, for "or sailor".

3. Ins. by s. 2 and Sch. I, *ibid.*

(Schedule II.—Tabular Statement of Offences. Chapter VIII.—Offences against the Public Tranquillity.)

SCHEDULE II—continued. CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY							
Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
143	Being member of an unlawful assembly.	May arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate ¹ .
144	Joining an unlawful assembly armed with any deadly weapon.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
147	Rioting	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
148	Rioting, armed with a deadly weapon.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	According as the offence is bailable or not.	Ditto	The same as for the offence.	The Court by which the offence is triable.

(Schedule II.—Tabular Statement of Offences, Chapter VIII.—Offences against the Public Tranquillity.)

150	Hiring, engaging or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged or employed.	Ditto	Ditto	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Ditto.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto	Summons	Bailable	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
152	Assaulting or obstructing public servant when suppressing riot, etc.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
	If not committed . .	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
153A	Promoting enmity between classes.	Shall not arrest without warrant.	Warrant	Not bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto	Summons	Bailable	Ditto	Fine of 1,000 rupees.	Presidency Magistrate or Magistrate of the first or second class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto	Ditto	Ditto	Ditto	Fine	Ditto.

1. In Bombay for the words "Any Magistrate" the words "Any Judicial Magistrate" were substituted, *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter VIII.—Offences against the Public Tranquillity.)

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY— <i>contd.</i>							
Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Fine	Presidency Magistrate or Magistrate of the first or second class.
157	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
158	Being hired to take part in an unlawful assembly or riot.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
159	Or to go armed	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
160	Committing affray	Shall not arrest without warrant.	Summons	Ditto	Ditto	Imprisonment of either description for one month, or fine of 100 rupees, or both.	Any Magistrate.

(Schedule II.—Tabular Statement of Offences. Chapter IX.—Offences by or relating to Public Servants.)

CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS						
	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	² [May arrest without warrant.]	Summons	Bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.
161						Court of Session, Presidency Magistrate or Magistrate of the first class.
162	Taking a gratification in order by corrupt or illegal means to influence a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Ditto

¹The figures "159" rep. by Act 37 of 1925, s. 3 and Sch. II.²Subs. by Act 26 of 1955, s. 114, for "Shall not arrest without warrant".³Subs by Act 36 of 1957, s. 3 and Sch. II, for "Simple imprisonment for 2 years".⁴In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter IX.—Offences by or relating to Public Servants.)

SCHEDULE II—*contd.*
CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS—*contd.*

Section	1	2	Whether the police may arrest without warrant or not	3	Whether a warrant or summons shall ordinarily issue in the first instance	4	Whether bailable or not	5	Whether compoundable or not	6	7	8	By what Court triable
167		Public servant framing an incorrect document with intent to cause injury.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.					
168		Public servant unlawfully engaging in trade.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.					
169		Public servant unlawfully buying or bidding for property.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both, and confiscation of property, if purchased.	Ditto.					
170		Personating a public servant.	May arrest without warrant.	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate. ⁶					
171		Wearing garb or carrying token used by public servant with fraudulent intent.	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.					

(Schedule II.—Tabular Statement of Offences. Chapter IXA.—Offences relating to Elections. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

171E	Bribery	¹ [CHAPTER IXA.—OFFENCES RELATING TO ELECTIONS				Imprisonment of either description for one year, or fine, or both or if treating only, fine only.	Presidency Magistrate or Magistrate of the first class.
		Shall not arrest without warrant.	Summons	Bailable	Not poundable		
² 171F	Undue influence ³ * * *	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for one year, or fine, or both.	Ditto
	⁴ [Personation at an election.]	⁴ [May arrest without warrant.]	⁴ [Ditto]	⁴ [Ditto]	⁴ [Ditto]	⁴ [Ditto]	⁴ [Ditto]
171G	False statement in connection with an election.	⁵ [Shall not arrest without warrant.]	Ditto	Ditto	Ditto	Fine	Ditto.
171H	Illegal payments in connection with elections.	Ditto	Ditto	Ditto	Ditto	Fine of 500 rupees.	Ditto.
171I	Failure to keep election Accounts.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.]
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS							
172	Absconding to avoid service of summons or other proceeding from a public servant.	Shall not arrest without warrant.	Summons	Bailable	Not poundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate ⁶ .
	If summons or notice requires attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.

¹Ins. by Act 39 of 1920, s. 3.

²This item has been amended in its application to the C. P. by the Code of Criminal Procedure (C. P. Amendment) Act, 1936 (C. P. Act. 19 of 1936), s. 3.

³The words "and personation" omitted by Act 43 of 1951, s. 138.

⁴Ins. by s. 138, *ibid*.

⁵Subs. by s. 138, *ibid*, for "Ditto".

⁶In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—*contd.*

SCHEDULE II—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation. If summons, etc., require attendance in person, etc., in a Court of Justice	Shall not arrest without warrant.	Summons	Bailable	Not Compoundable.	Simple imprisonment for 1 month or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority. If the order require personal attendance, etc., in a Court of Justice.	Ditto.	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Ditto.	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate. ²
						Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
						Simple imprisonment for 1 month, or fine of 500 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter

(Schedule II.—Tabular Statement of Offences. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

176	If the document is required to be produced in or delivered to a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.	X X X V; or, if committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.	
	If the notice or information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.	
177	¹ [If the notice or information is required by an order passed under sub-section (1) of section 565 of this Code.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.]	
	Knowingly furnishing false information to a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.	
	If the information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.	

¹Ins. by Act 22 of 1939, s. 4.

²In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

SCHEDULE II—*contd.*
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—*contd.*

Sec- tion	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordina- rily issue in the first instance.	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
178	Refusing Oath when duly required to take oath by a public servant.	Shall not arrest without warrant.	Summons.	Bailable	Not com- poundable.	Simple imprison- ment for 6 mon- ths, or fine of 1,000 rupees, or both.	The Court in which the off- ence is com- mitted, subject to the provi- sions of Chap- ter XXXV; or, if not com- mitted in a Court, a Presi- dency Magis- trate or Magis- trate of the first or second class.
179	Being legally bound to state truth, and refus- ing to answer questions.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
180	Refusing to sign a state- ment made to a public servant when legally required to do so.	Ditto.	Ditto	Ditto	Ditto	Simple imprison- ment for 3 months, or fine of 500 rupees, or both.	Ditto
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto.	Warrant	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Sessi- on, Presidency Magistrate or Magistrate of the first class.

(Schedule II.—Tabular Statement of Offences. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

		Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto					
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Ditto
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 200 rupees or both.	Ditto
186	Obstructing public servant in discharge of his public functions.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Ditto
187	Omission to assist public servant when bound by law to give such assistance.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month or fine of 200 rupees, or both.	Ditto
	Wilful neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Ditto

(Schedule II.—Tabular Statement of Offences. Chapter X.—Contempts of the Lawful Authority of Public Servants.)

SCHEDULE II—*contd.*
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a Warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed. If such disobedience causes danger to human life, health or safety, etc.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Simple imprisonment for 1 month or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
189	Threatening a public servant with injury to him, or one in whom he is interested to induce him to do or forbear to do any official act.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
						Imprisonment of either description for 1 year, or fine, or both.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter XI.—False Evidence and Offences against Public Justice.)

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE							
	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant	Bailable	Not punishable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
193	Giving or fabricating false evidence in any other case.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto	Ditto	Not bailable	Ditto	¹ [Imprisonment for life], or rigorous imprisonment for 10 years and fine.	Court of Session.
	If innocent person be thereby convicted and executed.	Ditto	Ditto	Ditto	Ditto	Death or as above.	Ditto.
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with ¹ [imprisonment for life] or with imprisonment for 7 years or upwards.	Ditto	Ditto	² [Not bailable]	Ditto	The same as for the offence	Ditto.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto	Ditto	According as the offence of giving such evidence is bailable or not.	Ditto	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto	Ditto	Bailable	Ditto	The same as for giving false evidence.	Ditto.

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".²Subs. by Act 1 of 1903, s. 3 and Sch. II, Pt. II, for "Bailable".

(Schedule II.—Tabular Statement of Offences. Chapter XI.—False Evidence and Offences against Public Justice.)

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
198	Using as a true certificate one known to be false in a material point.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	The same as for giving false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
199	False statement made in any declaration which is by law receivable as evidence.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
200	Using as true any such declaration known to be false.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
	If punishable with [imprisonment for life] or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with less than 10 years' imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.

(Schedule II.—Tabular Statement of Offences. Chapter XI.—False Evidence and offences against Public Justice.)

202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto	Summons	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
203	Giving false information respecting an offence committed.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
208	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.

¹Subs. by Act 26 of 1955, s. 114, for "transportation for life".

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—*contd.*
SCHEDULE II—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
209	False claim in a Court of Justice.	Shall not arrest without warrant	Warrant	Bailable	Not com- poundable.	Imprisonment of either description for 2 years and fine.	Presidency Ma- gistrate or Ma- gistrate of the first class.
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
211	False charge of offence made with intent to injure. If offences charged be punishable with impri- sonment for 7 years or upwards. If offence charged be capital, or punishable with ¹ [imprisonment for life].	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
212	Harbouring an offender, if the offence be capital.	May arrest with- out warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Court of Ses- sion, Presidency Magistrate or Magistrate of the first class.

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

If punishable with ¹ [imprisonment for life], or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
If punishable with imprisonment for 1 year and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable
213 Taking gift, etc., to screen an offender from punishment, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
If punishable with ¹ [imprisonment for life], or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
214 Offering gift or restoration of property in consideration of screening offender, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.

¹ Subs. by Act 26 of 1955, s. 114, for "transportation for life".² Subs. by Act 18 of 1923, s. 159, for the original entry.

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—*contd.*
SCHEDULE II—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant, or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
214— <i>contd.</i>	If punishable with ¹ [im- prisonment for life] or with imprisonment for 10 years.	² [Shall not arrest without warrant.]	Warrant	Bailable	Not com- poundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Ma- gistrate or Ma- gistrate of the first class, or Court by which the offence is triable.
215	Taking gift to help to re- cover movable proper- ty of which a person has been deprived by an of- fence, without causing apprehension of offender	² [May arrest with- out warrant.]	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Ma- gistrate or Ma- gistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class.
	If punishable with ¹ [im- prisonment for life] or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, with or without fine.	Ditto

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

		Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
216A	If with imprisonment for 1 year, and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
217	Harbouring robbers or dacoits.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
218	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant.	Summons	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
219	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto	Warrant	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto
220	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto
	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto	Ditto	Ditto	Ditto	Ditto		Ditto

¹Subs. by Act 26 of 1955, s. 114, for "transportation for life".²Subs. by Act 18 of 1923, s. 159, for the original entry.

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—*contd.*
SCHEDULE II—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital. If punishable with ¹ [imprisonment for life] or imprisonment for 10 years. If with imprisonment for less than 10 years.	Shall not arrest without warrant. Ditto Ditto	Warrant Ditto Ditto	Bailable Ditto Ditto	Not compoundable. Ditto Ditto	Imprisonment of either description for 7 years, with or without fine. Imprisonment of either description for 3 years, with or without fine. Imprisonment of either description for 2 years, with or without fine. ¹ [Imprisonment for life], or imprisonment of either description for 14 years, with or without fine.	Court of Session. Court of Session, Presidency Magistrate or Magistrate of the first class. Presidency Magistrate or Magistrate of the first or second class. Court of Session.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend a person under sentence of a Court of Justice if under sentence of death. If under sentence of ^{2,3} [imprisonment for life] or imprisonment ⁴ * * * for 10 years or upwards.	Ditto Ditto	Ditto Ditto	Not bailable Ditto	Ditto Ditto	Imprisonment of either description for 7 years, with or without fine.	Ditto

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

If under sentence of imprisonment for less than 10 years, or lawfully committed to custody.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
223 Escape from confinement negligently suffered by a public servant.	Ditto	Summons	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
224 Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
225 Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
If charged with an offence punishable with ¹ [imprisonment for life], or imprisonment for 10 years.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
If charged with a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.

¹Subs. by Act 26 of 1955, s. 114, for "transportation for life".²Subs. by Act 35 of 1950, s. 3 and Sch. II, for "transportation * * * or transportation".³Subs. by Act 26 of 1955, s. 114, for "transportation".⁴The words 'or penal servitude' omitted by Act 17 of 1949, s. 3 [w.e.f. 6-4-1949].

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and offences against Public Justice.)

SCHEDULE II—*contd.*
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
225— <i>contd.</i>	If the person is sentenced to [imprisonment for life], or to 2* * *, 3* * * or imprisonment for 10 years or upwards. If under sentence of death.	May arrest with- out warrant. Ditto	Warrant Ditto	Not bailable Ditto	Not Com- poundable. Ditto	Imprisonment of either description for 7 years and fine. [Imprisonment for life], or imprison- ment of either description for 10 years, and fine.	Court of Session. Ditto.
225A	Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for— (a) in case of intentional omission or sufferance; (b) in case of negligent omissions or sufferance.	Shall not arrest without warrant. Ditto	Ditto Summons	Bailable Ditto	Ditto Ditto	Imprisonment of either description for 3 years, or fine, or both. Simple imprison- ment for 2 years, or fine, or both.	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class. Presidency Ma- gistrate or Ma- gistrate of the first or se- cond class.

(Schedule II.—Tabular Statement of offences. Chapter XI.—False evidence and Offences against Public Justice. Chapter XII.—Offences relating to Coin and Government Stamps.)

225B	Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.	May arrest without warrant.	Warrant	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
226	Unlawful return from ⁴ [imprisonment for life].	Ditto	Ditto	Not bailable	Ditto	¹ [Imprisonment for life], and fine and rigorous imprisonment for 3 years before ⁴ [imprisonment for life].	Court of Session.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons	Ditto	Ditto	Punishment of original sentence, or, if part of the punishment has been undergone, the residue.	The Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto	Ditto	Bailable	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXV.
229	Personation of a juror or assessor.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
231	Counterfeiting, or per forming any part of the process of counterfeiting, coin.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session.

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

¹Subs. by Act 26 of 1955, s. 114, for "transportation for life".

²The word "transportation" omitted by s. 114, *ibid.*

³The words "penal servitude" omitted by Act 17 of 1949, s. 3 [w.e.f. 6.4.1949].

⁴Subs. by Act 26 of 1955, s. 114, for "transportation".

(Schedule II.—Tabular Statement of Offences. Chapter XII.—Offences relating to Coin and Government Stamps.)

SCHEDULE II—*contd.*
CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
232	Counterfeiting, or per- forming any part of the process of counterfeiting, 1[Indian coin].	May arrest with- out warrant.	Warrant	Not bailable	Not com- poundable.	2[Imprisonment for life], or imprison- ment of either des- cription for 10 years and fine.	Court of Ses- sion.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Ses- sion, Presi- dency Magis- trate or Magis- trate of the first class.
234	Making, buying or selling instrument for the purpose of counterfeiting 1[Indian coin].	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Ses- sion.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Ses- sion, Presi- dency Magis- trate or Magis- trate of the first class.
	If 3[Indian coin]	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.

(Schedule II.—Tabular Statement of Offences. Chapter XII.—Offences relating to Coin and Government Stamps.)

236	Abetting in ⁴ [India] the counterfeiting out of ⁴ [India] of coin.	Ditto	Ditto	Ditto	The punishment provided for abetting the counterfeiting of such coin within ⁴ [India].	Ditto.
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
238	Import or export of counterfeits of ¹ [Indian coin], knowing the same to be counterfeit.	Ditto	Ditto	Ditto	² [Imprisonment for life] or imprisonment of either description for 10 years, and fine.	Court of Session.
239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
240	The same with respect to ¹ [Indian coin].	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine of ten times the value of the coin counterfeited, or both.	Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by the A.O. 1950 for "the Queen's coin".²Subs. by Act 26 of 1955, s. 114, for "Transportation for life".³Subs. by the A.O. 1950 for "Queen's coin".⁴Subs. by Act 1 of 1951, s. 2, for "the States".

(Schedule II.—Tabular Statement of Offences. Chapter XII.—Offences relating to Coin and Government Stamps.)

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
243	Possession of ¹ [Indian coin] by a person who knew it to be counterfeit when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto.
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
245	Unlawfully taking from a mint any coining instrument.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
246	Fraudulently diminishing the weight or altering the composition of any coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or the Magistrate of the first class
247	Fraudulently diminishing the weight or altering the composition of ² [Indian coin].	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter XII.—Offences relating to Coin and Government Stamps.)

248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
249	Altering appearance of ¹ [Indian coin] with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
250	Delivery to another of coin possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto
251	Delivery of ² [Indian coin] possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto.
253	Possession of ² [Indian coin] by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto.
254	Delivery to another of coin as genuine which, when first possessed, the delinquent did not know to be altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine of ten times the value of the coin.	Presidency Magistrate or Magistrate of the first or second class.
255	Counterfeiting a Government stamp.	Ditto	Ditto	Bailable	Ditto	³ [Imprisonment for life] or imprisonment of either description for 10 years and fine.	Court of Session.

¹Subs. by the A.O. 1950 for "Queen's coin".²Subs., *ibid.*, for "the Queen's coin".³Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter XII.—Offences relating to Coin and Government Stamps.)

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—*contd.*
SCHEDULE II—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
258	Sale of counterfeit Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
259	Having possession of a counterfeit Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
260	Using as genuine a Government stamp known to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto.

(Schedule II.—Tabular Statement of offences. Chapter XIII.—Offences relating to weights and Measures. Chapter XIV.—Offences affecting the Public Health, Safety, Convenience, Decency and Morals.)

262	Using a Government stamp known to have been before used.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
263	Erasure of mark denoting that stamp has been used.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
263A	Fictitious stamps ..	Ditto	Ditto	Ditto	Fine of 200 rupees.	Presidency Magistrate or Magistrate of the first class.
CHAPTER XIII—OFFENCES RELATING TO WEIGHTS AND MEASURES						
264	Fraudulent use of false instrument for weighing.	Shall not arrest without warrant.	Bailable	Summons	Not compoundable.	Presidency Magistrate or Magistrate of the first or second class.
265	Fraudulent use of false weight or measure.	Ditto	Ditto	Ditto	Ditto	Ditto.
266	Being in possession of false weights or measures for fraudulent use.	Ditto	Ditto	Ditto	Ditto	Ditto.
267	Making or selling false weights or measures for fraudulent use.	Ditto	Ditto	Ditto	Ditto	Ditto.
CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS						
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	Bailable	Summons	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.
						Presidency Magistrate or Magistrate of the first or second class.

(Schedule II.—Tabular Statement of Offences. Chapter XIV.—Offences affecting the Public Health, Safety, Convenience, Decency and Morals.)

SCHEDULE II— <i>contd.</i>							
CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS— <i>contd.</i>							
Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest with- out warrant.	Summons	Bailable	Not com- poundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Ma- gistrate or Ma- gistrate of the first or second class.
271	Knowingly disobeying any quarantine rule.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter XIV.—Offences affecting the Public Health, Safety, Convenience, Decency and Morals.)

275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Ditto	Ditto	Ditto	Ditto	Ditto.
277	Defiling the water of a public spring or reservoir.	May arrest without warrant.	Ditto	Ditto	Ditto	¹ Any Magistrate.
278	Making atmosphere noxious to health.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Ditto.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto.
280	Navigating any vessel so rashly or negligently as to endanger human life, etc.	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
281	Exhibition of a false light, mark or buoy.	Ditto	Warrant	Ditto	Ditto	Court of Session.
282	Conveying for hire any person by water, in a vessel in such a state, or so loaded, as to endanger his life.	Ditto	Summons	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.

¹In Bombay the words 'Any Judicial Magistrate' have been substituted for the words 'Any Magistrate', vide Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XIV.—Offences affecting the Public Health, Safety, Convenience, Decency and Morals.)

CHAPTER XIV—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—*contd.*

SCHEDULE II—*contd.*

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
283	Causing danger, obstruction or injury in any public way or line of navigation.	May arrest without warrant.	Summons	Bailable	Not compoundable.	Fine of 200 rupees	Presidency Magistrate or Magistrate of the first or second class.
284	Dealing with any poisonous substance, so as to endanger human life, etc.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either { description for 6 months, or fine of 1,000 rupees, or both.	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Any Magistrate. ³
286	So dealing with any explosive substance.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
287	So dealing with any machinery.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

(Schedule II.—Tabular Statement of Offences. Chapter XIV.—Offences affecting the Public Health, Safety, Convenience, Decency and Morals.)

289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	May arrest without warrant.	Ditto	Ditto	Ditto	Any Magistrate. ³
290	Committing a public nuisance.	Shall not arrest without warrant.	Ditto	Ditto	Fine of 200 rupees	Ditto.
291	Continuance of nuisance after injunction to discontinue.	May arrest without warrant.	Ditto	Ditto	Simple imprisonment for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
292	Sale, etc., of obscene books, etc.	Ditto	Warrant	Ditto	Imprisonment of either description for 3 months, or fine, or both.	¹ [Presidency Magistrate, or Magistrate of the first class.]
293	¹ [Sale, etc., of obscene objects to young persons.]	Ditto	Ditto	Ditto	¹ [Imprisonment of either description for 6 months, or fine, or both.	¹ [Presidency Magistrate, or Magistrate of the first class.]
294	Obscene songs	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months, or fine, or both.	² [Any Magistrate.]
294A	Keeping a lottery office	Shall not arrest without warrant.	Summons	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate. ³
	Publishing proposals relating to lotteries.	Ditto	Ditto	Ditto	Fine of 1,000 rupees.	Ditto.

¹Subs by Act 8 of 1925, s. 3, for the original entries.

²Subs. by Act 18 of 1923, s. 159, for the original entries.

³In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XV.—Offences relating to Religion.)

SCHEDULE II—*contd.*

CHAPTER XV.—OFFENCES RELATING TO RELIGION

Section	Offence	Whether the Police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	May arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
¹ [295A]	Maliciously insulting the religion or the religious beliefs of any class.	Shall not arrest without warrant.	Warrant	Not bailable	Ditto	Ditto	Court of Session or Presidency Magistrate].
296	Causing a disturbance to an assembly engaged in religious worship.	² [May arrest without warrant.]	² [Summons]	² [Bailable]	² [Not compoundable.]	Imprisonment of either description for 1 year, or fine, or both.	² [Presidency Magistrate or Magistrate of the first or second class.]
297	Trespassing in place of worship or sepulchre, disturbing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of offences affecting Life.)

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY

Of offences affecting Life

298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight, of any person, with intention to wound his religious feeling.	Shall not arrest without warrant.	Ditto	Ditto	Compoundable.	Ditto	Ditto.
302	Murder	May arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Death, or ³ [imprisonment for life] and fine.	Court of Session.
303	Murder by a person under sentence of ³ [imprisonment for life].	Ditto	Ditto	Ditto	Ditto	Death	Ditto.
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc. If act is done with knowledge that it is likely to cause death, but without any intention to cause death, etc.	Ditto	Ditto	Ditto	Ditto	³ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto.
304A	Causing death by rash or negligent act.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

¹Ins. by Act 25 of 1927, s. 3.

²Subs. by s. 3, *ibid.*, for the original entries.

³Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of Offences affecting Life.—Contd.)

SCHEDULE II—contd.
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—contd.
Of Offences affecting Life—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
305	Abetment of suicide committed by child, or insane or delirious person or an idiot, or a person intoxicated.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Death, or ¹ [Imprisonment for life], or imprisonment for 10 years, and fine.	Court of Session.
306	Abetting the commission of suicide.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto
307	Attempt to murder If such act cause hurt to any person. Attempt by life-convict to murder, if hurt is caused	Ditto Ditto Ditto	Ditto Ditto Ditto	Ditto Ditto Ditto	Ditto Ditto Ditto	Ditto ¹ [Imprisonment for life], or as above. Death or as above.	Ditto Ditto Ditto
308	Attempt to commit culpable homicide. If such act cause hurt to any person.	Ditto Ditto	Ditto Ditto	Bailable Ditto	Ditto Ditto	Imprisonment of either description for 3 years, or fine, or both. Imprisonment of either description for 7 years, or fine, or both.	Ditto Ditto

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—Of the Causing of miscarriage; of injuries to unborn children; of the Exposure of Infants; and of the Concealment of births.)

309	Attempt to commit suicide.	Ditto	Ditto	Ditto	Simple imprisonment for one year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug	Ditto	Ditto	Not bailable	Ditto	Court of Session.
<i>Of the causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births</i>						
312	Causing miscarriage .	Shall not arrest without warrant	Warrant	Bailable	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
313	Causing miscarriage without woman's consent.	Ditto	Ditto	Not bailable	Imprisonment for [life], or imprisonment of either description for 10 years, and fine.	Ditto
314	Death caused by an act done with intent to cause miscarriage.	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto
	If act done without woman's consent.	Ditto	Ditto	Ditto	Imprisonment for [life], or as above.	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Ditto
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of the Causing of Miscarriage; of Injuries to unborn children; of the Exposure of Infants; and of the Concealment of births.—Of Hurt.)

SCHEDULE II—contd.

CHAPTER XVI—OFFENCES AFFECTING THE HUMAN BODY—contd.
Of the causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	[Court of Session, Presidency Magistrate or Magistrate of the first class.]
318	Concealment of birth by secret disposal of dead body.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant	Ditto	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of Hurt.)

	Voluntarily causing grievous hurt.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.	
325	Voluntarily causing grievous hurt.	Ditto	Ditto	Ditto	Ditto	Ditto	3[Imprisonment for life], or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.	
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	1[Court of Session, Presidency Magistrate, on Magistrate of the first class.	
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Ditto	Warrant	Ditto	Ditto	Ditto	Ditto	Ditto	1[Court of Session.]
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto	Ditto	Ditto	Ditto	Ditto	3[Imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto.	
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Ditto	Ditto	Bailable	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.	

¹Subs. by Act 18 of 1923, s. 159, for the original entry.²The words "or second" omitted by s. 159, *ibid*.³Subs. by Act 26 of 1955, s. 114, for "Transportation for life".⁴In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body.—Of Hurt.)

SCHEDULE II—contd.
CHAPTER XVI—OFFENCES AFFECTING THE HUMAN BODY—contd.
Of Hurt—contd.

Section	Offence	whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session.
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Shall not arrest without warrant.	Summons	Bailable	Compoundable	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Any Magistrate. ¹

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of Hurt—of wrongful Restraint and wrongful Confinement.)

335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	May arrest without warrant.	Ditto	Ditto	Compound-able when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 4 years, or fine of 2,000 rupees, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate. ¹
337	Causing hurt by an act which endangers human life, etc.	Ditto	Ditto	Ditto	Compound-able when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 6 months, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
338	Causing grievous hurt by an act which endangers human life, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both.	Ditto
<i>Of Wrongful Restraint and Wrongful Confinement</i>							
341	Wrongfully restraining any person.	May arrest without warrant.	Summons	Bailable	Compound-able.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate. ¹
342	Wrongfully confining any person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.

¹In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", vide Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of wrongful Restraint and wrongful Confinement—Contd.)

SCHEDULE II—contd.
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—contd.
Of Wrongful Restraint and Wrongful Confinement—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
343	Wrongfully confining for three or more days.	May arrest without warrant.	Summons	Bailable	¹ [Compoundable when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
344	Wrongfully confining for 10 or more days.	Ditto	Ditto	Ditto	² [Compoundable when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Shall not arrest without warrant.	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 2 years, in addition to imprisonment under any other section.	Court of Session, Presidency Magistrate, or Magistrate of the first or second class.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of wrongful Restraint and wrongful Confinement—of Criminal Force and Assault.)

346	Wrongful confinement in secret.	May arrest without warrant.	Ditto	Ditto	¹ [Compoundable when permission is given by the Court before which the prosecution is pending.]	Ditto	Ditto.
347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc.	Ditto	Ditto	Ditto	¹ [Not Compoundable.]	Imprisonment of either description for 3 years and fine.	Ditto.
348	Wrongful confinement for the purpose of exporting confession or information, or of compelling restoration of property, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
<i>Of Criminal Force and Assault</i>							
352	Assault or use of criminal force otherwise than on grave provocation.	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate. ³
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	May arrest without warrant.	Warrant	Ditto	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.

¹S. 159, by Act 18 of 1923, s. 159, for the original entry.

²S. 159, by Act 26 of 1955, s. 114, for 'Not Compoundable', which had been Subs. by Act 18 of 1923, s. 159, for the original entry.

³In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", vide Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of Criminal Force and Assault.)

SCHEDULE II—*contd.*
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—*contd.*
Of Criminal Force and Assault—contd.

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
355	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Shall not arrest without warrant.	Summons	Bailable	Compound-able.	Imprisonment of either description for 2 years, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Ditto	Any Magistrate. ⁵
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto	Ditto	Bailable	[Compoundable when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto.
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons	Ditto	Compoundable.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human body—of Kidnapping, Abduction, Slavery and Forced Labour.)

363	Kidnapping	Of Kidnapping, Abduction, Slavery and Forced Labour			Court of Session, Presidency Magistrate or Magistrate of the first class.
		May arrest without warrant.	Warrant	¹ [Bailable]	Not compoundable.
² [363A]	Kidnapping, or obtaining the custody of a minor, in order that such minor may be employed or used for purposes of begging.	Ditto	Ditto	Not bailable	Ditto
	Maiming a minor in order that such minor may be employed or used for purposes of begging.	Ditto	Ditto	Ditto	Ditto
364	Kidnapping or abducting in order to murder.	Ditto	Ditto	¹ [Not bailable]	Ditto
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Ditto
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	Ditto	Ditto	Ditto	Ditto
⁴ [366A]	Procurator of minor girl.	Ditto	Ditto	Ditto	Ditto
366B	Importation of girl from foreign country.	Ditto	Ditto	Ditto	Ditto

¹Subs. by Act 18 of 1923, s. 159, for the original entries.²Ins. by Act 52 of 1959, s. 3 (w.e.f. 15-1-1960).³Subs. by Act 26 of 1955, s. 114, for "Transportation for life".⁴Ins. by Act 20 of 1923, s. 4.⁵In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", vide Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human body—of Kidnapping, Abduction, Slavery and Forced Labour.)

SCHEDULE II—*contd.*
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—*contd.*
Of Kidnapping, Abduction, Slavery and Forced Labour—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
368	Concealing or keeping in confinement a kidnapped person.	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction.	[Court of Session, Presidency Magistrate or Magistrate of the first class.]
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto.
370	Buying or disposing of any person as a slave.	Shall not arrest without warrant.	Ditto	Bailable	Ditto	Ditto	Court of Session.
371	Habitual dealing in slaves.	May arrest without warrant.	Ditto	Not bailable	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Ditto.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body—of Kidnapping, Abduction, Slavery and Forced Labour—of Rape.)

372	Selling or letting to hire a minor for purposes of prostitution, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
373	Buying or obtaining possession of a minor for the same purposes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
374	Unlawful compulsory labour.	¹ [Shall not arrest without warrant.]	Ditto	Bailable	Compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate. ⁴
³ [Cf Rape							
376	Rape. If the sexual intercourse was by a man with his own wife not being under 12 years of age.	Shall not arrest without warrant.	Summons	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Chief Presidency Magistrate or District Magistrate. ⁵
	If the sexual intercourse was by a man with his own wife being under 12 years of age.	Ditto	Ditto	Ditto	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Court of Session
	In any other case . .	May arrest without warrant.	Warrant	Not bailable	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Court of Session.]

¹Subs. by Act 18 of 1923, s. 159, for the original entry.

²Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

³Subs. by Act 29 of 1925, s. 5, for the original entries.

⁴In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

⁵In Bombay the words "Magistrate of the First Class" were substituted for the words "District Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVI.—Offences affecting the Human Body.—Of Unnatural Offences. Chapter XVII.—Offences against Property—of Theft.)

SCHEDULE II—*contd.*
CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—*contd.*
Of Unnatural Offences

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
377	Unnatural offences ..	May arrest with- out warrant.	Warrant	Not bailable	Not com- poundable.	¹ [Imprisonment for life], or imprison- ment of either description for 10 years and fine.	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class.

CHAPTER XVII.—OFFENCES AGAINST PROPERTY

Of Theft

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
379	Theft ..	May arrest with- out warrant.	Warrant	Not bailable	² [Compound- able when the value of the property does not exceed two hundred and fifty rupees and permis- sion is given by the Court before wh- ich the pro- secution is pending.]	[Imprisonment of either description for 3 years, or fine, or both.	Any Magistrate. ³

(Schedule II.—Tabular Statement of Offences, Chapter XVII.—Offences against Property—of Theft—of Extortion.)

380	Theft in a building, tent or vessel.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto	Ditto	Ditto	² [Compoundable when the value of the property does not exceed two hundred and fifty rupees and permission is given by the Court before which the prosecution is pending.]	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
382	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it.	Ditto	Ditto	Ditto	Not compoundable.	Rigorous imprisonment for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
384	Extortion	..	..	..	..	..	..
		Shall not arrest without warrant.	Warrant	Of Extortion	Not compoundable.	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".²Subs. by s. 114, *ibid.*, for "Not compoundable".³In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Extortion.)

SCHEDULE II—contd.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—contd.
Of Extortion—contd.

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Shall not arrest without warrant.	Warrant	Bailable	Not com- poundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
386	Extortion by putting a person in fear of death or grievous hurt.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 10 years and fine.	Court of Session.
387	Putting or attempting to put a person in fear of death or grievous hurt in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto.
388	Extortion by threat of accusation of an offence punishable with death, [imprisonment for life] or imprisonment for 10 years.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
	If the offence threatened be an unnatural offence.	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life.]	Ditto.

(Schedule II.—Tabular Statement of Offences, Chapter XVII.—Offences against Property—of Extortion—of Robbery and Dacoity.)

389	Putting a person in fear of accusation of offence punishable with death, ¹ [imprisonment for life], or with imprisonment for 10 years, in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto.
	If the offence be an unnatural offence.	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life.]	Ditto.
<i>Of Robbery and Dacoity</i>							
392	Robbery	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Rigorous imprisonment for 10 years and fine.	Court of Session, Magistrate or Magistrate of the first class.
	If committed on the high way between sunset and sunrise.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 14 years and fine.	Ditto.
393	Attempt to commit robbery.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years and fine.	Ditto.
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or rigorous imprisonment for 10 years, and fine.	Ditto
395	Dacoity	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
396	Murder in dacoity ..	Ditto	Ditto	Ditto	Ditto	Death, ¹ [Imprisonment for life] or rigorous imprisonment for 10 years and fine.	Ditto.
397	Robbery or dacoity, with attempt to cause death or grievous hurt.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for not less than 7 years.	Ditto

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Robbery and Dacoity—of Criminal Misappropriation of Property.)

SCHEDULE II—contd.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—contd.
Of Robbery and Dacoity—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
398	Attempt to commit robbery or dacoity when armed with deadly weapon.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Rigorous imprisonment for not less than 7 years.	Court of Session.
399	Making preparation to commit dacoity.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 10 years and fine.	Ditto.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	Ditto	Ditto	Ditto	Ditto	[Imprisonment for life], or rigorous imprisonment for 10 years and fine.	Ditto.
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Shall not arrest without warrant.	Warrant	Bailable	[Compoundable when permission is given by	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate. ⁵

Of Criminal Misappropriation of Property

(Schedule II.—Tabular Statement of Offences, Chapter XVII.—Offences against Property—of Criminal Misappropriation of Property—of Criminal Breach of Trust.)

404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto	Ditto	Ditto	the Court before which the prosecution is pending.]	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
3* * *	If by clerk or person employed by deceased.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 7 years and fine.	Ditto
Of Criminal Breach of Trust							
406	Criminal breach of trust.	May arrest without warrant.	Warrant	Not bailable	¹ [Compoundable when the value of the property does not exceed two hundred and fifty rupees and permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

²Subs. by Act 18 of 1923, s. 159, for the original entry.

³The figures "405" omitted by s. 159, *ibid.*

⁴Subs. by Act 26 of 1955, s. 114, for "Not compoundable".

⁵In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", *vide* Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Criminal Breach of Trust.)

SCHEDULE II—contd.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—contd.
Of Criminal Breach of Trust—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
407	Criminal breach of trust by a carrier, wharfinger, etc.	May arrest without warrant.	Warrant	Not bailable	¹ [Compoundable when the value of the property does not exceed two hundred and fifty rupees and permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
408	Criminal breach of trust by a clerk or servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
409	Criminal breach of trust by public servant or by banker, merchant or agent, etc.	Ditto	Ditto	Ditto	Not Compoundable.	² [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of the Receiving of Stolen Property—of Cheating.)

Of the Receiving of Stolen Property				Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
Ditto	Ditto	Ditto	Ditto		
411	Dishonestly receiving stolen property, knowing it to be stolen.	Ditto	Ditto		
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	Ditto	Ditto	² [Imprisonment for life], or rigorous imprisonment for 10 years and fine.	Court of Session.
413	Habitually dealing in stolen property.	Ditto	Ditto	² [Imprisonment for life], or imprisonment of either description for 10 years, and fine.	Ditto
414	Assisting in concealment or disposal of stolen property, knowing it to be stolen.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
Of Cheating				Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
Shall not arrest without warrant.	Warrant	Bailable	³ [Compoundable when permission is given by the Court before which the prosecution is pending.]		
417	Cheating				
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 26 of 1955, s. 114, for "Not compoundable".²Subs. by s. 114, *ibid.*, for "Transportation for life."³Subs. by Act 18 of 1923, s. 159, for the original entry.

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Cheating—of Fraudulent Deeds and Disposition of Property.)

SCHEDULE II—contd.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—contd.
Of Cheating—Contd.

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
419	Cheating by personation.	May arrest without warrant.	Warrant	Bailable	1[Compound- able when permission is given by the Court before which the prosecu- tion is pen- ding.]	Imprisonment of either description for 3 years, or fine, or both.	Court of Session Presidency Ma- gistrate or Ma- gistrate of the first or second class.
420	Cheating and thereby dis- honestly inducing delivery of property, or the mak- ing, alteration or destruc- tion of a valuable security.	Ditto	Ditto	Ditto	1[Compound- able when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 7 years and fine.	Court of Session Presidency Ma- gistrate or Ma- gistrate of the first class.
421	Fraudulent removal or concealment of property, etc., to prevent distribu- tion among creditors.	Shall not arrest without war- rant.	Warrant	Bailable	2[Compound- able when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magi- strate or Magis- trate of the first or second class.

Of Fraudulent Deeds and Disposition of Property

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Fraudulent Deeds and Disposition of Property—of Mischief.)

	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Shall not arrest without warrant.	Warrant	Bailable	² [Compoundable when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
422							
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
424	Fraudulent removal or concealment of property, of himself, or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
<i>Of Mischief</i>							
426	Mischief	Shall not arrest without warrant.	Summons	Bailable	Compoundable when the loss or damage caused is loss or damage to a private person.	Imprisonment of either description for 3 months, or fine, or both.	Any Magistrate.
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 18 of 1923, s. 159, for the original entry.

²Subs. by Act 26 of 1955, s. 114, for "Not compoundable."

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Mischief.)

SCHEDULE II—*contd.*
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—*contd.*
Of Mischief—contd.

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
428	Mischief by killing, poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards.	May arrest without warrant.	Warrant	Bailable	¹ [Compound-able when permission is given by the Court before which the prosecution is pending.] Ditto	Imprisonment of either description for 2 years or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, etc., whatever may be its value, or any other animal of the value of 50 rupees or upwards.	Ditto.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years or fine, or both.	Court of Session Presidency Magistrate or Magistrate of the first or second class.
430	Mischief by causing diminution of supply of water for agricultural purposes, etc.	Ditto.	Ditto	Ditto	² [Compound-able when permission is given by the Court before which the prosecution is pending.]	Ditto	Ditto.

(Schedule II.—Tabular Statement of Offences, Chapter XVII.—Offences against Property—of Mischief.)

		Ditto	Ditto	Ditto	Ditto	² [Not compoundable.]	Ditto	Ditto.
431	Mischief by injury to public road, bridge, navigable river, or navigable channel, and rendering it impassable or less safe for travelling or conveying property.	Ditto	Ditto	Ditto	Ditto			Ditto.
432	Mischief by causing inundation or obstruction to public drainage, attended with damage.	Ditto	Ditto	Ditto	Ditto	Not compoundable.	Ditto	Ditto.
433	Mischief by destroying or moving or rendering less useful a light-house or sea-mark, or by exhibiting false lights.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
434	Mischief by destroying or moving, etc., a land-mark fixed by public authority.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or, in case of agricultural produce, 10 rupees or upwards.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire or explosive substance with intent to destroy a house, etc.	Ditto	Ditto	Not bailable	Ditto	Ditto.	³ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Court of session.

¹Subs. by Act 26 of 1955, s. 114, for "Not compoundable."²Subs. by Act 18 of 1923, s. 159, for the original entry.³Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Mischief—of Criminal Trespass.)

SCHEDULE II—*contd.*
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—*contd.*
Of Mischief—concl.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
437	Mischief with intent to destroy or make unsafe a docked vessel or a vessel of 20 tons burden.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 10 years and fine.	Court of Session
438	The mischief described in the last section when committed by fire or any explosive substance.	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto.
439	Running vessel ashore with intent to commit theft, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.
440	Mischief committed after preparation made for causing death, or hurt, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Court of Session Presidency Magistrate or Magistrate of the first class.
447	Criminal trespass ..	May arrest without warrant.	Summons	Bailable	Compoundable	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate. ³

Of Criminal Trespass

(Schedule II.—Tabular Statement of Offences. Chapter XVII.—Offences against Property—of Criminal Trespass.)

448	House-trespass ..	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for one year, or fine of 1,000 rupees, or both.	Ditto
449	House-trespass in order to the commission of an offence punishable with death.	Ditto	Ditto	Not bailable	Not compoundable.	¹ [Imprisonment for life], or rigorous imprisonment for 10 years, and fine.	Court of Session.
450	House-trespass in order to the commission of an offence punishable with ¹ [imprisonment for life.]	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Bailable	² [Compoundable when permission is given by the court before which the prosecution is pending.]	Imprisonment of either description for 2 years and fine.	Any Magistrate.
	If the offence is theft	Ditto	Ditto	Not bailable	² [Not compoundable.]	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
452	House-trespass, having made preparation for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Not compoundable.	Ditto	Ditto
453	Lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years and fine.	Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".²Subs. by Act 18 of 1923, s. 159, for the original entry.³In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate" vide Bombay Act 23 of 1951.

(Schedule II.—Tabular Statement of offences. Chapter XVII.—Offences against Property—of Criminal Trespass.)

SCHEDULE II—contd.
CHAPTER XVII.—OFFENCES AGAINST PROPERTY—contd.
Of Criminal Trespass—Contd.

Section	1	2	3	4	5	6	7	8
		Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
454		Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment. If the offence is theft	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
455		Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
456		Lurking house-trespass or house-breaking by night.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
457		Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

(Schedule II.—Tabular Statement of offences. Chapter XVII.—Offences against Property—of Criminal Trespass. Chapter XVIII.—Offences relating to Documents and Property Marks.)

If the offence is theft	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years, and fine. Ditto	Ditto.
458 Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
459 Grievous hurt caused whilst committing lurking house-trespass or house breaking.	Ditto	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Court of Session.
460 Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Court of Session.
461 Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
462 Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
463 Forgery	..	..	..	..	..	..	..
	Shall not arrest without warrant.	Warrant	Bailable	Not com- poundable.	Imprisonment of either description for 2 years or fine, or both.		Court of Session, Presidency Magistrate or Magistrate of the first second class.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO ²PROPERTY MARKS

¹Subs. by Act 26 of 1955, s. 114, for 'Transportation for life'.

²The words 'TRADE OR' omitted by Act 43 of 1958, s. 135 and Sch. [w.e.f. 25-11-1959].

(Schedule II.—Tabular Statement of offences. Chapter XVIII.—Offences relating to Documents and Property Marks.)

SCHEDULE II—*contd.*
CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO PROPERTY MARKS—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Shall not arrest without warrant.	Warrant	Not bailable	Not com- poundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
467	Forgery of a valuable security, will, or authority to make or transfer any valuable security, or to receive any money, etc.	Ditto	Ditto	Ditto	Ditto	[Imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto.
468	When the valuable security is a promissory note of the Central Government. Forgery for the purpose of cheating.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
		Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 3 years and fine.	Ditto

(Schedule II.—Tabular Statement of offences, Chapter XVIII.—Offences relating to Documents and Property Marks.)

471	Using as genuine a forged document which is known to be forged.	Ditto	Ditto	Ditto	Ditto	Punishment for forgery of such document.	Same Court as that by which the forgery is triable.
	When the forged document is a promissory note of the Central Government.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto.	Court of Session.
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	¹ [Imprisonment for life], or imprisonment of either description for 7 years and fine.	Ditto
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Ditto	Ditto	Ditto	Ditto	Ditto.	Ditto

¹Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of offences. Chapter XVIII.—Offences relating to Documents and Property Marks.)

SCHEDULE II—contd.

CHAPTER XVIII—OFFENCES RELATING TO DOCUMENTS AND TO PROPERTY MARKS—contd.

Sec- tion	Offence	Whether the police may arrest with- out warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
	If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Shall not arrest without warrant.	Warrant	Bailable	Not Com- poundable.	¹ [Imprisonment for life], or imprison- ment of either description for 7 years and fine.	Court of Session
475	Counterfeiting a device or mark used for authenti- cating documents descri- bed in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
476	Counterfeiting a device or mark used for authenticat- ing documents other than those described in section 467 of the Indian Penal Code, or possessing coun- terfeit marked material.	Ditto	Ditto	Not bailable	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
477	Fraudulently destroying, defacing, or attempting to destroy or deface, or secreteting, a will, etc.	Ditto	Ditto.	Ditto	Ditto	¹ [Imprisonment for life], or imprison- ment of either description for 7 years and fine.	Ditto

(Schedule II.—Tabular Statement of offences. Chapter XVIII.—Offences relating to Documents and Property Marks.)

477A	Falsification of accounts,	Ditto	Ditto	² [Bailable]	Ditto	² [Imprisonment of either description for 7 years, or fine, or both.]	² [Court of Session, Presidency Magistrate or Magistrate of the first class.]
Of 3* * * * Property Marks							
482	Using a false 4* * * property mark with intent to deceive or injure any person.	Shall not arrest without warrant.	Warrant	Bailable	² [Compoundable when permission is given by the Court before which the prosecution is pending.]	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
483	Counterfeiting a 4* * * property mark used by another, with intent to cause damage or injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 year, or fine, or both.	Ditto
484	Counterfeiting a property mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of and property.	Ditto	Summons	Ditto	² [Not compoundable.]	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
485	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property 5* * * mark.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Ditto

¹Subs. by Act 26 of 1955, s. 114 for "Transportation for life".²Subs. by Act 18 of 1923, s. 159, for the original entry.³The words "*trade and*" omitted by Act 43 of 1958, s. 135 and Sch. (w.e.f. 25-11-1959).⁴The words "trade or" omitted by s. 135 and Sch., *ibid.* (w.e.f. 25-11-1959).⁵The words "or trade" omitted by s. 135 and Sch., *ibid.* (w.e.f. 25-11-1959).

(Schedule II.—Tabular Statement of offences. Chapter XVIII.—Offences relating to Documents and Property Marks.)

SCHEDULE II—contd.
CHAPTER XVIII—OFFENCES RELATING TO DOCUMENTS AND TO PROPERTY MARKS—contd.
Of Property Marks—contd.

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
486	Knowingly selling goods marked with a counterfeit property 1* * * mark.	Shall not arrest without warrant	Summons	Bailable	² [Compoundable with permission of the Court before which the prosecution is pending.]	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc.	Ditto	Ditto	Ditto	² [Not compoundable.]	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
488	Making use of any such false mark.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489	Removing, destroying or defacing any property mark with intent to cause injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

(Schedule II.—Tabular Statement of offences, Chapter XVIII.—Offences relating to Documents and Property Marks.—Of Currency-Notes and Bank-Notes, Chapter XIX.—Of Criminal Breach of Contracts of Service.)

³[Of Currency-Notes and Bank-Notes

	May arrest without warrant.	Warrant	Not bailable	Nor compoundable.	⁴ [Imprisonment for life], or imprisonment of either description, for 10 years and fine.	Court of Session.
489A Counterfeiting currency-notes or bank-notes.						
489B Using as genuine forged or counterfeit currency-notes or bank-notes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto.
489C Possession of forged or counterfeit currency-notes or bank-notes.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
489D Making or possessing instruments or material for forging or counterfeiting currency-notes or bank-notes.	Ditto	Ditto	Not bailable	Ditto	⁴ [Imprisonment for life], or imprisonment of either description for 10 years and fine.	Ditto.

CHAPTER XIX.—CRIMINAL BREACH OF CONTRACTS OF SERVICE

	Shall not arrest without warrant.	Summons	Bailable	Compoundable.	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
490 Being bound by contract to render personal service during a voyage or journey or to convey or guard any property or person and voluntarily committing to do so.						

¹The words "or trade" omitted by Act 43 of 1958, s. 135 and Sch. [w.e.f. 25-11-1959].

²Subs. by Act 18 of 1923, s. 159, for the original entry.

³Added by Act 12 of 1899, s. 3.

⁴Subs. by Act 26 of 1955, s. 114, for "Transportation for life".

(Schedule II.—Tabular Statement of offences. Chapter XIX.—Criminal Breach of Contracts of Service. Chapter XX.—Offences relating to Marriage.)

SCHEDULE II—*contd.*
CHAPTER XIX—CRIMINAL BREACH OF CONTRACTS OF SERVICE—*contd.*

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily committing to do so.	Shall not arrest without warrant.	Summons	Bailable	Compoundable	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Presidency Ma- gistrate or Ma- gistrate of the first or se- cond class.
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer, and voluntarily deserting the service or refusing to perform the duty.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both.	Ditto

CHAPTER XX.—OFFENCES RELATING TO MARRIAGE

Sec- tion	Offence	Whether arrest without warrant	Whether bailable	Whether com- pound- able	Punishment
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief.	Shall not arrest without warrant.	Not bailable	Not Com- poundable.	Imprisonment of either description for 10 years and fine.

(Schedule II.—Tabular Statement of offences. Chapter XX.—Offences relating to Marriage.)

494	Marrying again during the lifetime of a husband or wife.	Ditto	Ditto	Bailable	¹ [Compoundable with permission of the Court before which the prosecution is pending.]	Imprisonment of either description for 7 years and fine.	¹ [Court of Session Presidency Magistrate or Magistrate of the first class.]
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto	Ditto	¹ [Bailable]	¹ [Not compoundable.]	Imprisonment of either description for 10 years and fine.	¹ [Court of Session.]
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
497	Adultery	Ditto	Ditto	Bailable	Compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
498	Enticing or taking away or detaining with a criminal intent a married woman.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

¹Subs. by Act 18 of 1923, s. 159. for the original entry.

(Schedule II.—Tabular Statement of offences. Chapter XXI.—Defamation.)

SCHEDULE II—*contd.*

CHAPTER XXI—DEFAMATION

Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
1500	(a) Defamation (under than defamation by spoken words) against the President or the Vice-President or the Governor or a Minister or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions, when instituted upon a complaint made by the Public Prosecutor.	Shall not arrest without warrant.	Warrant	Bailable	Compoundable with the permission of the Court before which the prosecution is pending.	Simple imprisonment for two years or fine or both	Court of Session.
	(b) Defamation in any other case.	Ditto	Ditto	Ditto	Compoundable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
501	(a) Printing or engraving matter knowing it to be defamatory against the President or the Vice-President or the Gov.	Ditto	Ditto	Ditto	Compoundable with the permission of the Court before which	Ditto	Court of Session.

(Schedule II.—Tabular Statement of offences. Chapter XXI.—Defamation.)

ernor ² * * of a State or a Minister or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions, when intitled upon a complaint made by the Public Prosecutor.	Ditto	Ditto	Ditto	the prosecution is pending.	Court of Session, Presidency Magistrate or Magistrate of the first class.
(b) Printing or engraving matter knowing it to be defamatory, in any other case.	Ditto	Ditto	Ditto	Compoundable.	Ditto
(a) Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter against the President or the Vice-President or the Governor ² * * of a State or a Minister or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions, when instituted upon a complaint made by the Public Prosecutor.	Ditto	Ditto	Ditto	Compoundable with the permission of the Court before which the prosecution is pending.	Ditto
(b) Sale of printed or engraved substance containing defamatory matter knowing it to contain such matter, in any other case.	Ditto	Ditto	Ditto	Compoundable.	Ditto

Court of Session, Presidency Magistrate or Magistrate of the first class.]

¹Subs. by Act 26 of 1955, s. 114, for entries relating to sections 500, 501 and 502.²The words "or Rajpramukh" omitted by the Adaptation of Laws [No. 2] Order, 1956.

(Schedule II.—Tabular Statement of Offences. Chapter XXII.—Criminal Intimidation, Insult and Annoyance.)

SCHEDULE II—*contd.*
CHAPTER XXII—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
504	Insult intended to provoke a breach of the peace.	Shall not arrest without warrant	Warrant	Bailable	Compound- able.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace.	Ditto	Ditto	Not bailable	Not com- poundable.	Ditto	Presidency Ma- gistrate or Ma- gistrate of the first class.
506	Criminal intimidation	Ditto	Ditto	Bailable	Compound- able.	Ditto	[Presidency Ma- gistrate or Ma- gistrate of the first or second class.]
	If threat be to cause death or grievous hurt, etc.	Ditto	Ditto	Ditto	Not com- poundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class.
507	Criminal intimidation by anonymous communica- tion or having taken precaution to conceal whence the threat comes.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years in addition to the punishment under above section.	Ditto.

(Schedule II.—Tabular Statement of offences. Chapter XXII.—Criminal Intimidation, Insult and Annoyance. Chapter XXIII.—Attempts to Commit offences.)

508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure.	Ditto	Ditto	Ditto	² [Compoundable.]	Imprisonment of either description for 1 year, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Ditto ⁵	Ditto	Ditto	² [Compoundable when permission is given by the Court before which the prosecution is pending.]	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
510	Appearing in a public place, etc., in a state of intoxication, and causing annoyance to any person.	Ditto ⁶	Ditto	Ditto	² [Not compoundable.]	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Any Magistrate.

CHAPTER XXIII—ATTEMPTS TO COMMIT OFFENCES

511	Attempting to commit offences punishable with ³ [imprisonment for life] or imprisonment, and in such attempt doing any act towards the commission of the offence.	According as the offence is one in respect of which the police may arrest without warrant or not.	According as the offence is one in respect of which a summons or warrant shall ordinarily issue.	According as the offence contemplated by the offender is bailable or not.	Compoundable when the offence attempted is compoundable.	³ [Imprisonment for life] or imprisonment not exceeding half of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence attempted is triable.
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Offences Against Other Laws

	If punishable with death, ³ [imprisonment for life] or imprisonment for 7 years or upwards.	May arrest without warrant.	Warrant	Not bailable	Not compoundable.	..	Court of Session.
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¹Subs. by Act 1 of 1903, s. 3 and Sch. II, Pt. II, for "Ditto".

²Subs. by Act 18 of 1923, s. 159, for the original entry.

³Subs. by Act 26 of 1955, s. 114, for "Transportation".

⁴In Bombay the words "Any Judicial Magistrate" were substituted for the words "Any Magistrate", vide Bombay Act 23 of 1951.

⁵In Madhya Pradesh read the words "May arrest without warrant" for the word "ditto", i.e., "shall not arrest without warrant", vide M.P. Act 50 of 1950.

⁶In Madhya Pradesh for the word "ditto" read the words "shall not arrest without warrant", vide M.P. Act 50 of 1950.

(Schedule II.—Tabular Statement of offences. Chapter XXIII.—Attempts to Commit offences—offences Against other Laws.)

SCHEDULE II—contd.
CHAPTER XXIII—ATTEMPTS TO COMMIT OFFENCES—contd.
Offences Against Other Laws—contd.

Sec- tion	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordi- narily issue in the first instance	Whether bailable or not	Whether compound- able or not	Punishment under the Indian Penal Code	By what Court triable
1	2	3	4	5	6	7	8
	If punishable with im- prisonment for 3 years and upwards but less than 7 years.	May arrest with- out warrant.	Warrant	Not bailable. Except in cases ¹ [not relating to fire-arms] under the Indian Arms Act, 1878, section 19, which shall be bailable. ²	Not com- poundable.	..	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first class.
	If punishable with imprisonment for 1 year and upwards, but less than 3 years.	Shall not arrest without warrant.	Summons	Bailable	Ditto	..	Court of Session, Presidency Ma- gistrate or Ma- gistrate of the first or second class.
	If punishable with imprisonment for less than 1 year, or with fine only.	Ditto	Ditto	Ditto	Ditto	..	Any Magis- trate. ³

¹Ins. by Act 1 of 1951, s. 24.

²In Bihar omit the words "Except in cases" and ending with "which shall be bailable", vide Bihar Act 31 of 1948.

³In Bombay the words "Any Judicial Magistrate were substituted for the words "Any Magistrate", vide Bombay Act 23 of 1951.

(Sch. III.—Ordinary Powers of State Magistrates.)

SCHEDULE III

(see section 36.)

ORDINARY POWERS OF STATE MAGISTRATES

I.—Ordinary Powers of a Magistrate of the Third Class

- (1) Power to arrest or direct the arrest of, and to commit to custody, a person committing an offence in his presence, section 64.
 - (2) Power to arrest, or direct the arrest in his presence of, an offender, section 65.
 - (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 86.
 - (4) Power to issue proclamations in cases judicially before him, section 87.
 - (5) Power to attach and sell property ¹[and to dispose of claims to attached property] in cases judicially before him, section 88.
 - (6) Power to restore attached property, section 89.
 - (7) Power to require search to be made for letters and telegrams, section 95.
 - (8) Power to issue search-warrant, section 96.
 - (9) Power to endorse a search-warrant and order delivery of thing found, section 99.
 - (10) Power to command unlawful assembly to disperse, section 127.
 - (11) Power to use civil force to disperse unlawful assembly, section 128.
 - (12) Power to require military force to be used to disperse unlawful assembly, section 130.
- 2* * * * * * * *
- (14) Power to authorise detention ¹[not being detention in the custody of the police] of a person during a police-investigation, section 167.
- ¹[(14a) Power to postpone issue of process and inquire into case himself, section 202.]
- (15) Power to detain an offender found in Court, section 351.
- 3* * * * * * *
- (17) Power to apply to District Magistrate to issue commission for examination of witness, section 506 (2).
 - (18) Power to recover forfeited bond for appearance before Magistrate's Court, section 514 ¹[and to require fresh security, section 514A].
- ¹[(18a) Power to make order as to custody and disposal of property pending inquiry or trial, section 516A].
- (19) Power to make order as to disposal of property, section 517.
 - (20) Power to sell ⁴* * * property of a suspected character, section 525.
 - ¹[(21) Power to require affidavit in support of application, section 539A.
 - (22) Power to make local inspection, section 539B.]

Bombay Amendment.— In item No. (17) the words "Sessions Judge" were substituted for the words "District Magistrate", vide Bombay Act 23 of 1951.

1. Ins. by Act 18 of 1923, s. 160.

2. Item 13 omitted by s. 160, *ibid.*

3. Item 16 rep. by Act 37 of 1925, s. 3 and Sch. II.

4. The word "perishable" omitted by Act 18 of 1923, s. 160.

(Sch. III.—*Ordinary Powers of State Magistrates.*)II.—*Ordinary Powers of a Magistrate of the Second Class*

- (1) The ordinary powers of a Magistrate of the third class.
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, section 155.
- ¹[(3) Power to postpone issue of process and to inquire into a case or direct investigation, section 202.]

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III.—*Ordinary Powers of a Magistrate of the First Class*

- (1) The ordinary powers of a Magistrate of the second class.
- (2) Power to issue search-warrant otherwise than in course of an inquiry, section 98.
- (3) Power to issue search-warrant for discovery of persons wrongfully confined, section 100.
- (4) Power to require security to keep the peace, section 107.
- (5) Power to require security for good behaviour, section 109.
- (6) Power to discharge sureties, section ³[126A].
- ⁴[6a) Power to make orders as to local nuisances, section 133.]
- (7) Power to make orders, etc., in possession cases, sections 145, 146 and 147.
- ⁴[(7a) Power to record statements and confessions during a police-investigation, section 164.
- (7aa) Power to authorise detention of a person in the custody of the police during a police-investigation, section 167.
- (7b) Power to hold inquests, section 174.]
- (8) Power to commit for trial, section 206.
- (9) Power to stop proceedings when no complainant, section 249.
- ⁴[(9a) Power to tender pardon to accomplice during inquiry into case by himself, section 337.]
- (10) Power to make orders of maintenance, sections 488 and 489.
- (11) Power to take evidence on commission, section 503.
- (12) Power to recover penalty on forfeited bond, section 514.
- ⁴[(12a) Power to require fresh security, section 514A.
- (12b) Power to re-call case made over by him to another Magistrate, section 528 (4).]
- (13) Power to make order as to first offenders, section 562.
- ⁴[(14) Power to order released convicts to notify residence, section 565.]

Bombay Amendment.— (i) After item No. (1) the following item was added:—

“(1-a) Power to direct warrants to ‘landholders, section 78’ and item numbers (4), (5), (6), (6a), (7), (7b) were omitted *vide* Bombay Act 23 of 1951.

(ii) After Part III the following Part was added by Bombay Act 23 of 1951, namely—

1. Subs. by s. 160, *ibid.*, for the original item.
2. Item (4) omitted by s. 160, *ibid.*
3. Subs. by Act 18 of 1923, s. 160, for “126”.
4. Ins. by s. 160, *ibid.*

(Sch. III.—*Ordinary Powers of State Magistrates.*)*III-A—Ordinary Powers of a Taluka Magistrate.*

- (1) Power to arrest or to direct the arrest of, and to commit to custody a person committing an offence in his presence, section 64.
- (2) Power to arrest, or to direct the arrest, in his presence of an offender, section 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 85.
- (4) Power to require search to be made for letters and telegrams, section 95.
- (5) Power to issue search warrant, section 96.
- (6) Power to endorse a search warrant and order delivery of things found, section 99.
- (7) Power to command unlawful assembly to disperse, section 127.
- (8) Power to use civil force to disperse unlawful assembly, section 128.
- (9) Power to require military force to be used to disperse unlawful assembly, section 130.
- (10) Power to apply to District Magistrate to issue commission for examination of witness, section 506.
- (11) Power to recover penalty on forfeited bond, section 514 and to require fresh security, section 514A.
- (12) Power to make order as to disposal of property, section 517.
- (13) Power to sell property of a suspected character, section 525".

*IV.—Ordinary Powers of a Sub-divisional Magistrate*¹[*appointed under section 131.*]

- (1) The ordinary powers of a Magistrate of the first class.
- (2) Power to direct warrants to landholders, section 78.
- (3) Power to require security for good behaviour, section 110.
- 2* * * * *
- (5) Power to make orders prohibiting repetitions of nuisances, section 143.
- (6) Power to make orders under section 144.
- (7) Power to depute Subordinate Magistrate to make local inquiry, section 148.
- (8) Power to order police-investigation into cognizable case, section 156.
- (9) Power to receive report of police-officer and pass order, section 173.
- 2* * * * *
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.
- (12) Power to entertain complaints, section 190.
- (13) Power to receive police-reports, section 190.
- (14) Power to entertain cases without complaint, section 190.
- (15) Power to transfer cases to a Subordinate Magistrate, section 192.
- (16) Power to pass sentence on proceedings recorded by a Subordinate Magistrate, section 349.
- (17) Power to forward record of inferior Court to District Magistrate, section 435 (2).
- (18) Power to sell property alleged or suspected to have been stolen, etc., section 524.

1. Ins. by s. 160, *ibid.*

2. Items (4) and (10) omitted by s. 160, *ibid.*

(Sch. III.—*Ordinary Powers of State Magistrates.*)

- (19) Power to withdraw cases other than appeals, and to try or refer them for trial, section 528.

1* * * * * * *

Bombay Amendment.— For item No. (1) read the following, namely :—

“(1) The ordinary powers of a Taluka Magistrate”.

After item No. (2) read the following items, namely :—

“(2a) Power to issue search warrant otherwise than in course of an inquiry, section 98.

(2b) Power to issue search warrant for discovery of persons wrongfully confined, section 100.

(2c) Power to require security to keep peace, section 107.

(2cc) Power to require security for good behaviour, section 108. (Inserted by Bombay Act 34 of 1953).

(2ca) Power to require security to keep good behaviour”²

After item No. (3) read the following items, namely :—

“(4) Power to discharge securities, Section 126A.

(4a) Power to make orders as to local nuisances, section 33.”

After item No. (6) read the following, namely :—

“(6a) Power to make orders, etc., in possession cases, sections 145, 146 and 147.”

After item No. (8) read the following, namely :—

“(8a) Power to record statements and confessions during a police investigation, section 164.”

After item No. (9) read the following, namely :—

“(10) Power to hold inquests, section 174” and omit item Nos. (12), (13), (14), (15), (16) and (19), *vide* Bombay Act 23 of 1951.

Item (10) has been deleted by Bombay Act 34 of 1953.

V.—Ordinary Powers of a District Magistrate

(1) The ordinary powers of a Sub-divisional Magistrate.

^{2a} [(1a) Power to try juvenile offenders, section ⁴ ([29B].)]

(2) Power to require delivery of letters, telegrams, etc., section 95.

(3) Power to issue search-warrants for documents in custody of postal or telegraph authorities, section 96.

(4) Power to require security for good behaviour in case of sedition, section 108.

(5) Power to discharge persons bound to keep the peace or to be of good behaviour, section 124.

(6) Power to cancel bond for keeping the peace, section 125.

³ [(6a) Power to order preliminary investigation by police-officer not below the rank of Inspector in certain cases, section 196B.]

(7) Power to try summarily, section 260.

1. Item (20) omitted by s. 160, *ibid*.

2. (2d) has been numbered as (2ca) by Bombay Act 34 of 1953.

3. Ins. by Act 18 of 1923, s. 160.

4. Subs. by Act 24 of 1934, s. 2 and Sch. I, for “29A”.

(Sch. III.—Ordinary Powers of State Magistrates.)

- ¹[7a) Power to tender pardon to accomplice at any stage of a case, section 337.]
 (8) Power to quash convictions in certain cases, section 350.
 (9) Power to hear appeals from orders requiring security for ¹[keeping the peace or] good behaviour, section 406.
¹[(9a) Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, section 406A.]
 (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, section 407².
 (11) Power to call for records, section 435.
³[(12)] Power to order inquiry into complaint dismissed or case of accused discharged, section ⁴[436].
³[(13)] Power to order commitment, section ⁵[437].
 (14) Power to report case to High Court, section 438.
 6* * * * *
 (17) Power to appoint person to be Public Prosecutor in particular case, section 492(2).
 (18) Power to issue commission for examination of witness, sections 503, 506.
 (19) Power to hear appeals from or revise orders passed under sections 514, 515.
 (20) Power to compel restoration of abducted female, section 552.

Bombay Amendments.— (i) Item Nos. (1a), (7), (8), (9), (10), (12), (13) and (14) were omitted by Bombay Act 23 of 1951.

(ii) In item (4) the words "in case of sedition" shall be deleted, *vide* Bombay Acts 23 of 1951, 34 of 1953, 71 of 1954 and 63 of 1959.

Uttar Pradesh Amendments.— Item Nos. (9), (9a), (10) and (19) omitted, *vide* U.P. Act 36 of 1948, S. 9.

SCHEDULE IV

(See sections 37 and 38).

ADDITIONAL POWERS WITH WHICH STATE MAGISTRATES MAY BE INVESTED

POWERS WITH WHICH A MAGISTRATE OF THE FIRST CLASS MAY BE INVESTED.	{	BY THE STATE GOVERNMENT.	{	(1) Power to require security for good behaviour in case of sedition, section 108 : (2) Power to require security for good behaviour, section 110 : 7* * * (4) Power to make orders prohibiting repetitions of nuisances, section 143 :

1. Ins. by Act 18 of 1923, s. 160.

2. S. 407 being omitted by Act 26 of 1955, item (10) should also have been omitted.

3. The original items (12) and (13) re-numbered¹ (13) and (12) respectively by Act 18 of 1923, s. 160.

4. Subs. by s. 160, *Ibid.*, for "437".

5. Subs. by s. 160, *ibid.*, for "436".

6. Items (15) and (16) rep. by Act 37 of 1925, s. 3 and Sch. II.

7. Item (8) omitted by Act 18 of 1923, s. 161.

(Sch. IV.—Additional Powers of Magistrates.)

POWERS WITH WHICH A
MAGISTRATE OF THE
FIRST CLASS MAY BE
INVESTED—*contd.*BY THE STATE
GOVERNMENT—
contd.

- (5) Power to make orders under section 144 :
1* * *
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186 :
- (8) Power to take cognizance of offences upon complaint, section 190 :
- (9) Power to take cognizance of offences upon police-reports, section 190 :
- (10) Power to take cognizance of offences without complaint, section 190 :
- (11) Power to try summarily, section 260 :
- (12) Power to hear appeals from convictions by Magistrates of the second and third classes, section 407 :
- (13) Power to sell property alleged or suspected to have been stolen, etc., section 524 :
1* * *
- (15) Power to try cases under section 124A of the Indian Penal Code :

BY THE DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) Powers to make orders under section 144 :
2* * *
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police-reports, section 190 :

1. Items (6) and (14) omitted by Act 18 of 1923, s. 161.
2. Item (3) omitted by s. 161, *ibid.*

*(Sch. IV.—Additional Powers of Magistrates.)*POWERS WITH WHICH A
MAGISTRATE OF THE
SECOND CLASS MAY
BE INVESTED.BY THE STATE
GOVERNMENT.

- (6) Power to transfer cases, section 192 :
1* * *
- (2) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (3) Power to make orders under section 144 :
- 2[(3a) Power to record statements and confessions during a police-investigation, section 164 :
- (3b) Power to authorise detention of a person in the custody of the police during a police investigation, section 167 :]
- (4) Power to hold inquests, section 174 :
- (5) Power to take cognizance of offences upon complaint, section 190 :
- (6) Power to take cognizance of offences upon police reports, section 190 :
- (7) Power to take cognizance of offences without complaint, section 190 :
- (8) Power to commit for trial, section 206 :
- (9) Power to make order as to first offenders, section 562 :

BY THE DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) Power to make orders under section 144 :
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :

1. Item (1) omitted by Act 4 of 1909, s. 8 and Sch.

2. Ins. by Act. 18 of 1923, s. 161.

(Sch. IV—*Additional Powers of Magistrates.*)

(Contd.)	{ BY THE DISTRICT MAGISTRATE.— <i>Contd.</i> }	(5) Power to take cogni- zance of offences upon police-reports, section 190 :
POWERS WITH WHICH A MAGISTRATE OF THE THIRD CLASS MAY BE INVESTED.	BY THE STATE GOVERNMENT.	(1) Power to make orders prohibiting repetitions of nuisances, section 143 : 1* * *
		(3) Power to hold in- quests, section 174 : (4) Power to take cogni- zance of offences upon complaint, section 190 : (5) Power to take cogni- zance of offences upon police-reports, section section 190 : 1* * *
POWERS WITH WHICH A SUB-DIVISIONAL MA- GISTRATE MAY BE INVESTED.	BY THE DISTRICT MAGISTRATE	(1) Power to make orders, prohibiting repetitions of nuisances, section 143 : 2* * *
		(3) Power to hold in- quests, section 174 : (4) Power to take cogni- zance of offences upon complaint, section 190 : (5) Power to take cogni- zance of offences upon police-reports, section 190 :
	BY THE STATE GOVERNMENT.	Power to call for re- cords, section 435.

Bombay Amendment.— For Schedule IV, the following Schedule was substituted by Bombay Act 23 of 1951, namely :—

"Schedule IV".

(See Section 37.)

ADDITIONAL POWERS WITH WHICH MAGISTRATES MAY BE INVESTED

Part I—(A) By State Government

Powers with which a Magistrate of the First Class may be invested

1. Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186 ;

1. Items (2) and (6) omitted by Act 18 of 1923, s. 161.

2. Item (2) omitted by s. 161, *ibid.*

(Sch. IV — Additional Powers of Magistrates.)

2. Power to take cognizance of offences upon complaint, section 190 ;
3. Power to take cognizance of offences upon police reports section 190 ;
4. Power to take cognizance of offences without complaint, section 190 ;
5. (Deleted by S. 7 of Bombay Act 71 of 1954) ;
6. Power to try summarily, section 260 ;
7. Power to pass sentence on proceedings recorded by a Magistrate of the Second and Third Class, section 349 ;
8. Power to hear appeals from conviction by Magistrate of the Second and Third Class, Section 407 ;
9. Power to try cases under S. 124A of the Indian Penal Code.

Powers with which a Magistrate of Second Class may be invested

1. Power to record statements and confessions during a police investigation, section 164 ;
2. Power to authorise detention of a person in the custody of the police during a police investigation, Section 167 ;
3. Power to take cognizance of offences upon complaint, section 190 ;
4. Power to take cognizance of offences upon police-report, Section 190 ;
5. Power to take cognizance of offences without complaint, Section 190 ;
6. Power to commit for trial, Section 206 ;
7. Power to stop proceedings instituted otherwise than upon complaint, section 249 ;
8. Power to make order as to first offenders, section 562.

Powers with which a Magistrate of the Third Class may be invested

1. Power to record statements and confessions during a police investigation, section 164 ;
2. Power to take cognizance of offences upon complaint, Section 190 ;
3. Power to take cognizance of offences upon police report, Section 190 ;
4. Power to stop proceedings instituted otherwise than upon complaint. Section 249.

*(B) By a Sessions Judge**Powers with which any Judicial Magistrate may be invested*

1. Power to take cognizance of offences upon complaint, section 190 ;
2. Power to take cognizance of offences upon police reports, section 190 ;
3. Power to transfer cases, section 190.

*Part II—(A) By State Government**Powers with which a Sub-divisional Magistrate may be Invested*

1. Powers to call for records, section 435.

Powers with which any other Executive Magistrate may be invested

1. Power to make orders prohibiting repetitions of nuisances, Section 143 ;
2. Power to make orders under Section 144 ;
3. Power to make orders, etc., in possession cases, Section 145 and 147 ;
4. Power to record statements and confessions during a police investigation, Section 164 ;
5. Power to hold inquest, Section 174 ;
6. Power to sell property alleged or suspected to have been stolen, etc., Section 514.

(Sch. V.—Forms.)

Powers with which a Taluka Magistrate may be invested

1. Power to require security to keep the peace, Section 107.

(B) *By District Magistrate**Powers with which any Executive Magistrate may be invested*

1. Power to make orders prohibiting repetitions of nuisances, Section 143.
2. Power to make order under Section 144.
3. Power to hold inquests, Section 174.

—*Vide* Bom. Act 23 of 1951, S. 2 and Sch. Part I, item 77 ; Act 34 of 1953, S. 11 and Act 71 of 1954, S. 7.

Uttar Pradesh Amendment.—

Item 12 in column 3 is omitted.

—U.P. Act 36 of 1948, S. 10.

SCHEDULE V

(See section 1[5551].)

FORMS**I.—SUMMONS TO AN ACCUSED PERSON**

(See section 68.)

To _____ of _____

WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*) you are hereby required to appear in person (*or by pleader, as the case may be*) before the (*Magistrate*) of _____, on the _____ day of _____.

Dated this _____ day of _____, 18 ____.

(Seal)

(Signature)

II.—WARRANT OF ARREST

(See section 75.)

To (*name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS _____ of _____ stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said _____ and to produce him before me. Herein fail not.

Dated this _____ day of _____, 18 ____.

(Seal)

(Signature)

1. Subs. by Act 1 of 1903, s. 3 and Sch. II, Pt. II, for "554".

(See section 76.)

If the said _____ shall give bail himself in the sum of _____
with one surety in the sum of _____ (or two sureties each in the sum of _____
_____) to attend before me on the _____
day of _____ and to continue so to attend until otherwise
directed by me, he may be released.

Dated this _____ day of _____, 18 ____.

(Signature)

(See section 86.)

I, (name) of _____ being brought before the District
Magistrate of _____ (or as the case may be) under a
warrant issued to compel my appearance to answer to the charge of _____,
do hereby bind myself to attend in the Court of _____ on the
_____ day of _____

next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default herein, I bind myself to forfeit, to ¹[Government], ²[* * *] the sum of rupees .

Dated this _____ day of _____, 18 ____.

(Seal) _____ (Signature)

I do hereby declare myself surety for the above named _____ of _____, that he shall attend before _____ in the Court of _____ on the _____ day of _____ next to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to ¹[Government] ²* * * the sum of rupees _____.

Dated this _____ day of _____, 18__.

(Signature)

(See section 87.)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of _____, punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or is concealing himself to avoid the service of the said warrant*) ;

Proclamation is hereby made that the said _____ of _____
is required to appear at (*place*) before this Court (*or* before me) to answer the said
complaint ³[on the _____ day of _____].

Dated this _____ day of _____, 18 ____.

(Seal) _____ (Signature)

1. Subs. by the A.O. 1950 for "Her Majesty the Queen".

2. The words "Empress of India" omitted by the A.O. 1948.

3. Subs. by Act 1 of 1903, s. 3 and Sch. II, Pt. II, for "within this date".

(Sch. V.—Forms.)

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(See section 87.)

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of (*mention the offence concisely*) and a warrant has been issued to compel the attendance of (*name, description and address of the witness*) before this Court to be examined touching the matter of the said complaint; and whereas it has been returned to the said warrant that the said (*name of witness*) cannot be served, and it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*);

Proclamation hereby made that the said (*name*) is required to appear at (*place*) before the Court of _____ on the _____ day of _____ touching _____ next at _____ o'clock, to be examined the offence complained of.
Dated this _____ day of _____, 18 .
(Seal) _____ (Signature)

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS
(See section 88.)

To the Police-officer in charge of the Police-station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (*name, description and address*) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (*or is concealing himself to avoid the service of the said warrant*); and thereupon a ¹[Proclamation has been or is being duly issued] and published requiring the said _____ to appear and give evidence at the time and place mentioned herein, 2* * * ;

This is to authorize and require you to attach by seizure the movable property belonging to the said _____ to the value of rupees _____

which you may find within the District of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____, 18 .
(Seal) _____ (Signature)

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED
(See section 88.)

To (*Name and designation of the person or persons who is or are to execute the warrant*).

WHEREAS complaint has been made before me that (*name, description and address*) has committed (*or is suspected to have committed*) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (*or is concealing* _____

1. Subs. by Act 18 of 1923, s. 162, for "Proclamation was duly issued".

2. The words "and he has failed to appear" omitted by s. 162, *ibid.*

(Sch. V.—Forms.)

himself to avoid the service of the said warrant), and thereupon a ¹[Proclamation has been or is being duly issued] and published requiring the said

to appear to answer the said charge within

days; and whereas the said

the following property other than land paying revenue to Government in the village (or town) of _____ is possessed of _____, in the District of _____

, viz.,

and an order has been made for the attachment thereof;

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____, 18 ____.

(Seal)

(Signature)

ORDER AUTHORIZING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR

(See section 88.)

To the Deputy Commissioner of the District of _____

WHEREAS complaint has been made before me that (*name, description and address*) has committed (or is suspected to have committed) the offence of _____, punishable under section _____

of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found; and whereas it has been shown to my satisfaction that the said (*name*) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a ¹[Proclamation has been or is being duly issued] and published requiring the said

to appear to answer the said charge within

days ²* * *; and whereas the said _____ is possessed

of certain land paying revenue to Government in the village (or town) of _____ in the District of _____;

You are hereby authorised and requested to cause the said land and to be attached, and to be held under attachment pending the further order of this Court, and to certify without delay what you may have done in pursuance of this order.

Dated this _____ day of _____, 18 ____.

(Seal)

(Signature)

VII.—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(See section 90.)

To (*name and designation of the Police-officer or other person or persons who is or are to execute the warrant*).

WHEREAS complaint has been made before me that _____ of _____ has (or is suspected to have) committed the offence of (*mention the offence concisely*), and it appears likely that (*name and description of witness*) can give evidence concerning the said complaint; and whereas I have good and sufficient reason to believe

1. Subs. by Act 18 of 1923, s. 162, for "Proclamation was duly issued".

2. The words "but he has not appeared", omitted by s. 162, *ibid.*

(Sch. V.—Forms.)

that he will not attend as a witness on the hearing of the said complaint unless compelled to do so ;

This is to authorize and require you to arrest the said (*name*), and on the _____ day of _____ to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

VIII.—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE

(See section 96.)

To (*name and designation of the Police-officer or other person or persons who is or are to execute the warrant*)

WHEREAS information has been laid (*or* complaint has been made) before me of the commission (*or* suspected commission) of the offence of (*mention the offence concisely*), and it has been made to appear to me that the production of (*specify the thing clearly*) is essential to the inquiry now being made (*or* about to be made) into the said offence (*or* suspected offence) ;

This is to authorize and require you to search for the said (*the thing specified*) in the (*describe the house or place or part thereof to which the search is to be confined*), and, if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

IX.—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT

(See section 98.)

To (*name and designation of a Police-officer above the rank of a Constable*).

WHEREAS information has been laid before me, and on due inquiry thereupon I have been led to believe that the (*describe the house or other place*) is used as a place for the deposit (*or* sale) of stolen property (*or* if for either of the other purposes expressed in the section, state the purpose in the words of the section) ;

This is to authorize and require you to enter the said house (*or other place*) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose, and to search every part of the said house (*or other place, or if the search is to be confined to a part, specify the part clearly*), and to seize and take possession of any property (*or* documents, *or* stamps, *or* seals, *or* coins, ¹[*or* obscene objects,] *as the case may be*)—[Add (*when the case requires it*) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, *or* counterfeit stamps, *or* false seals, *or* counterfeit coin (*as the*

1. Ins. by Act 8 of 1925, s. 3.

(Sch. V.—Forms.)

case may be)], and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

X.—BOND TO KEEP THE PEACE

(See section 107.)

WHEREAS I, (name), inhabitant of (place), have been called upon to enter into a bond to keep the peace for the term of _____¹[or until the completion of the inquiry in the matter of _____ now pending in the Court of _____]; I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term ¹[or until the completion of the said inquiry] and, in case of my making default therein, I hereby bind myself to forfeit to ²[Government] ³* * * the sum of rupees _____.

Dated this _____ day of _____, 18 .

(Signature)

XI.—BOND FOR GOOD BEHAVIOUR

(See sections 108, 109 and 110.)

WHEREAS I, (name), inhabitant of (place), have been called upon to enter into a bond to be of good behaviour to ⁴[Government and all the citizens of India] for the term of (state the period) ¹[or until the completion of the inquiry in the matter of _____ now pending in the Court of _____]; I hereby bind myself to be of good behaviour to ⁴[Government and all the citizens of India] during the said term ¹[or until the completion of the said inquiry]; and, in case of my making default therein, I bind myself to forfeit to Government the sum of rupees _____.

Dated this _____ day of _____, 18 .

(Signature)

(Where a bond with sureties is to be executed, add)—We do hereby declare ourselves sureties for the above named _____ that he will be of good behaviour to ⁴[Government and all the citizens of India] during the said term ¹[or until the completion of the said inquiry]; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Government the sum of rupees _____.

Dated this _____ day of _____, 18 .

(Signature)

1. Ins. by Act 18 of 1923, s. 162.

2. Subs. by the A.O. 1950 for "Her Majesty the Queen".

3. The words "Empress of India" omitted by the A.O. 1948.

4. Subs. by the A.O. 1950 for "Her Majesty the Queen and to all Her subjects".

(Sch. V.—Forms.)

XII.—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE

(See section 114.)

To _____ of _____

WHEREAS it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (*or by which act a breach of the peace will probably be occasioned*), you are hereby required to attend in person (*or by a duly authorized agent*) at the Office of the Magistrate of _____ on the _____ day of _____, 18____, at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees [when sureties are required, add, and also to give security by the bond of one (*or two, as the case may be*) surety (*or sureties*) in the sum of rupees (each if more than one), that you will keep the peace for the term of _____.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal)

(Signature)

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE

(See section 123.)

To the Superintendent (*or Keeper*) of the Jail at _____

WHEREAS (*name and address*) appeared before me in person (*or by his authorized agent*) on the _____ day of _____ in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees _____ with one surety (*or a bond with two sureties each in rupees* _____), that he, the said (*name*), would keep the peace for the period of _____ months; and whereas an order was then made requiring the said (*name*) to enter into and find such security (*state the security ordered when it differs from that mentioned in the summons*), and he has failed to comply with the said order;

This is to authorize and require you, the said Superintendent (*or Keeper*), to receive the said (*name*), into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) unless he shall in the meantime ¹[be lawfully ordered to be released], and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18____.

(Seal)

(Signature)

1. Subs. by Act 1 of 1963, s. 3 and Sch. II, Pt. II for "comply with the said order by himself and his surety (*or sureties*) entering into the said bond, in which case the same shall be received, and the said (*name*) released".

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR
(See section 123.)

WHEREAS it has been made to appear 'to me that (*name and description*) has been and is lurking within the district of _____ having no ostensible means of subsistence (*or, and that he is unable to give any satisfactory account of himself*) ;

WHEREAS evidence of the general character of (*name and description*) has been adduced before me and recorded, from which it appears that he is an habitual robber (*or house-breaker, etc., as the case may be*) ;

And whereas an order has been recorded stating 'the same and requiring the said (name) to furnish security for his good behaviour for the term of (state the period) by entering into a bond with one surety (or two or more sureties, as 'the case may be), himself for rupees _____, and the said surety (or each of the said sureties) for rupees _____ and the said (name) has failed to comply with the said order and for such default has been adjudged imprisonment for (state the term) unless the said security be sooner furnished :

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name), into your custody, together with this warrant and him safely to keep in the said Jail for the said period of (term of imprisonment) unless he shall in the meantime ¹[be lawfully ordered to be released] and to return this warrant with an endorsement certifying the manner of its execution.

[illegible]

(Signature)

Uttar Pradesh Amendments.—The following new form was inserted by U.P. Act 8 1949 :—

"XIV-A.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR DUE PERFORMANCE OR ENFORCEMENT OF ANY RESTRICTION OR CONDITION
(See section 123-A.)

To the Superintendent (or Keeper) of the jail at

Whereas an order has been duly recorded requiring _____ (name)
to furnish security for the due performance or enforcement of restriction and condition
for the term of _____ (State the period) by
into bond (with one surety or two or more sureties as the case may be) himself for
Rs. _____ and the said surety or each of the said sureties for
rupees _____ And whereas the said _____
_____ has furnished security in accordance with the order

rupees
(name) was duly required by me to furnish the security in accordance with the order
but has failed to comply with the said order and for such default is liable to simple
imprisonment for (state the term) unless the said security be
sooner furnished.

1. Subs. by Act 1 of 1963, s. 3 and Sch. II, Pt. II for "comply with the said order by himself and his surety (or sureties) entering into the said bond, in which case the same shall be received, and the said (name) released".

(Sch. V.—Forms.)

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant and keep him safely in the said jail for the said period of (term of imprisonment) unless he shall, in the meantime, be lawfully ordered to be released and return this warrant with an endorsement certifying the manner of its execution.

Given under my hand, this

day of 19 .

(Signature of the Authority
Authorised to take security,
in accordance with the order)".

XV.—WARRANT TO DISCHARGE A PERSON IMPRISONED ON FAILURE TO GIVE SECURITY

(See sections 123 and 124.)

To the Superintendent (or Keeper) of the Jail at (or other
officer in whose custody the person is).

WHEREAS (name and description of prisoner) was committed to your custody under warrant of the Court, dated the day of
and has since duly given security under section
of the Code of Criminal Procedure;

or

and there have appeared to me sufficient grounds for the opinion that he can be released without hazard to the community;

This is to authorize and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other cause.

Given under my hand and the seal of the Court, this day of
, 18 .

(Seal)

(Signature)

Uttar Pradesh Amendments.— In Form XV, for the words and figures "See Section 123 and 124" the following words and figures were substituted by U.P. Act 8 of 1949, S. 4, namely,—

"See sections 123, 123A and 124".

XVI.—ORDER FOR THE REMOVAL OF NUISANCES

(See section 133.)

To (name, description and address).

WHEREAS it has been made to appear to me that you have caused an obstruction (or nuisance) to persons using the public roadway (or other public place) which, etc., (describe the road or public place), by, etc., (state what it is that causes the obstruction or nuisance), and that such obstruction (or nuisance) still exists;

or

(Sch. V.—Forms.)

WHEREAS it has been made to appear to me that you are carrying on as owner, or manager, the trade or occupation of (*state the particular trade or occupation and the place where it is carried on*), and that the same is injurious to the public health (or comfort) by reason (*state briefly in what manner the injurious effects are caused*), and should be suppressed or removed to a different place ;

or

WHEREAS it has been made to appear to me that you are the owner (or are in possession of or have the control over) a certain tank (or well or excavation) adjacent to the public way (*describe the thoroughfare*), and that the safety of the public is endangered by reason of the said tank (or well or excavation) being without a fence (or insecurely fenced) ;

or

WHEREAS, etc., etc., (*as the case may be*) ;

I do hereby direct and require you within (*state the time allowed*) to (*state what is required to be done to abate the nuisance*) or to appear at _____ in the _____ Court of _____ on the _____ day of _____ next, and to show cause why this order should not be enforced ;

or

I do hereby direct and require you within (*state the time allowed*) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc. ;

or

I do hereby direct and require you within (*state the time allowed*) to put up a sufficient fence (*state the kind of fence, and the part to be fenced*) ; or to appear, etc. ;

or

I do hereby direct and require you, etc., etc., (*as the case may be*).
Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

XVII.—MAGISTRATE'S ORDER CONSTITUTING A JURY

(See section 138.)

WHEREAS on the _____ day of _____ 18 , an order was issued to (*name*) requiring him (*state the effect of the order*), and whereas the said (*name*) has applied to me, by a petition bearing date the _____ day of _____ for an order appointing a Jury to try whether the said recited order is reasonable and proper ; I do hereby appoint (*the names, etc., of the five or more jurors*) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within _____ days from the date of this order at my office at _____

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

(Sch. V.—Forms.)

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY A JURY

(See section 140.)

To (name, description and address).

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the day of _____ requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (state the time allowed), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY

(See section 142.)

To (name, description and address).

WHEREAS the inquiry by a Jury appointed to try whether my order issued on the _____ day of _____, 18 , is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby, under the provisions of section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (state plainly what is required to be done as a temporary safeguard), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

XX.—MAGISTRATE'S ORDER PROHIBITING THE REPETITION, ETC., OF A NUISANCE (See section 143.)

To (name, description and address).

WHEREAS it has been made to appear to me that, etc., (state the proper recital, guided by Form No. XVI, or Form No. XXI, as the case may be);

I do hereby strictly order and enjoin you not to repeat the said nuisance by again placing or causing or permitting to be placed, etc., (as the case may be).

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

(Schedule V.—Forms.)

XXI.—MAGISTRATE'S ORDER TO PREVENT OBSTRUCTION, RIOT, ETC.

(See section 144.)

To (name, description and address).

WHEREAS it has been made to appear to me that you are in possession (or have the management) of (*describe clearly the property*), and that, in digging a drain on the said land, you are about to throw or place a portion of the earth and stones dug-up upon the adjoining public road, so as to occasion risk of obstruction to persons using the road :

or

WHEREAS it has been made to appear to me that you and a number of other persons (*mention the class of persons*) are about to meet and proceed in a religious procession along the public street, etc. (*as the case may be*), and that such procession is likely to lead to riot or an affray ;

or

WHEREAS, etc., etc., (*as the case may be*) ;

I do hereby order you not to place or permit to be placed any of the earth or stones dug from land on any part of the said road ;

or

I do hereby prohibit the procession passing along the said street, and strictly warn and enjoin you not to take any part in such procession (*or as the case recited may require*).

Given under my hand and the seal of the Court, this

day of

, 18 .

(Seal)

(Signature)

Andhra Pradesh Amendment — In Form XXI for the words "strictly warn" substitute the words "strictly order". A.P. Gazette, Part II, p. 335.

XXII.—MAGISTRATE'S ORDER DECLARING PARTY ENTITLED TO RETAIN POSSESSION OF LAND, ETC., IN DISPUTE

(See section 145.)

It appearing to me, on the grounds duly recorded, that a dispute, likely to induce a breach of the peace, existed between (*describe the parties by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*), situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said (*name or names or description*) is true ;

I do decide and declare that he is (*or they are*) in possession of the said (*the subject of dispute*) and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his (*or their*) possession in meantime.

Given under my hand and the seal of the Court, this

day of

, 18

(Seal)

(Signature)

(Sch. V.—Forms.)

XXIII.—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO THE POSSESSION
OF LAND, ETC.

(See section 146.)

To the Police-officer in charge of the Police-station at
Collector of].

[or, to the

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describe the parties concerned by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and whereas, upon due inquiry into the said claims, I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [or I am unable to satisfy myself as to which of the said parties was in possession as aforesaid] ;

This is to authorize and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this
18

day of

(Seal)

(Signature)

XXIV.—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON LAND
OR WATER

(See section 147.)

A DISPUTE having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or water*) is claimed exclusively by (*describe the person or persons*), and it appearing to me, on due inquiry into the same, that the said land (*or water*) has been open to the enjoyment of such use by the public (*or if by an individual or a class of persons, describe him or them*) and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry (*or if the use is enjoyable only at particular seasons, say "during the last of the seasons at which the same is capable of being enjoyed"*).

I do order that the said (*the claimant or claimants of possession*) or any one in their interest, shall not take (*or retain*) possession of the said land (*or water*) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or they*), shall obtain the decree or order of a competent Court adjudging him (*or them*) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this
18

day of

(Seal)

(Signature)

(Sch. V.—Forms.)

XXV.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE-OFFICER
(See section 169.)

I, (*name*) of _____, being charged with the offence of _____
and after inquiry required to appear before the Magistrate of _____,
or _____
and after inquiry called upon to enter into my own recognizance to appear when re-
quired, do hereby bind myself to appear at _____, on the
in the Court of _____ day of _____ next (or on
such day as I may hereafter be required to attend) to answer further to the said
charge, and, in case of my making default herein, I bind myself to forfeit to
1[Government] 2* * * the sum of rupees _____
Dated this _____ day of _____, 18 _____.
(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each
of us) surety (or sureties) for the abovesaid _____, that he shall attend
at _____, in the Court of _____, on the
_____ day of _____ next (or on such day as he
may hereafter be required to attend), further to answer to the charge pending against
him, and, in case of his making default therein, I hereby bind myself (or we hereby
bind ourselves) to forfeit to 1[Government] 2* * * the sum of rupees _____
Dated this _____ day of _____, 18 _____.
(Signature)

XXVI.—BOND TO PROSECUTE OR GIVE EVIDENCE
(See section 170.)

I, (*name*), of (*place*), do hereby bind myself to attend at _____ in the
Court of _____, at _____ o'clock on the _____ day of _____
next and then and there to prosecute (or to prosecute and give
evidence) (or to give evidence) in the matter of a charge of _____
against one A. B. and, in case of making default herein, I bind myself to forfeit to
1[Government] 2* * * the sum of rupees _____
Dated this _____ day of _____, 18 _____.
(Signature)

XXVII.—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER
(See section 218.)

THE MAGISTRATE of _____ hereby gives notice that he has committed
one _____ or trial at the next Sessions; and the Magistrate hereby ins-
tructs the Government Pleader to conduct the prosecution of the said case.
The charge against the accused is that etc. (*state the offence as in the charge*).
Dated this _____ day of _____, 18 _____.
(Seal) _____ (Signature)

1. Subs. by the A.O. 1950 for "Her Majesty the Queen".

2. The words "Empress of India" omitted by the A.O. 1948.

(Sch. V.—Forms.)

XXVIII.—CHARGES

(See sections 221, 222, 223.)

(I) Charges with one head

(a) I, [name and office of Magistrate, etc.], hereby charge you [name of accused person] as follows :—

(b) that you, on or about the _____ day of _____, at _____, waged war against ¹[the Government of India] 2* * *
 On Penal Code, _____ and thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.
 (Signature and seal of the Magistrate)

[To be substituted for (b)] :—

(2) That you, on or about the _____ day of _____, at _____, with the intention of inducing the Hon'ble A. B. Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) That you, being a public servant in the _____ Department, directly accepted from [state the name], for another party [state the name] a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session. [or High Court].

(4) That you, on or about the _____ day of _____, at _____, did [or omitted to do, as the case may be] _____, such conduct being contrary to the provisions of Act _____, section _____, and known by you to be prejudicial to _____ and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(5) That you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in evidence that " _____ " which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(6) That you, on or about the _____ day of _____, at _____, committed culpable homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by A. B., a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

1. Subs. by the A.O. 1950 for 'Her Majesty the Queen'.

2. The words "Empress of India" omitted by the A.O. 1948.

(Sch. V.—Forms.)

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and
On section 325. thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(9) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance Code, and within the cognizance of the Court of Session [or High Court].

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court."]

(II) CHARGES WITH TWO OR MORE HEADS

(a) I, [name and office of Magistrate, etc.] hereby charge you [name of accused person] as follows :—

(b) *First.*—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the same to another person, by name A.B., as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, attempted to induce another person, by name A.B., to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.
[Signature and seal of the Magistrate]

[To be substituted for (b)] :—

(2) *First.*—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) *First.*—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable

(Sch. V.—Forms.)

under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed as offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Fourthly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, at _____, in the course of the inquiry into _____, before _____, Alternative charges, on section 193. stated in evidence that “_____, and that you, on or about the _____, day of _____, at _____, in the course of the trial of _____, before _____, stated in the evidence that “_____, one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session ([or High Court]).

[In cases tried by Magistrates substitute “within my cognizance” for “within the cognizance of the Court of Session” and in (c) omit “by the said Court”.]

(III) CHARGE FOR THEFT AFTER PREVIOUS CONVICTION

I, (name and office of Magistrate, etc.), hereby charge you (name of accused person) as follows :—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session _____ High Court [or _____ as the case may be].

Magistrate

And you, the said (name of accused), stand further charged that you, before the committing of the said offence, that is to say, on the _____ day of _____, had been convicted by the (state Court by which conviction was had) at _____ of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (describe the offence in the words used in the section under which the accused was convicted), which conviction is still in full force and effect, and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

Bombay Amendment.—Under the heading “(1) Charges with one Head” in subparagraph (b) of the first paragraph, the brackets and the words “[When the charge is framed by a Presidency Magistrate]” were deleted, and for “Court of Session”, “High Court” was substituted, *vide* Bombay Act 32 of 1948.

West Bengal Amendment.—In Form XXVIII—

(Sch. V.—Forms.)

“(I) Charges with one head”.—

In paragraphs (4), (5), (6), (7), (8), (9) and (10) the words and brackets “[or High Court]” were omitted.

Under the heading “(II) Charges with two or more heads” (i) in paragraph (b) omit the words and brackets “[or High Court]” in the two places where they occur.

(ii) in paragraphs (3) and (4) omit the words and brackets “[or High Court]” wherever they occur.

Under the heading “(III) Charge for theft after previous conviction” for “[or High Court|Magistrate as the case may be]” substitute “[or Magistrate]” vide W. B. Act 20 of 1953, S. 17 and Sch. II.

Madras Amendment.— (a) Under the heading “(I) charges with one Head” in sub-paragraph (b) of the first paragraph, the brackets and words “[when the charge is framed by a Presidency Magistrate, for Court of Session, substitute High Court]” shall be omitted :

(b) in paragraph (2) under the same heading, for the portion beginning with the words “with the intention of inducing” and ending with the words “assaulted such member”, the following words shall be substituted, namely :—

“With the intention of inducing or compelling the President of India, Governor or Rajpramukh of State to refrain from exercising a lawful power as such President, Governor or Rajpramukh, assaulted such President, Governor or Rajpramukh” ;

(c) the brackets and words “[or High Court]” wherever they occur shall be omitted ;

(d) for the expression “High Court|Magistrate” occurring in the first paragraph under the heading “(III) Charge for Theft after Previous Conviction” the expression “Magistrate” shall be substituted, (vide, Madras Act 34 of 1955).

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE

(See sections 245 and 258.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS on the day of 18 .., (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. of the Calender for 18 .., was convicted before me (name and official designation) of the offence of (mention the offence or offences concisely) under section (or sections) of the Indian Penal Code (or of Act), and was sentenced to (state the punishment fully and distinctly);

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said Jail, together with this warrant, and there carry the aforesaid sentence into execution according to law.

Given under my hand and the seal of the Court, this day of 18 ..

(Seal)

(Signature)

(Sch. V.—Forms)

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY
¹[ATTACHMENT AND SALE]

(See section 250.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*) and the same has been dismissed as ²[false and] frivolous (or vexatious), and the order of dismissal awards payment by the said (*name of complainant*) of the sum of rupees

as amends; and whereas the said sum has not been paid 3* * * and an order has been made for his simple imprisonment in Jail for the period of days, unless the aforesaid sum be sooner paid;

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid, and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of , 18

(Seal)

(Signature)

XXXI.—SUMMONS TO WITNESS

(See sections 68 and 252.)

To of

WHEREAS complaint has been made before me that of has (*or is suspected to have*) committed the offence of (*state the offence concisely with time and place*), and it appears to me that you are likely to give material evidence for the prosecution;

You are hereby summoned to appear before this Court on the day of next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court, this day of , 18

(Seal)

(Signature)

Andhra Pradesh Amendment.— In Form XXXI for the word "warned" substitute the word "informed". Andh. Pra. Gazette. 1956, Part II.

1. Subs. by Act 18 of 1923 s. 162, for "Distress".

2. Ins. by s. 162, *ibid.*

3. The words "and cannot be recovered by distress of the movable property of the said (*name of complainant*)" omitted by s. 162, *ibid.*

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS 1* * *

(See section 326.)

WHEREAS a Criminal Session is appointed to be held in the Court-house at _____ on the _____ day of _____ next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of Jurors ¹* * * furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at 10 A.M. on the said date, and, within such date, to certify that you have done so in pursuance of this precept.

Given under my hand and the seal of the Court, this day of
 , 18 .

West Bengal Amendment.— In its application to the City Sessions Court, substitute "Chief Presidency Magistrate" for "District Magistrate"—W. B. Act 20 of 1953, S. 9.

(See section 328.)

Given under my hand and the seal of the Office, this day of
 , 18 .

Bombay Sch. II. Amendment.—Form XXXIII deleted—Bom. Act 21 of 1954, S. 3 and

(See section 374.)

WHEREAS at the Session held before me on the _____ day of _____
18____, (*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case
No. _____ of the Calendar at the said Session,
was duly convicted of the offence of culpable homicide amounting to murder under
section _____ of the Indian Penal Code, and sentenced to suffer
death, subject to the confirmation of the said sentence by the
Court of _____;

1. The words "and Assessors" omitted by Act 26 of 1955, s. 115.

2. The words "Assessor or" omitted by s. 115, *ibid.*, as amended by Act 36 of 1957, S. 3 and Sch. II.

b. Subs. by Act 26 of 1955, s. 115, as amended by Act 36 of 1957, s. 3 and Sch II, for "an Assessor (or) a Juror)",

(Sch. V.—Forms.)

This is to authorize and require you, the said Superintendent (*or* Keeper), to receive the said (*prisoner's name*) into your custody in the said Jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said Court

Given under my hand and the seal of the Court, this

, 18 .

day of

(Seal)

(Signature)

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH
(See section 381.)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS (*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No. of the Calendar at the Session held before me on the day of , 18 , has been by a warrant of this Court, dated the day of , committed to your custody under sentence of death; and whereas the order of the Court of confirming the said sentence has been received by this Court;

This is to authorize and require you, the said Superintendent (*or* Keeper), to carry the said sentence into execution by causing the said to be hanged by the neck until he be dead, at (*time and place of execution*), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Given under my hand and the seal of the Court, this

, 18 .

day of

(Seal)

(Signature)

XXXVI.—WARRANT AFTER A COMMUTATION OF A SENTENCE
(See sections 381 and 382.)

To the Superintendent (*or* Keeper) of the Jail at

WHEREAS at a Session held on the day of 18 (*name of prisoner*), the (1st, 2nd, 3rd, *as the case may be*) prisoner in case No. of the Calendar at the said Session, was convicted of the offence of , punishable under section of the India Penal Code, and sentenced to and was thereupon committed to your custody; and whereas by the order of the Court of (a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of ¹[imprisonment for life] (*or as the case may be*);

This is to authorize and require you, the said Superintendent (*or* Keeper), safely to keep the said (*prisoner's name*) in your custody in the said Jail, as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of ²[imprisonment for life] under the said order.

1. Subs. by Act 26 of 1955, s. 115, for "transportation for life".

2. Subs. by s. 115, *ibid.*, for "transportation".

(Sch. V.—Forms.)

or

....

if the mitigated sentence is one of imprisonment, say, after the words, "custody in the said Jail," "and thereto carry into execution the punishment of imprisonment under the said order according to law".

Given under my hand and the seal of the Court, this
 , 18 .

day of

(Seal)

(Signature)

XXXVII.—WARRANT TO LEVY A FINE BY ¹[ATTACHMENT] AND SALE(See section 386 ²[(1) (a)].)

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant).

WHEREAS (name and description of the offender) was on the day of 18 , convicted before me of the offence of (mention the offence concisely), and sentenced to pay a fine of rupees and whereas the said (name), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorize and require you to ³[attach any] moveable property belonging to the said (name) which may be found within the district of ; and, if within (state the number of days or hours allowed) next after ⁴[such attachment] the said sum shall not be paid (or forthwith), to sell the moveable ⁵[property attached], or so much thereof as shall be sufficient to satisfy the said fine, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this
 , 18 .

day of

(Seal)

(Signature)

⁶[XXXVIA.—BOND FOR APPEARANCE OF OFFENDER RELEASED PENDING REALISATION OF FINE

(See section 388.)

WHEREAS I, (name), inhabitant of (place), have been sentenced to pay a fine of rupees and in default of payment thereof to undergo imprisonment for ; and whereas the Court has been pleased to order my release ⁷* * * on condition of my executing a bond for my appearance ⁸[on the following date (or dates) namely :—

1 ;

I hereby bind myself to appear before the Court of at o'clock ⁸[on the following date (or dates) namely :—

1. Subs. by Act 18 of 1923, s. 162, for "Distress".

2. Ins. by s. 162, *ibid.*

3. Subs. by Act 18 of 1923, s. 162, for "make distress by seizure of any".

4. Subs. by s. 162, *ibid.*, for "such distress".

5. Subs. by s. 162, *ibid.*, for "property distrained".

6. Form XXXVIA ins. by s. 162, *ibid.*

7. The words "until the day of " omitted by Act 37 of 1923, s. 5.

8. Subs. by s. 5, *ibid.*, for "on that day", "on the said day of next", next" and "on the day of next".

(Sch. V.—Forms.)

I, and, in case of making default herein, I bind myself to forfeit to ¹[Government] ²* * * the sum of Rupees

Dated this day of 19 .

(Signature)

Where a bond with sureties is to be executed, add—

We do hereby declare ourselves sureties for the above-named that he will appear before the Court of date (or dates) namely :—

I, and, in case of his making default ³[on the following therein, we bind ourselves jointly and severally to forfeit to ¹[Government] ²* * * the sum of Rupees

(Signature)

XXXVIII.—WARRANT OF COMMITMENT IN CERTAIN CASES OF CONTEMPT WHEN A FINE IS IMPOSED

(See section 480.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at Court holden before me on this day (*name and description of the offender*) in the presence (or view) of the Court committed wilful contempt ;

And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees , or in default to suffer simple imprisonment for the space of (*state the number of months or days*) ;

This is to authorize and require you, the Superintendent (or Keeper) of the said Jail, to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*), unless the said fine be sooner paid ; and, on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of , 18 .

(Seal)

(Signature)

XXXIX.—MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT OF WITNESS REFUSING TO ANSWER

(See section 485.)

To (*name and designation of officer of Court*).

WHEREAS (*name and description*), being summoned (or brought before this Court) as a witness and this day required to give evidence on an inquiry into an alleged offence, refused to answer a certain question (or certain questions) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (*term of detention adjudged*) ;

This is to authorize and require you to take the said (*name*) into custody, and him safely to keep in your custody for the space of days, unless in the meantime he shall consent to be examined and to answer the questions asked of him, and on the last of the said days, or forthwith on such consent being known, to

1. Subs. by the A.O. 1950 for "His Majesty the King".

2. The words "Emperor of India" omitted by the A.O. 1948.

3. Subs. by s. 5, *ibid* ; for "on that day", "on the said day of next" and "on the day of next".

(Sch. V.—Forms.)

bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE
(See section 488.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (*name, description and address*) has been proved before me to be possessed of sufficient means to maintain his wife (*name*) [or his child (*name*), who is by reason of (*state the reason*) unable to maintain herself (or himself)] and to have neglected (or refused) to do so, and an order has been duly made requiring the said (*name*) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____ : and whereas it has been further proved that the said (*name*) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____

: And thereupon an order was made adjudging him to undergo simple (or rigorous) imprisonment in the said Jail for the period of _____ ;

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody in the said Jail, together with this warrant, and there carry the said order into execution according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY ¹[ATTACHMENT]
AND SALE
(See section 488.)

To (*name and designation of the Police-officer or other person to execute the warrant*),

WHEREAS an order has been duly made requiring (*name*) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____, and whereas the said (*name*) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____ ;

This is to authorize and require you to ²[attach any] moveable property belonging to the said (*name*) which may be found within the district of _____, and if within (*state the number of days or hours allowed*) next after ³[such 'attachment'] the said sum shall not be paid (or forthwith), to sell the moveable ⁴[property attached], or so much thereof as shall be sufficient to satisfy the said sum, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18 .

(Seal)

(Signature)

1. Subs. by Act 18 of 1923, s. 162, for "Distress".

2. Subs. by Act 18 of 1923, s. 162, for "make distress by seizure of any".

3. Subs. by s. 162, *ibid.*, for "such distress".

4. Subs. by s. 162, *ibid.*, for "property distrained".

(Sch. V.—Forms.)

XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE

(See sections 496 and 499).

I, (*name*), of (*place*), being brought before the Magistrate of (*as the case may be*) charged with the offence of _____, and required to give security for my attendance in his Court and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge, and, should the case be sent for trial by the Court of Session, to be, and appear, before the said Court when called upon to answer the charge against me; and, in case of my making default, herein, I bind myself to forfeit to ¹[Government] 2* * * the sum of rupees _____

Dated this _____

day of _____

18 .

(Signature)

I hereby declare myself (*or* We jointly and severally declare ourselves and each of us) surety (*or* sureties) for the said (*name*) that he shall attend at the Court of _____ on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and, in case of his making default therein, I bind myself (*or* we bind ourselves) to forfeit to ¹[Government] 2* * * the sum of rupees _____

Dated this _____

day of _____

18 .

(Signature)

Bombay Amendment.— For Form No. XLII the following form shall be substituted, namely :—

“XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE
(Section 499 of the Criminal Procedure Code)

I, (*name*) _____ of (*place*) _____ being brought before the Magistrate of (*as the case may be*) charged with the offence of _____ and required to give security for my attendance in his Court or in the Court of any other Magistrate who may hold the preliminary inquiry into the said charge and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate or at the Court of any other Magistrate who may hold the preliminary inquiry into the said charge on every day of such inquiry and should the case be sent for trial by the Court of Session, to be, and appear, before the Court of Session when called upon to answer the charge against me and, in case of my making default herein, I bind myself to forfeit to Government the sum of rupees _____

Dated this _____

day of _____

19 .

(Signature)

I hereby declare myself (*or* we jointly and separately declare ourselves and each of us) surety (*or* sureties) for the said (*name*) that he shall attend at the Court of _____ or at the Court of any other Magistrate who may hold the preliminary inquiry into the offence with which the said _____ is charged, on every day of the preliminary inquiry into the said charge and, should the case be sent for Trial by the Court of Session, that he shall be, and appear, before the Court of Session to answer the charge

1. Subs. by the A.O. 1950 for “Her Majesty the Queen”.

2. The words “Empress of India” omitted by the A.O. 1948.

against him, and in case of making default therein, I bind myself (or we bind ourselves
to forfeit to Government the sum of rupees _____
Dated this _____ day of _____ 19____

2. The words "Empress of India" omitted by the A.O. 1948.

¹[Government] 2* * * and whereas the said (*name*) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees

You are hereby required to pay the said penalty or show cause, within days from this date, why payment of the said sum should not be enforced against you.

Given under my hand and the seal of the Court, this _____ day of _____, 18__.

(Signature)

To _____ of _____
 WHEREAS on the _____ day of _____ 18 _____, you became
 surety by a bond for (name) of (place) that he would be of good behaviour for the
 period of _____ and bound yourself in default thereof to
 forfeit the sum of rupees to¹ [Government] 2* * * ; and whereas the said (name)
 has been convicted of the offence of (mention the offence concisely) committed since
 you became such surety, whereby your security bond has become forfeited ;

You are hereby required to pay the said penalty of rupees _____ or to show cause within _____ days why it should not be paid.

Given under my hand and the seal of the Court, this _____ day of _____, 18 ____.

(Signature)

To _____ of _____

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*), and the said (*name*) has made default, and thereby forfeited to ¹[Government] 2* * * the sum of rupees _____

(*the penalty in the bond*) ;

This is to authorize and require you to attach any moveable property of the said (name) which you may find within the district of _____, by seizure and detention; and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realize the amount aforesaid, and make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of
 , 18 .

(Signature)

1. Subs. by the A.O. 1950 for "Her Majesty the Queen".
2. The words "Empress of India" omitted by the A.O. 1948.

(Sch. V.—Forms.)

**XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON
ADMITTED TO BAIL
(See section 514.)**

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to 1[Government] 2* * * ; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*).

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody with this warrant and him safely to keep in the said Jail, for the said (term of imprisonment), and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____, 18__.

(Signature)

(Seal)

(Signature)

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE
(See section 514.)

To (name, description and address).

WHEREAS on the _____ day of _____, 18____; you entered into a bond not to commit, etc., (as in the bond), and proof of the forfeiture of the same has been given before me and duly recorded;

You are hereby called upon to pay the said penalty of rupees _____
or to show cause before me within _____ days why payment of the
same should not be enforced against you.

Dated this _____ day of _____ 18____
(Seal) (Signature)

**L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND
TO KEEP THE PEACE
(See section 514.)**

To (name and designation of Police-officer), at the Police-station of

WHEREAS (*name and description*), did, on the _____ day of _____, 18____, enter into a bond for the sum of rupees _____, binding himself not to commit a breach of the peace, etc. (*as in the bond*), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (*name*) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum.

This is to authorize and require you to attach by seizure moveable property belonging to the said (*name*) to the value of rupees _____ which you may find within the district of _____, and, if the said sum be not paid within _____

1. Subs. by the A.O. 1950 for "Her Majesty the Queen".
2. The words "Empress of India" omitted by the A.O. 1948.

(Sch. V.—Forms.)

to sell the property so attached, or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this
 , 18 .

day of

(Seal)

(Signature)

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE
 (See section 514.)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (*name and description*) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to ¹[Government] ²* * * the sum of rupees ; and whereas the said (*name*) has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (*name*) in the Civil Jail for the period of (*term of imprisonment*) ;

This is to authorize and require you, the said Superintendent (or Keeper) of the said Civil Jail to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (*term of imprisonment*) ; and to return that warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this
 , 18 .

day of

(Seal)

(Signature)

LII.—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514.)

To the Police-officer incharge of the Police-station at

WHEREAS (*name, description and address*) did, on the
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This is to authorize and require you to attach by seizure movable property belonging to the said (*name*) to the value of rupees which you may find within the district of , and, if the said sum be not paid, within , to sell the property so attached, or so much of it as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this
 , 18 .

day of

(Seal)

(Signature)

1. Subs. by the A.O. 1950 for "Her Majesty the Queen"
 2. The words "Empress of India" omitted by the A.O. 1948.

[illegible]

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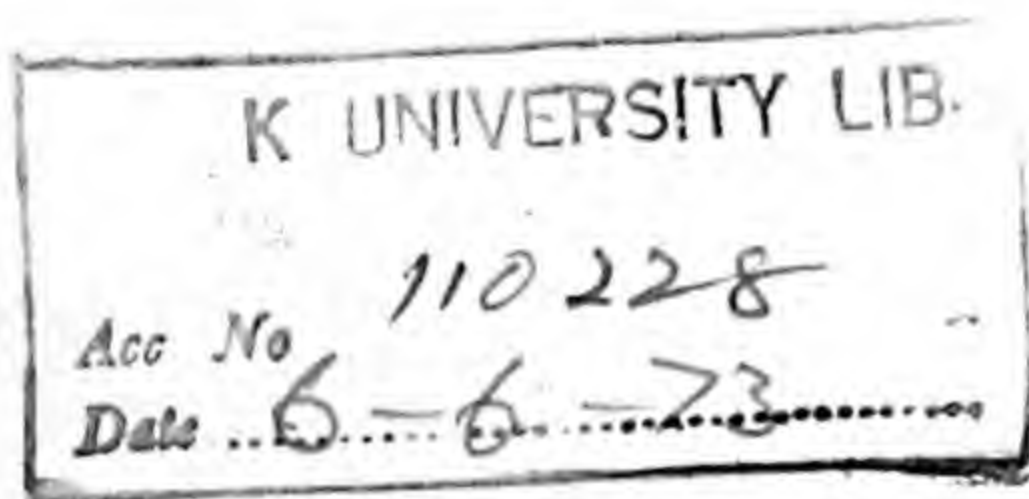
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Title

Author

Accession No.

Call No.

BORROWER'S
NO.

ISSUE
DATE

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NO.

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Title

Author

Accession No.

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